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Sept. 68

Vol. I

**TRANSCRIPT OF RECORD**

(Pages 1 to 554)

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**Supreme Court of the United States**

**OCTOBER TERM, 1963**

**No. 188**

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**UNITED CONSTRUCTION WORKERS, AFFILIATED  
WITH UNITED MINE WORKERS OF AMERICA,  
ET AL, PETITIONERS,**

**vs.**

**LABURNUM CONSTRUCTION CORPORATION**

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**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF APPEALS OF  
THE COMMONWEALTH OF VIRGINIA**

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**PRINTED FOR THE COURT JULY 12, 1964**

**RECEIVED JANUARY 12, 1964**

(Clerk's Note—See end of Volume I for index to complete record.)

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND

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**Record No. 3989.**

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VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Monday the 3rd day of March, 1952.

UNITED CONSTRUCTION WORKERS AND OTHERS,  
Plaintiffs in Error,

*against*

LABURNUM CONSTRUCTION CORPORATION,  
Defendant in Error,

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UPON A WRIT OF ERROR AND *SUPERSEDEAS* TO A JUDGMENT RENDERED BY THE CIRCUIT COURT OF THE CITY OF RICHMOND ON THE 5TH DAY OF JULY, 1951.

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This day came the defendant in error, by counsel, and moved the court to dismiss the writ of error and *supersedeas* granted in this case for the reason that the assignments of error are insufficient to give the court jurisdiction; and came also the defendant in error, by counsel, and obtained leave to file his answer thereto. Upon consideration whereof it is ordered that defendant in error's answer and brief in support thereof be filed on or before the 25th day of March, and that the motion be set for oral argument at the April session of this court.

**RECORD**

Virginia:

In the Circuit Court of the City of Richmond.

Laburnum Construction Corporation, a corporation, Com-  
plainant

v.

United Construction Workers Affiliated with United Mine  
Workers of America; District 50 United Mine Workers of  
America, and United Mine Workers of America, Defendants

Nov. 16, 1949. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk

By E. M. EDWARDS, D. C.

**NOTICE OF MOTION FOR JUDGMENT.**

To—United Construction Workers affiliated with United Mine  
Workers of America; District 50 United Mine Workers  
of America and United Mine Workers of America.

TAKE NOTICE that Laburnum Construction Corporation, a corporation duly organized and existing under the laws of the Commonwealth of Virginia, with its principal office in the City of Richmond, Virginia, on the 22nd day of December, 1949, at 10 o'clock a. m. or soon thereafter as its counsel may be heard, will move the Circuit Court of the City of Richmond, Virginia, for judgment against you and each of you jointly and severally in the sum of Five Hundred Thousand Dollars (\$500,000.00) for this to-wit:

That Laburnum Construction Corporation, hereinafter sometimes called "Plaintiff", under and by virtue of a contract or construction agreement dated October 28, 1948, between the Plaintiff and Pond Creek Pocahontas Company of Huntington, West Virginia, was on and prior to the 26th day of July, 1949, and until on or about August 4, 1949, engaged in the construction of a coal preparation plant for said Pond Creek Pocahontas Company at that Company's Number One Coal Mine in Breathitt County, Kentucky; and further that

by virtue of a contract dated December 15, 1948,  
page 2 } between the Plaintiff and Spring Fork Development  
Company, Plaintiff was engaged in the construction  
of twenty-five dwellings in Breathitt County, Kentucky, near  
the aforesaid Coal Mine. Plaintiff was continuously engaged  
in and about said work from on or about the respective dates  
of said contracts until August 4, 1949, and had nearly com-  
pleted each of said projects in accord with the terms of the  
aforesaid contracts. Prior to undertaking said construction  
projects, Plaintiff had entered into a contract with Richmond  
Building and Construction Trades Council, a copy of which  
is attached to and made a part of this Notice of Motion for  
Judgment and is marked Exhibit "A", under the terms of  
which last mentioned contract Plaintiff was obligated to em-  
ploy workmen through the said Richmond Building and Con-  
struction Trades Council and its affiliates, as more particu-  
larly set forth in said contract. Pursuant to the terms of said  
contract (Exhibit "A"), the Plaintiff entered into an ar-  
rangement with Paintsville, Kentucky, Carpenters Local  
Union No. 646, American Federation of Labor recognizing  
that Union as the bargaining agent for workmen of Plaintiff  
on said construction projects.

On or about July 14, 1949, one William O. Hart of Pike-  
ville, Kentucky, communicated by telephone with the Plain-  
tiff and said Hart stated that he was the Field Representa-  
tive and an officer of United Construction Workers Affiliated  
With United Mine Workers of America (hereinafter some-  
times called United Construction Workers) and that he  
worked under a Mr. David Hunter, Regional Director of and  
an officer of District 50 United Mine Workers of America,  
(District 50 United Mine Workers of America will herein-  
after sometimes be called District 50) in charge of Region 58  
of said District 50, and that he was calling about the work  
which the Plaintiff was doing for Pond Creek Poca-  
page 3 } hontas Company in Breathitt County, Kentucky.

The said Hart further stated that he understood  
that Pond Creek Pocahontas Company intended to award  
to the Plaintiff considerable additional work in Breathitt  
County, Kentucky, which would include among other things  
approximately 500 dwellings, stores and other buildings.  
Said Hart then stated that the territory in which this work  
was being performed was the territory of the United Con-  
struction Workers and that he intended "to take over" all of  
the Plaintiff's work for the Pond Creek Pocahontas Company  
in Breathitt County, Kentucky. The said Hart then stated  
that the United Construction Workers had closed down a job  
of Beckett Construction Company at Wheelwright, Kentucky,

and unless the Plaintiff agreed to recognize immediately United Construction Workers as the sole bargaining agent for the employees of Plaintiff on said projects in Breathitt County, Kentucky, that he, William O. Hart as Field Representative and an officer of United Construction Workers and District 50, would close down the work of the Plaintiff in Breathitt County, Kentucky. The Plaintiff informed the said Hart that it could not comply with his demands since Plaintiff was already under contract for these same employees with the Richmond Building and Construction Trades Council and the Paintsville Carpenters Local No. 646, American Federation of Labor, and other labor unions affiliated with American Federation of Labor.

On or about July 25, 1949, the superintendent in charge of the works of Plaintiff in Breathitt County, Kentucky, learned that the said William O. Hart had arranged to bring a large group of men to the job site of Plaintiff in Breathitt County, Kentucky, at about noon on the following day, July 26, 1949, for the purpose of forcibly stopping the work of the Plaintiff on said job, and the said superintendent was also informed that the said group of men with said Hart would be armed.

Pursuant to said threat, the said William O. Hart, page 4 } Field Representative of and an officer and agent of the said United Construction Workers while acting within his authority as such representative, officer and agent, as hereinafter set forth, arrived at the said job in Breathitt County, Kentucky, at about noon on July 26, 1949, with a mob of men variously estimated at between 75 and 100 men, which mob was headed by the said William O. Hart acting in his capacity as Field Representative and an officer of United Construction Workers and District 50. Upon inquiring of the said Hart as to his authority to interfere with and prevent Plaintiff from continuing its work the said Hart then replied that he was acting under orders of Tom (Thomas) Rainey and that he was carrying out Rainey's orders. The said Tom (Thomas) Rainey is a member of United Mine Workers of America and is one of the members of the International Executive Board of said United Mine Workers of America and is authorized to give orders for and on behalf of United Mine Workers of America, to said District 50 and United Construction Workers and the said Hart. The said mob headed by said Hart went to the schoolhouse being constructed by Plaintiff in Breathitt County, Kentucky, being Job No. 340 of the Plaintiff, and then went to the coal tipple in Breathitt County, Kentucky, being part of Job No. 322 of Plaintiff, and immediately began haranguing workmen employed by Plaintiff with threats and abuses and then demanded that these men

immediately become members of United Construction Workers. The said Hart further in violent language said to these men that they would not be permitted to continue their work unless they became members of the United Construction Workers. Said Hart and the mob of men headed by him were informed that workmen on said job were members of Local Unions affiliated with the American Federation of Labor or had made application to become members of such local unions. The employees on the job promptly refused to become members of said United Construction Workers. Thereupon, the said mob headed by the said William O. Hart, Field Representative and an officer as aforesaid of United Construction Workers and District 50, swarmed around most of the laborers on said job and demanded that these laborers sign application blanks to become members of United Construction Workers. The Plaintiff is not informed whether any of its said employees signed application blanks, but is of opinion and believes that some did so under duress since they feared they would be injured or killed by said mob if they refused to sign such cards. A number of the mob headed by the said William O. Hart had been drinking and were intoxicated or seemingly intoxicated, and many of said mob headed by the said Hart were carrying pistols or guns according to the information and belief of the employees of the Plaintiff. Some of these employees saw the outline of pistol handles or bullet cylinders concealed under the shirts or in the pockets of some of the members of said mob, and after the said mob left the said schoolhouse, pistol shots were heard while this mob was approaching the said coal tipple. The said Hart then with said mob, entered the toolhouse of the Plaintiff in Breathitt County, Kentucky, and there violently addressed a group of Plaintiff's employees and said Hart then again emphatically and violently affirmed that he and his mob had come to the job for the purpose of stopping the Plaintiff's men from working unless they joined United Construction Workers. The said Hart further stated that excepting some few laborers, Plaintiff's employees had refused to join United Construction Workers and that the employees who had not joined his (Harts) Union would not be permitted to work. The said Hart stated that he and his mob were establishing a picket line and that they were prepared to use all force necessary to hold the picket line and prevent the employees of Plaintiff from working. The said Hart further stated that the United Construction Workers intended to see that the Plaintiff's men did not work and that if anyone did not believe this, he, the said Hart would bring to the job 200 tough men from Beaver Creek,

Kentucky, and that these men would come "rough" and that they would kick the Plaintiff's men off the job. Some of the Plaintiff's employees resented the interference of said Hart and his mob and so stated in vigorous terms and thereupon some of the mob of followers of the said William O. Hart reached into their shirts or pockets as though they were reaching for guns, but due to the cool headedness of one of the men present, the Plaintiff's workmen were advised not to run the risk of bloodshed and to submit to be driven from their work by said Hart and his mob.

Thereupon, the said workmen employed by the Plaintiff in Breathitt County, Kentucky, were driven from their work by said Hart and his mob by use of threats of bodily harm to them and their families, and thus all work of the Plaintiff under the aforesaid contracts was stopped on July 26, 1949.

On or about July 27, 1949, many of the employees of the Plaintiff returned to their said work, but upon arriving at the aforesaid tippie, found two men who apparently were "spotters" for United Construction Workers and also found one H. G. Robinson who represented himself to be a Field Representative and an officer of United Construction Workers. A number of the employees of the Plaintiff were gathered in the carpenters toolhouse near said tippie and said employees and their steward refused to return to work for the reason that the men had been informed that in the event they undertook to work, more than 100 United Construction Workers would come upon the job and force them to stop, and that possibly something might happen to them if they returned to work on the tippie. It was also rumored that certain of the mob were hiding in the hills with rifles and would  
page 7 } shoot any of the men who might return to work.

Shortly thereafter, all of the employees of the Plaintiff left the said work because of said threats and rumors and have not since returned to their work. The Plaintiff in the meantime, had appealed to a Kentucky State Police officer for assistance, but had received no adequate assistance to maintain law and order upon the said works. The Kentucky State Police officer knew of the disturbance but stated that he had orders not to take part in any such disturbance. The said state policeman stated that he was convinced there was real danger to the men should they return to their work, and further stated that "I have not only seen them shot that way, but have picked them up after they were shot". On or about August 1, 1949, a meeting was held of United Construction Workers at a place known as "Tiptop" at or near Carver, Kentucky, which meeting was attended by approximately 250 persons. The said meeting was conducted by the said Wil-

liam O. Hart and at which meeting there was a further discussion of the construction work of the Plaintiff in Breathitt County, Kentucky, and the said Mr. William O. Hart at that meeting again insisted upon preventing the Plaintiff from proceeding with its work under said contracts in Breathitt County, Kentucky. Thereupon, arrangements were made by the said Hart to have certain people who were members of United Construction Workers posted at various parts of the said works of Plaintiff and the said Hart thereupon called upon the assembled crowd for volunteers to go to the Plaintiff's job site to serve as pickets or spies for United Construction Workers. The Plaintiff was constantly making every effort to induce his workmen to return to work but was unable to do so because of the threats which theretofore had been made by the said Hart and members of the United Construction Workers.

page 8 } On or about August 1, 1949, the Plaintiff did induce some of its workmen to return to the location of the job and new badges were issued to them and such other men as the Plaintiff was able to hire to go to work. Before starting actual work these men also were intimidated by the said Hart and his mob so that none of these men actually went to work because they were fearful of consequences which might be visited upon them by the said United Construction Workers if they did so. While the said men were still at the job location, the said William O. Hart came to the works and made another very emphatic speech and statement that United Construction Workers would not permit the work to go on so far as common laborers were concerned unless the Company signed a contract with the United Construction Workers. Said Hart was informed by Plaintiff that the work could go along without any laborers since the carpenters on the job would be willing to do the work which normally the laborers should do. Thereupon the said Hart stated that he would not permit the said carpenters to do any such work. The said Hart then indicated he would take whatever measures might be necessary to see to it that the men did not work. He then threatened the men with bodily harm if they attempted to go to work. The Plaintiff then undertook to communicate and did communicate with Mr. Thomas Davis, an Assistant Chairman of said District 50, and the coordinator of various Regions of District 50 including among other locations, Breathitt County, Kentucky. Mr. Davis has an office in Knoxville, Tennessee, but was not there. The Plaintiff located him in Kingsport, Tennessee. Mr. Davis was thereupon informed of the developments at the Plaintiff's project in Breathitt County, Kentucky, and of the agreement between

the Plaintiff and American Federation of Labor Unions and of the agreement of Plaintiff with Richmond Building and Construction Trades Council. Mr. Davis thereupon page 9 } stated, "We do not recognize the American Federation of Labor any more than they recognize us".

Mr. Davis said he was very sympathetic with people in Plaintiff's position, but that it was caught between two big unions and he would not, although urgently requested so to do by Plaintiff, direct the said Mr. Hunter or the said Hart not to disturb or interfere with the employees of the Plaintiff. The said Davis refused to come to the location of said work because of other appointments which he claimed to have. The Plaintiff, thereupon, arranged a meeting for the succeeding day, August 2, 1949, at 10 o'clock a. m. which meeting the said Hart agreed to attend upon condition that the Plaintiff would not attempt to perform any work until said meeting. On the succeeding morning, August 2, 1949, the meeting proposed was held and at said meeting a number of representatives from various Unions affiliated with the American Federation of Labor, were present. The Plaintiff then stated that it felt that the men should be directed to go back to work and it requested and urged them to do so. One of the representatives of the American Federation of Labor asked the question "Do you want to wait until somebody is killed before you do something?" The Plaintiff stated that it did not think anybody would be killed, but all of the representatives of the said Unions agreed that none of the men voluntarily should expose themselves to such a risk, since they believed someone would be killed if work was permitted to go on. The men then refused, because of said threats of said Hart and his mob, to go back to work. While the meeting was in progress, the representatives of the American Federation of Labor refused to meet with the said Hart. Thereupon the said Hart informed the Plaintiff that his position had not changed, that he would insist that the Plaintiff's employees discontinue page 10 } their work and said further that he would if necessary bring 1,000 men to the job to hold his picket line. Because of the threats of the said Hart and the said United Construction Workers, the employees of the Plaintiff refused to return to their work.

Under date of August 4, 1949, Pond Creek Pocahontas Company, by letter, notified the Plaintiff that because of Plaintiff's inability to proceed with said work, its contract therefor was cancelled as of that date. A copy of said letter of cancellation is attached hereto and made a part hereof and marked Exhibit "B". On the same day, Spring Fork Development Company, by letter, notified the Plaintiff that

because of Plaintiff's inability to proceed with the said work, its contract therefor was cancelled. A copy of said letter of cancellation is attached hereto and made a part hereof and marked Exhibit "C".

That United Construction Workers is an unincorporated association composed of numerous members and is commonly called a labor union. That District 50 is an unincorporated association composed of numerous members and is commonly called a labor union. That United Mine Workers of America is an unincorporated association composed of numerous members and is commonly called a labor union. That the constitution of the United Mine Workers of America provides among other things that the organization of United Mine Workers of America shall be international in its scope and that its international union shall be composed of workers eligible for membership in the United Mine Workers of America, and that it may be divided into districts, and sub-districts, but that the United Mine Workers of America shall have supreme legislative and judicial authority over all members and subordinate branches and shall be the ultimate tribunal to which all matters of importance to the welfare of its membership and subordinate branches shall be re-

page 11 } ferred for adjustment, and that between the international conventions the supreme executive and judicial powers of the United Mine Workers of America shall be vested in its Executive Officers and the Executive Board; that all districts, subdistricts and local unions must be chartered by and under the jurisdiction of and subject to the laws of United Mine Workers of America and subject to the rulings of its International Executive Board. Under Article XX of said Constitution of United Mine Workers of America, it provided that District 50 United Mine Workers of America, subject to the jurisdiction and regulations of the said International Executive Board is thereby created and set up under the authority of the United Mine Workers of America. Said District 50 United Mine Workers of America, although organized under and pursuant to the terms of said Constitution of United Mine Workers of America, and thus subordinate to and under the control and direction of said United Mine Workers of America, is nevertheless a separate unincorporated association having members, officers, committees, and property of its own, and has power to adopt by-laws and rules not inconsistent of the Constitution of the United Mine Workers of America. Pursuant to the provisions of said Constitution of United Mine Workers of America, said District 50 was set up under rules adopted by its organizing committee, as a separate unincorporated association, but subordinate and

subsidiary to United Mine Workers of America. Under the terms of its said rules said District 50 has an administrative officer operating under the authority of Article XX of the Constitution of the United Mine Workers of America, (who is sometimes known as its Chairman or Director) who has supervision over the administration of the affairs of said District 50. The said rules further provide for the payment of dues and assessments to said District 50 by its page 12 } members, and provides for a separate treasurer, so that business and affairs of said District 50 are separate and distinct from the affairs of United Mine Workers of America, with the exception that said District 50 is subordinate to and is a subsidiary of United Mine Workers of America and is completely controlled by and must act within the Constitution of the said United Mine Workers of America. The said rules set up for the governing of the said District 50 among other things, provide that the administrative officer of said District 50 shall be authorized to appoint Regional Directors who shall have supervision over local unions within the region assigned to each, and which Regional Directors are required to report to said administrative officer on all matters of policy and organizational activities at the end of each week.

It is further provided by said Constitution of United Mine Workers of America and said rules of said District 50, that subdistricts may be set up by said District 50. Pursuant to the authority therein conferred, said District 50 has caused to be set up a number of subdistricts among which is the United Construction Workers. The rules under which the said United Construction Workers is organized expressly provide that the said organization shall be affiliated with United Mine Workers of America and shall be subject to the Constitution of the said United Mine Workers of America. It is further provided by said rules that the administrative officer (sometimes called Chairman or Director) of United Construction Workers shall be subject to and conform with the Constitution and policy of the United Mine Workers of America. The said United Construction Workers, although organized by and pursuant to the direction and control of District 50, is nevertheless a separate unincorporated association having members, officers, committees and property of its own, and has power to adopt by-laws or rules page 13 } not inconsistent with the Constitution and by-laws of United Mine Workers of America and the rules and by-laws of District 50. Its members are required to pay dues and assessments. A portion of said dues after payment to United Construction Workers is transferred to District 50,

and to United Mine Workers of America. That the said United Construction Workers is a separate unincorporated association but is subordinate to and a subsidiary of District 50 and United Mine Workers of America and is affiliated with and controlled by said District 50 and by United Mine Workers of America.

That the Regional Director of District 50 for the region including Breathitt County, Kentucky, is also a Regional Director of United Construction Workers and the said David Hunter and the said William O. Hart were and are the duly authorized representatives of United Mine Workers of America, of District 50 and of United Construction Workers. The said United Construction Workers is and was at all times hereinbefore mentioned, the agent of United Mine Workers of America and of said District 50, and all of the acts of the said William O. Hart and his mob and the acts of the said United Construction Workers in and about their efforts unlawfully and maliciously to prevent the Plaintiff from continuing its work in Breathitt County, Kentucky, were duly authorized, ratified and confirmed by said United Construction Workers, by said District 50 and by said United Mine Workers of America as their own acts jointly and severally.

United Construction Workers is now doing business within the Commonwealth of Virginia and has one of its principal offices in the Commonwealth of Virginia located in the City of Richmond, Virginia, and an officer thereof is also domiciled and has his office in the said City of Richmond. District 50 is now doing business within the Commonwealth of Virginia and has one of its principal offices in the Commonwealth of Virginia located in the City of Richmond, and an officer thereof is also domiciled and has his office in the City of Richmond, Virginia. That United Mine Workers of America is now doing business within the United States of America and within the Commonwealth of Virginia.

The Plaintiff urged the said William O. Hart, David Hunter and Thomas Davis, all of whom were and are officers and agents of United Construction Workers, of District 50, and of United Mine Workers of America to cease interfering with and preventing the Plaintiff from proceeding in a normal manner with its work, but each of them refused to cease their interference on behalf of said United Construction Workers, District 50 and United Mine Workers of America and each of them maliciously, wilfully and unlawfully continued their said interference with the said work of Plaintiff; all of which said actions were wilful, malicious, illegal and unwarranted and were intended to and did actually greatly damage and in-

jure the Plaintiff's in and about its property and reputation and caused Plaintiff's work in Breathitt County, Kentucky, to be stopped and its said contracts to be cancelled, and further caused Plaintiff to lose other contracts for work which would have resulted in large profits to Plaintiff. The said United Mine Workers of America, said District 50, and the said United Construction Workers each jointly and severally ratified, approved and confirmed and authorized the acts of the said William O. Hart and his mob against the Plaintiff in Breathitt County, Kentucky, for the purpose of wilfully, maliciously and unlawfully attempting to destroy Plaintiff's business, and to prevent Plaintiff from further continuing lawfully to work within the State of Kentucky unless and until Plaintiff submitted to their demands to permit United Construction Workers to become the bargaining agent for Plaintiff's employees.

page 15 } Wherefore, the said Plaintiff will move the said court at the time and place aforesaid for judgment against United Mine Workers of America, United Construction Workers Affiliated With United Mine Workers of America, and District 50 United Mine Workers of America jointly and severally in the sum of \$500,000.00 for damages both actual and punitive.

LABURNUM CONSTRUCTION CORPORATION

By HUNTON, WILLIAMS, ANDERSON,  
GAY AND MOORE,

Counsel

NORMAN C. FLIPPEN

Of Counsel for Plaintiff

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EXHIBIT "A".

THIS AGREEMENT, made this 15th day of April, 1947, between LABURNUM CONSTRUCTION CORPORATION, hereinafter called the "Contractor", of Richmond, Virginia, party of the first part; and RICHMOND BUILDING AND CONSTRUCTION TRADES COUNCIL, hereinafter called the "Council", of Richmond, Virginia, party of the second part:

WITNESSETH:

WHEREAS, the Contractor is engaged in the construction business in the State of Virginia and elsewhere; and,

WHEREAS, the Council is a voluntary association of certain Local Unions, which, through their respective International Organizations, are affiliated with the National Building Trades Department of the American Federation of Labor; and,

WHEREAS, The Contractor and the Council, subject to the terms and conditions hereinafter set out, desire to enter into this agreement for their mutual benefit.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for and in consideration of the premises and the mutual covenants and agreements herein contained, the Contractor and the Council, subject to the terms and conditions hereinafter set out, do hereby agree as follows:

#### ARTICLE I. DEFINITIONS.

1. As used herein, the words "Local Union" shall mean a Local Union now or hereafter associated with the Council.

2. As used herein, the words "Other Local Union" shall mean a Local Union which is affiliated with the National Building Trades Department of the American Federation of Labor, but which is not associated with the Council.

3. As used herein, the words "Jurisdictional  
page 17 } Dispute" shall mean a condition which exists when two or more Local Unions claim the right to perform the same work at the same time in the same place.

#### ARTICLE II. EMPLOYMENT.

1. The Contractor agrees with each Local Union to employ only members of that Local Union when working in the area over which it, the Local Union, has jurisdiction, and when performing work over which it, the Local Union, has jurisdiction. It is understood and agreed, however, that in a case where there is or may be more than one Local Union for a craft, the Contractor, as it may deem fit, may employ the members of any of those Local Unions. It is further understood and agreed that in a case where one or more Local Unions and one or more Other Local Unions have jurisdiction over the same craft or trade in the same or substantially the same area, the Contractor, as it may deem fit, may employ the members of any of those Local Unions or Other Local Unions.

2. Each Local Union agrees with the Contractor to exercise every effort to furnish to the Contractor a sufficient number of qualified workers as and when they may be needed by

the Contractor. It is specifically understood that each Local Union will make every reasonable effort to discharge fully and faithfully this obligation imposed upon it and, to that end, it agrees to keep in close contact with all its members in order that prompt and efficient service may be rendered to the Contractor. If a Local Union should not be able to refer promptly to the Contractor enough members to fill the Contractor's needs, then the Local Union, at its own cost and expense, will contract, by mail, telephone or telegraph, Other Local Unions in the State of Virginia and elsewhere, and also, if deemed advisable, it will contact the International Organization with which it is affiliated, all in an effort page 18 } to recruit enough qualified workers to meet the Contractor's demands.

3. With respect to work which the Contractor may have in an area over which a Local Union does not have jurisdiction, the Contractor agrees to contact the Other Local Union which has jurisdiction over that area, to request that Other Local Union to furnish qualified workers and to give preference to members of that Other Local Union in employing workers.

### ARTICLE III. SUBCONTRACTS.

1. The Council agrees to make every effort to organize all crafts and trades to the end that there shall be in each craft or trade at least three (3) Union Subcontractors having offices and engaging in business in the area or areas over which the Local Unions have jurisdiction. Each Local Union shall make known to the Contractor the names of the Union Subcontractors for its craft or trade, and the Contractor, until notified to the contrary in writing by the Local Union, may regard those Subcontractors as Union Subcontractors and may enter into agreement with them.

2. It shall be the duty and obligation of the Contractor, prior to subletting any portion of its work, to communicate with the Council or with the Local Union having jurisdiction over the trade or craft involved, and to ascertain whether a proposed subcontractor is a Union Subcontractor. If the Contractor shall be advised that a proposed Subcontractor is a Union Subcontractor, then the Contractor may enter into an agreement with that Subcontractor. If the Contractor shall be advised that the proposed subcontractor is not a Union Subcontractor, then the Contractor shall not enter into an agreement with that subcontractor.

#### ARTICLE IV. WAGES, RULES AND REGULATIONS.

1. With respect to wages, the Contractor agrees with each Local Union to pay wages to the members of that Local Union based upon the then prevailing wage rate as the page 19 } same may have been established as the result of collective bargaining.

2. The Contractor further agrees with each Local Union to abide by the rules and regulations of that Local Union.

3. The Council and the Local Unions agree that no change will be made in the wages to be paid and in their respective rules and regulations which will cause increased costs to the Contractor unless the Contractor is first consulted and agrees to the proposed change. This shall not be construed to mean that no changes shall be made without the consent of the Contractor. It is admitted by all parties concerned that from time to time changes will occur. It does mean that no change will be made which will cause the Contractor to sustain increased costs with respect to work then under contract or in progress.

#### ARTICLE V. JURISDICTIONAL DISPUTES.

1. The Council and the Local Unions agree to the following:

(a) The Council shall provide a means for the prompt and speedy temporary settlement of any jurisdictional dispute which may occur among the Local Unions, which temporary settlement shall be final and conclusive until such time as the dispute may be finally settled by the National Building Trades Department of the American Federation of Labor.

(b) The President of the Council shall promptly advise the Contractor in writing about any temporary settlement of a jurisdictional dispute, and shall also advise the Contractor in writing about any final settlement made by the National Building Trades Department of the American Federation of Labor.

(c) The Contractor agrees to abide by any temporary settlement made by the Council until such time as a final settlement shall have been made by the National Building Trades Department of the American Federation of Labor, and further agrees, after a final settlement is made, to abide by same.

2. The Council and the Local Union agree that there will be no stoppage of work or strike because of a jurisdictional dispute unless the Contractor fails to discharge the obligations imposed upon it by subparagraph (c) next above.

## ARTICLE VI. COOPERATION.

1. The Council and the Local Unions agree to cooperate with the Contractor and to promote its business and interests in every way possible, to do nothing that will injure the Contractor, and to urge the members of the Local Unions to put forth their best efforts to accomplish the work in hand as efficiently, expeditiously and economically as possible, all to the end that the Contractor may derive as much profit from its work as may reasonably be expected.

2. The Contractor agrees to cooperate with the Council and the Local Unions and to promote their business and interests in every way possible, and to do nothing which will injure the Council and the Local Unions.

3. It is the declared purpose and intention of the Council and its Local Unions on one hand and also of the Contractor on the other that each shall work for and promote the business and interests of the other.

## ARTICLE VII. DURATION.

1. This agreement shall become effective April 15, 1947, and shall continue in full force and effect until terminated by the written notice provided for in the paragraph next below.

2. Either party to this contract shall have the right to terminate same on April 15, 1949, by giving three months prior written notice to the other. After April 15, page 21 } 1949, either party to this contract shall have the right to terminate this contract on its anniversary date, that is, April 15, by giving three months prior written notice to the other.

3. It is expressly understood and agreed that this contract shall continue in full force and effect without interruption until such time as it may be terminated by the written notice hereinabove provided for, and that the failure of either party to give notice to terminate shall not be construed as a renewal or extension of this contract.

## ARTICLE VIII. RIGHTS AND OBLIGATIONS.

1. It is expressly understood and agreed that this contract shall enure to the benefit of and shall be binding upon (a) the Council and its Local Unions and (b) the Contractor.

## ARTICLE IX. ARBITRATION.

1. Should any question arise as to the rights, duties and obligations of the Council or any of its Local Unions under this contract, or as to the rights, duties and obligations of the Contractor hereunder, then the matter shall be handled in the following manner:

(a) The Contractor and the Council, upon five days written notice given by either to the other, shall each immediately appoint one representative. The two representatives thus appointed shall seek amicably to settle any questions arising under this agreement. If the two representatives agree, their decision shall be final and binding on all parties. If the two representatives shall be unable to agree within 5 days (this time may be extended by mutual agreement), the two sides shall, upon motion of either side, select a disinterested person who shall be known as an umpire, and who, together with the two representatives, shall constitute a Board of Arbitration. The Board shall consider the matter in dispute and render a decision as promptly as possible. The majority decision of this Board shall be final, conclusive, and binding on both parties.

page 22 } (b) The Council, each Local Union and the Contractor jointly and severally agree that there shall be no stoppage of work, strike or look-out pending settlement of a dispute in the manner hereinabove provided.

(c) Any expense incurred jointly through arbitration shall be shared equally by the Contractor and the Council.

IN WITNESS WHEREOF, the parties of the first and second parts have caused their names to be signed hereto by their respective duly authorized officers, all as of the day and year first above mentioned.

LABURNUM CONSTRUCTION CORPORATION

By /s/ A. HAMILTON BRYAN

President

Witnesses:

/s/ WILLIAM J. MOORE, JR.

/s/ FRANCES W. EVANS

As to the Contractor

RICHMOND BUILDING AND CONSTRUCTION TRADES COUNCIL

By /s/ J. F. JOINVILLE

President

By /s/ W. M. ROBERTSON

(Seal)

Secretary

.....  
As to Council

## POND CREEK POCAHONTAS COMPANY

R. E. SALVATI  
PRESIDENTHUNTINGTON  
WEST VIRGINIA

August 4, 1949.

Laburnum Construction Corporation,  
Richmond, Virginia

Attn: Mr. Hamilton Bryan, President.

Gentlemen:

Please refer to Article 6 in our construction agreement with you dated October 28, 1948, covering the construction of a coal preparation plant at our No. 1 Mine in Breathitt County, Kentucky.

About noon on July 26, 1949, we understand that your men were prevented from continuing to work on the tipple by threats and other action of representatives of the United Construction Workers, a branch of District 50 of the United Mine Workers of America. Since that time, no further work has been done on the tipple.

I am sure that you realize that it is necessary for us to complete the construction of the tipple at the earliest practicable date. Therefore, under the provisions of Article 6 above referred to, you are hereby notified that said contract and your employment thereunder is terminated. It will be appreciated if you will remove all your tools and equipment from the site of the work at the earliest practicable date.

Yours very truly,

POND CREEK POCAHONTAS COM-  
PANY,  
By /s/ R. E. SALVATI

President.

/let

page 24 }

EXHIBIT "C".

August 4, 1949.

Laburnum Construction Corporation,  
Richmond, Virginia.

Attn: Mr. Hamilton Bryan, President.

Gentlemen:

Please refer to Article 6 in our construction agreement with you dated December 15, 1948, covering the construction of twenty-five dwellings near the No. 1 Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky.

About noon on July 26, 1949, we understand that your men were prevented from continuing to work on the dwellings and a school house by threats and other action of representatives of the United Construction Workers, a branch of District 50 of the United Mine Workers of America. Since that time, no further work has been done on the dwellings and school house.

I am sure that you realize that it is necessary for us to complete the construction of the dwellings and school house at the earliest practicable date. Therefore, under the provisions of Article 6 above referred to, you are hereby notified that said contract and your employment thereunder is terminated. It will be appreciated if you will remove all your tools and equipment from the site of the work at the earliest practicable date.

Yours very truly,

SPRING FORK DEVELOPMENT COM-  
PANY,

By /s/ W. A. OGG

President.

. . . . .

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. . . . .

PLEA OF NOT GUILTY.

The Defendants, United Construction Workers Affiliated  
with United Mine Workers of America, by their attorneys,

## Supreme Court of Appeals of Virginia.

come and say that they are not guilty of the premises in this action laid to their charge in manner and form as the plaintiff hath complained.

And of this the said defendants put themselves upon the country.

WILLIAMS, MULLEN & HAZELGROVE  
GUY B. HAZELGROVE, p. d.

Jan. 10, 1950. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

page 60 {

. . . . .

## PLEA OF NOT GUILTY.

The Defendants, District 50, United Mine Workers of America, by their attorneys, come and say that they are not guilty of the premises in this action laid to their charge in manner and form as the plaintiff hath complained.

And of this the said defendants put themselves upon the country.

WILLIAMS, MULLEN & HAZELGROVE  
GUY B. HAZELGROVE, p. d.

Jan. 10, 1950. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

page 61 {

. . . . .

## PLEA OF NOT GUILTY.

The Defendants, United Mine Workers of America, by their attorneys, come and say that they are not guilty of the prem-

ises in this action laid to their charge in manner and form as the plaintiff hath complained.

And of this the said defendants put themselves upon the country.

WILLIAMS, MULLEN & HAZELGROVE  
GUY B. HAZELGROVE, p. d.

Jan. 10, 1950. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

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\* \* \* \* \*

Upon motion of the Plaintiff, it is ordered that the Defendants file herein their grounds of defense within 20 days from the receipt of answers to interrogatories which Defendants shall serve upon Plaintiff on or before June 20, 1950.

HAROLD F. SNEAD

6/8/50.

\* \* \* \* \*

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\* \* \* \* \*

#### INTERROGATORIES.

Received & filed Jun. 19, 1950.

Teste:

WILBUR J. GRIGGS, Clerk  
By LUTHER C. MONTGOMERY  
D. C.

The Defendants call upon the Complainant to answer upon oath the following interrogatories to be used in evidence on behalf of the Defendants at the trial of this case:

(1) Furnish a copy of the contract, dated October 28, 1948, between the Plaintiff and Pond Creek Pocahontas Company? What was the "cost of work" (as defined by such contract) incurred by the Plaintiff in the performance of such contract? What payments were made to the Plaintiff by Pond Creek Pocahontas Company under such contract? What was the maximum net profit the Plaintiff could have earned under this contract? How much of such net profit was the plaintiff paid? What does plaintiff estimate would have been the additional "cost of work" had it completed the work under the contract? What was the actual additional "cost of work" to complete the contract and when was it completed? When does Plaintiff estimate it would have completed the work under the contract had it not been cancelled?

(2) Furnish a copy of the contract dated December 15, 1948, between the Plaintiff and Spring Fork Development Company? What was the "cost of work" (as defined page 64 } by such contract) incurred by the Plaintiff in the performance of such contract? What payments were made to the Plaintiff by Spring Fork Development Company under such contract? What is the maximum net profit the Plaintiff would have earned under this contract? How much of such net profit was the Plaintiff paid? What does Plaintiff estimate would have been the additional "cost of work" had it completed the work under the contract? What was the actual additional "cost of work" to complete the contract and when was it completed? When does Plaintiff estimate it would have completed the work under the contract had it not been cancelled?

(3) With regard to the aforementioned contracts between the Plaintiff and Pond Creek Pocahontas Company, and between the Plaintiff and Spring Fork Development Company, what percentage of work under each contract was uncompleted on the date the contracts were cancelled?

(4) What were the exact terms of the "arrangement" which the Plaintiff entered into with Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, and on what date was the "arrangement" entered into? Was such "arrangement" reduced to writing?

(5) Was application ever made either by the Plaintiff or by Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, to the National Labor Relations Board, requesting that such Union be certified as the bargaining agent for the employees of the Plaintiff? Was such an application ever made with respect to Richmond Building and Construction Trades Council?

(6) Did the National Labor Relations Board ever certify

Paintsville, Kentucky, Carpenters Local Union page 65 } No. 646, American Federation of Labor, as the bargaining agent for employees of the Plaintiff, and if so, what employees of the Plaintiff were included in the bargaining unit? Has Richmond Building and Construction Trades Council ever been so certified, and if so, what employees were included in the bargaining unit?

(7) On page 2 of the Notice of Motion for Judgment, it is stated: "On or about July 14, 1949, one William O. Hart, of Pikesville, Kentucky, communicated by telephone with the Plaintiff \* \* \*". Who was the officer, agent or employee of the Plaintiff with whom Hart allegedly communicated?

(8) Was the Plaintiff adhering to all of the terms of the contract between the Plaintiff and Richmond Building and Construction Trades Council (attached to the Notice of Motion for Judgment and marked Exhibit "A") between the dates July 14, 1949 and August 4, 1949?

(9) Pursuant to Article VI(I) of the contract (attached to the Notice of Motion for Judgment and marked Exhibit "A"), with what "Local Unions" had the plaintiff, as of July 14, 1949, a prevailing wage rate which had been established as the result of collective bargaining, and if so, what are all the crafts and trades which were covered thereby?

(10) Under the contract (attached to the Notice of Motion for Judgment and marked Exhibit "A"), what is the area over which the "Local Unions" have jurisdiction?

(11) With respect to all persons who were employed by the Plaintiff in the performance of the contracts with Pond Creek Pocahontas Company and Spring Fork Development Company between the dates of July 10, 1949, and August 4, 1949, what are their names; what were their addresses on

August 4, 1949; what are their present addresses; page 66 } in what capacity and at what rate of pay were they employed by the Plaintiff?

(12) It is alleged on page 4 of the Notice of Motion for Judgment that "Said Hart and the mob of men headed by him were informed that workmen on said job were members of Local Unions affiliated with the American Federation of Labor or had made application to become members of such local unions." Who allegedly so informed Hart?

(13) What is the name of the Kentucky State Police Officer to whom the Plaintiff allegedly appealed for assistance?

(14) At page 14 of the Notice of Motion for Judgment, it is alleged: "\* \* \* and further caused Plaintiff to lose other contracts for work which would have resulted in large profits to Plaintiff." What are the contracts, and the dollar value of the work to be done thereunder, which it is alleged that

the Defendants caused the Plaintiff to lose? What were the bids, if any, made by the Plaintiff on such contracts? On what basis were such bids made? What contracts, if any, is it alleged that the Defendants caused the Plaintiff to lose on which the Plaintiff did not bid?

(15) What was the net profit, before taxes, of the Plaintiff in 1949 and in each of the five years next preceding 1949?

(16) What is the net worth of the Plaintiff?

(17) Furnish a copy of Plaintiff's balance sheet for 1948 and 1949. On what date was Plaintiff domesticated, i. e., qualified to do business in Kentucky? Is it still so qualified, and if not, when was such qualification terminated?

(18) What was the total dollar volume of work performed by the Plaintiff in the State of Kentucky in 1949 page 67 } and in each of the five years next preceding 1949? Furnish same for Virginia and West Virginia.

(19) What was the value placed on "goodwill" in the Plaintiff's balance sheet as of December 31, 1949? As of December 31, 1948?

(20) What is each and every item comprising the plaintiff's alleged damages of \$500,000?

(21) On July 13, 1949, which employees of the Plaintiff, requested in question (11), were employed in connection with the Pond Creek Pocahontas contract and which were employed in connection with the Spring Fork Development Company contract? What was the minimum number of such employees with which the Plaintiff could have prosecuted the work on each of these contracts?

(22) What is the actual cost value of all the tools and equipment owned by Plaintiff which were located on the situs of the work on the day the contracts were cancelled?

UNITED CONSTRUCTION WORKERS  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA; DISTRICT  
50, UNITED MINE WORKERS OF  
AMERICA, AND UNITED MINE  
WORKERS OF AMERICA, Defendants  
By Counsel.

WILLIAMS, MULLEN & HAZELGROVE,  
By FRED G. POLLARD

Memorandum to Clerk:

Please make returnable on July 10, 1950, and serve sum-

mons on A. Hamilton Bryan, President Laburnum Construction Corporation.

FRED G. POLLARD

June 19, 1950.

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\* \* \* \* \*

This day came the Plaintiff, by counsel, and moved the Court to extend the time for answering or otherwise moving or acting upon the interrogatories filed herein until September 20, 1950, and it appearing to the Court that additional time should be granted Plaintiff it is ordered that the time for filing answer or for taking such action as Plaintiff may be advised upon the interrogatories propounded to Plaintiff be and the same hereby is extended until September 20, 1950.

HAROLD F. SNEAD

7/7/50.

\* \* \* \* \*

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\* \* \* \* \*

1950, Sept. 20. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

ANSWER OF LABURNUM CONSTRUCTION CORPORATION  
TO SUMMONS OF THE DEFENDANTS TO  
ANSWER INTERROGATORIES.

For answer to the summons directed by the Defendants to Plaintiff Laburnum Construction Corporation to answer certain interrogatories filed in the Clerk's Office of the Circuit Court of the City of Richmond, plaintiff Laburnum Construction Corporation answers and says:

1. (a) Q. Furnish a copy of the contract, dated October 28, 1948, between the Plaintiff and Pond Creek Pocahontas Company.

A. Attached hereto is a copy of the contract between Plaintiff and Pond Creek Pocahontas Company dated October 28, 1948.

(b) Q. What was the "cost of work" (as defined by such contract) incurred by the Plaintiff in the performance of such contract?

A. The contract between Plaintiff and Pond Creek Pocahontas Company dated October 28, 1948, provided page 72 } for the construction of a Coal Preparation Plant at the No. 1 Kentucky Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky. As defined in said contract, the "cost of work" incurred by Plaintiff in connection with the construction of said Coal Preparation Plant amounted to the sum of \$251,546.90.

As additional work under said contract dated October 28, 1948, Pond Creek Pocahontas Company awarded to Plaintiff the construction of a Schoolhouse near said No. 1 Kentucky Mine. As defined in said contract, the "cost of work" incurred by Plaintiff in connection with the construction of said Schoolhouse amounted to the sum of \$606.83.

(c) Q. What payments were made to the Plaintiff by Pond Creek Pocahontas Company under such contract?

A. The payments made to Plaintiff by Pond Creek Pocahontas Company under said contract dated October 28, 1948, amounted to the following:

(1) For work performed in connection with said Coal Preparation Plant, the payments amounted to the sum of \$265,370.09.

(2) For work performed in connection with the construction of said Schoolhouse, the payments amounted to the sum of \$637.16.

(d) Q. What was the maximum net profit the Plaintiff could have earned under this contract?

A. The maximum net profit which Plaintiff could have earned under said contract dated October 28, 1948, for work in connection with the construction of said Coal Preparation Plant was the sum of \$12,000.00. With respect to the construction of said Schoolhouse and page 73 } other work in addition to said Coal Preparation Plant, there was no limitation to the net profit which Plaintiff could have earned under said contract. Such

net profit, however, would have been equal to five per cent of the "cost of work".

(e) Q. How much of such net profit was the Plaintiff paid?

A. Pond Creek Pocahontas Company paid Plaintiff a fee of \$12,000.00 for work performed in connection with the construction of said Coal Preparation Plant. Pond Creek Pocahontas Company paid Plaintiff for work performed in connection with the construction of said Schoolhouse a fee of \$30.33, being five per cent of the "cost of work" amounting to \$637.16 on the Schoolhouse.

(f) Q. What does Plaintiff estimate would have been the additional "cost of work" had it completed the work under the contract?

A. Had Plaintiff completed its work under said contract in connection with the construction of said Coal Preparation Plant, Plaintiff estimates that the additional "cost of work" on said Coal Preparation Plant would have been the sum of approximately \$15,000.00. In this connection, the Plaintiff states the following:

Pond Creek Pocahontas Company had agreed to award Plaintiff considerable work in addition to said Coal Preparation Plant, a portion of which additional work was the construction of said Schoolhouse. The above estimate of \$15,000.00 includes only the additional cost of completing work on said Coal Preparation Plant. It does not include the estimated cost of completing said Schoolhouse or of performing other work in addition to said Coal Preparation Plant and said Schoolhouse.

page 74 } (g) Q. What was the actual additional "cost of work" to complete the contract and when was it completed?

A. Plaintiff does not know the answer to this question.

(h) Q. When does Plaintiff estimate it would have completed the work under the contract had it not been cancelled?

A. With respect to Plaintiff's work on said Coal Preparation Plant, Plaintiff estimates it could have completed this work on or about September 1, 1949, had not work under said contract been cancelled. With respect to work under said contract in addition to the construction of said Coal Preparation Plant, which Pond Creek Pocahontas Company had agreed to award Plaintiff, Plaintiff does not know when it would have completed such additional work. Had it not been for the actions of the Defendants herein as shown in the Notice of Motion for Judgment, Plaintiff believes that it would

still be working for Pond Creek Pocahontas Company at or near the site if its mines in Breathitt County, Kentucky.

2. (a) Q. Furnish a copy of the contract dated December 15, 1948, between the Plaintiff and Spring Fork Development Company.

A. Attached hereto is a copy of the contract between Plaintiff and Spring Fork Development Company dated December 15, 1948.

(b) Q. What was the "cost of work" (as defined by such contract) incurred by the Plaintiff in the performance of such contract?

page 75 } A. The contract between Plaintiff and Spring Fork Development Company dated December 15, 1948, provided for the construction of twenty-five dwellings on sites near the No. 1 Kentucky Mine of Pond Creek Pocahontas Company, Breathitt County, Kentucky. As defined in said contract, the "cost of work" incurred by Plaintiff in connection with the construction of said twenty-five dwellings amounted to the sum of \$39,316.24.

(c) Q. What payments were made to the Plaintiff by Spring Fork Development Company under such contract?

A. The payments made to Plaintiff by Spring Fork Development Company under such contract amounted to the sum of \$41,282.05.

(d) Q. What is the maximum net profit the Plaintiff would have earned under this contract?

A. The maximum net profit which Plaintiff would have earned under said contract for work in connection with the construction of said twenty-five dwellings was the sum of \$2,500.00. With respect to other work in addition to said twenty-five dwellings, there was no limitation to the net profit which Plaintiff could have earned under said contract. Such net profit, however, would have been equal to five per cent of the "cost of work".

(e) Q. How much of such net profit was the Plaintiff paid?

A. Spring Fork Development Company paid Plaintiff a fee of \$1,965.81 for work performed in connection with the construction of said twenty-five dwellings.

(f) Q. What does Plaintiff estimate would have been the additional "cost of work" had it completed the work under the contract?

page 76 } A. Had Plaintiff completed its work under said contract dated December 15, 1948, in connection with the construction of said twenty-five dwellings, Plaintiff estimates that the additional "cost of work" would have been from \$4,000.00 to \$10,000.00 depending upon what work

Spring Fork Development Company wished to have performed. In this connection, the Plaintiff states the following:

Pond Creek Pocahontas Company, the parent corporation of Spring Fork Development Company, had agreed that considerable additional work would be awarded Plaintiff either under Plaintiff's contract with Pond Creek Pocahontas Company dated October 28, 1948, or under the Plaintiff's contract with Spring Fork Development Company dated December 15, 1948. The above estimate of from \$4,000.00 to \$10,000.00 includes only the additional cost of completing work on said twenty-five dwellings. It does not include the estimated cost of performing the additional work which Pond Creek Pocahontas Company had agreed to award to Plaintiff.

(g) Q. What was the actual additional "cost of work" to complete the contract and when was it completed?

A. Plaintiff does not know the answer to this question.

(h) Q. When does Plaintiff estimate it would have completed the work under the contract had it not been cancelled?

A. With respect to Plaintiff's work on said twenty-five dwellings, Plaintiff estimates it would have completed this work on or about September 1, 1949. had not work under said contract been cancelled. With respect to work under said contract in addition to the construction of said twenty-five dwellings, Plaintiff does not know when it would have completed such additional work. Had it not been for the actions of the Defendants herein as shown in the Notice of Motion for Judgment, Plaintiff believes it would page 77 } still be working for Pond Creek Pocahontas Company or Spring Fork Development Company at or near the site of the mines of Pond Creek Pocahontas Company in Breathitt County, Kentucky.

3. (a) Q. With regard to the aforementioned contracts between the Plaintiff and Pond Creek Pocahontas Company, and between the Plaintiff and Spring Fork Development Company, what percentage of work under each contract was uncompleted on the date the contracts were cancelled?

A. With respect to the contract between the Plaintiff and Pond Creek Pocahontas Company dated October 28, 1948, Plaintiff estimates approximately five per cent of the work under said contract in connection with the Coal Preparation Plant was uncompleted on the date that contract was cancelled.

With respect to the contract between Plaintiff and Spring

Fork Development Company dated December 15, 1948, Plaintiff estimates approximately ten per cent of the work under said contract in connection with the twenty-five dwellings was uncompleted on the date the contract was cancelled.

4. (a) Q. What were the exact terms of the "arrangement" which the Plaintiff entered into with Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, and on what date was the "arrangement" entered into?

A. The "arrangement" between Plaintiff and Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, is shown in an agreement dated December 14, 1948, copy of which is attached hereto.

(b) Q. Was such "arrangement" reduced to writing?

A. Yes.

5. (a) Q. Was application ever made either by the Plaintiff or by Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, to the National Labor Relations Board, requesting that such Union be certified as the bargaining agent for the employees of the Plaintiff?

A. Plaintiff has not made any application to the National Labor Relations Board requesting that Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, be certified as bargaining agent for the employees of Plaintiff.

Plaintiff does not know whether Paintsville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, ever made application to the National Labor Relations Board requesting that it be certified as bargaining agent for the employees of Plaintiff.

(b) Q. Was such an application ever made with respect to Richmond Building and Construction Trades Council?

A. Plaintiff has not made any application to the National Labor Relations Board requesting that Richmond Building and Construction Trades Council be certified as bargaining agent for the employees of Plaintiff.

Plaintiff does not know whether Richmond Building and Construction Trades Council ever made application to the National Labor Relations Board requesting that said Council be certified as bargaining agent for the employees of Plaintiff.

6. (a) Q. Did the National Labor Relations Board ever certify Paintsville, Kentucky, Carpenters Local Union No.

646, American Federation of Labor, as the bargaining agent for employees of the Plaintiff, and if so, what employees of the Plaintiff were included in the bargaining unit?

A. As far as Plaintiff knows and has been advised, the National Labor Relations Board has never certified Paints-ville, Kentucky, Carpenters Local Union No. 646, American Federation of Labor, as bargaining agent for employees of Plaintiff.

(b) Q. Has Richmond Building and Construction Trades Council ever been so certified, and if so, what employees were included in the bargaining unit?

A. As far as Plaintiff knows and has been advised, the National Labor Relations Board has never certified Richmond Building and Construction Trades Council as bargaining agent for employees of Plaintiff.

7. (a) Q. On page 2 of the Notice of Motion for Judgment, it is stated: "On or about July 14, 1949, one William O. Hart, of Pikesville, Kentucky, communicated by telephone with the Plaintiff \* \* \*". Who was the officer, agent or employee of the Plaintiff with whom Hart allegedly communicated?

A. The officer, agent or employee of Plaintiff with whom William O. Hart communicated by telephone on or about July 14, 1949, was A. Hamilton Bryan, President of Laburnum Construction Corporation.

page 80 } 8. (a) Q. Was the Plaintiff adhering to all of the terms of the contract between the Plaintiff and Richmond Building and Construction Trades Council (attached to the Notice of Motion for Judgment and marked Exhibit "A") between the dates July 14, 1949, and August 4, 1949?

A. With respect to the contract between Plaintiff and Richmond Building and Construction Trades Council (attached to the Notice of Motion for Judgment and marked Exhibit "A") Plaintiff, between the dates July 14, 1949, and August 4, 1949, was adhering to the terms of that contract in a manner satisfactory to said Richmond Building and Construction Trades Council.

9. (a) Q. Pursuant to Article VI(I) of the contract (attached to the Notice of Motion for Judgment and marked Exhibit "A"), with what "Local Unions" had the plaintiff, as of July 14, 1949, a prevailing wage rate which had been established as the result of collective bargaining, and if so, what are all the crafts and trades which were covered thereby?

A. Article VI(1) of the contract (attached to the Notice

of Motion for Judgment and marked Exhibit "A") does not pertain to wage rates established as the result of collective bargaining. Plaintiff does not understand this question and therefore is unable to answer it.

10. (a) Q. Under the contract (attached to the Notice of Motion for Judgment and marked Exhibit "A"), what is the area over which the "Local Unions" have jurisdiction?

A. Plaintiff is advised that the area over which page 81 } each Local Union has jurisdiction is determined and fixed by the International Union with which it is affiliated.

11. (a) Q. With respect to all persons who were employed by the Plaintiff in the performance of the contracts with Pond Creek Pocahontas Company and Spring Fork Development Company between the dates of July 10, 1949, and August 4, 1949, what are their names; what were their addresses on August 4, 1949; what are their present addresses; in what capacity and at what rate of pay were they employed by the Plaintiff?

A. Plaintiff declines to answer this question except under order of the Court.

12. (a) Q. It is alleged on page 4 of the Notice of Motion for Judgment that "Said Hart and the mob of men headed by him were informed that workmen on said job were members of Local Unions affiliated with the American Federation of Labor or had made application to become members of such local unions". Who allegedly so informed Hart?

A. Plaintiff declines to answer this question except under order of the Court.

13. (a) Q. What is the name of the Kentucky State Police Officer to whom the Plaintiff allegedly appealed for assistance?

A. Plaintiff declines to answer this question except under order of the Court.

14. (a) Q. At page 14 of the Notice of Motion for Judgment, it is alleged: " \* \* \* and further caused Plaintiff to lose other contracts for work which would have page 82 } resulted in large profits to Plaintiff." What are the contracts, and the dollar value of the work to be done thereunder, which it is alleged that the Defendants caused the Plaintiff to lose? What were the bids, if any, made by the Plaintiff on such contracts? On what basis were such bids made? What contracts, if any, is it alleged that

the Defendants caused the Plaintiff to lose on which the Plaintiff did not bid?

A. On or about October 28, 1948, Pond Creek Pocahontas Company awarded to Laburnum Construction Corporation a contract dated October 28, 1948, for the construction of a Coal Preparation Plant at the No. 1 Kentucky Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky.

The work of Laburnum Construction Corporation on the Coal Preparation Plant was to be commenced on or about November 1, 1948, and was to be completed at the earliest possible date. Based on material delivery promises, Pond Creek Pocahontas Company estimated that this work could be completed by May 1, 1949.

Pond Creek Pocahontas Company advised Laburnum Construction Corporation that a large part of the work would be performed under winter conditions; that at times the roads leading to and from the job site would probably be impassable; that there were no facilities at the job site to house or feed the employees of Laburnum Construction Corporation; and that it would be necessary for Laburnum Construction Corporation to provide adequate facilities at the job site to house and feed most of its employees. Salyerspage 83 } ville, Kentucky, distant from the job site approximately twenty-five miles, was the nearest town of consequence.

When the contract dated October 28, 1948, was awarded to Laburnum Construction Corporation, Mr. R. E. Salvati, President of Pond Creek Pocahontas Company, Island Creek Coal Company and various associated companies, (at that time Mr. Salvati was Vice-President in charge of operations of Pond Creek Pocahontas Company, Island Creek Coal Company and various associated companies) said that Pond Creek Pocahontas Company had considerable work to be performed in Breathitt County, Kentucky, in addition to the construction of the Coal Preparation Plant at the No. 1 Kentucky Mine. This additional work included, among other things, 200 Houses, 10 Supervisors Houses, one Large Store, one Service Store, a Change House, a Lamp House, a Superintendent's Office, Machine Shops, a Warehouse Building, a Sand House, a Church, a Schoolhouse, a water system, and concrete foundations for a Coal Preparation Plant at the proposed No. 2 Mine (now called No. 3 mine) of Pond Creek Pocahontas Company.

Mr. Salvati said that he wanted Laburnum Construction Corporation also to handle this additional work, the first thing to be done in that connection being the construction of 25 dwellings. Work on the 25 dwellings was to be commenced

promptly. Mr. Salvati said, however, that the most important thing to be done was to rush to completion at the earliest possible date work on the Coal Preparation Plant at the No. 1 Mine. The remainder of the additional work page 84 } would then follow.

With reference to the 25 dwellings, Mr. Salvati said that Pond Creek Pocahontas Company would form a subsidiary corporation which would enter into an agreement with Laburnum Construction Corporation for that work.

It was agreed with Mr. Salvati that Laburnum Construction Corporation would perform this additional work on a basis of cost plus a fee of five per cent. Mr. Salvati said that since Laburnum Construction Corporation would already have its organization, tools and equipment at the job site, it should be in a better position to perform the additional work than any other contractor. He also said that Pond Creek Pocahontas Company felt obligated to have Laburnum Construction Corporation perform the additional work because of the extremely difficult conditions under which the Coal Preparation Plant would be constructed. The additional work, for the most part, would be performed under much more favorable conditions.

Pursuant to the above agreement with Mr. Salvati, Laburnum Construction Corporation entered into a contract with Spring Fork Development Company, a wholly owned subsidiary of Pond Creek Pocahontas Company, dated December 15, 1948, for the construction of said 25 dwellings. This work was to be performed on a basis of cost plus a fee of five per cent, the total fee not to exceed the sum of \$2,500.00.

Also pursuant to the above agreement with Mr. Salvati,

Pond Creek Pocahontas Company awarded to Laburnum Construction Corporation a contract dated page 85 }

December 8, 1948, for the construction of a telephone line approximately eleven miles in length extending from Carver, Kentucky, to the No. 1 Mine of Pond Creek Pocahontas Company. This work was performed on a basis of cost plus a fee of five per cent.

Also pursuant to the above agreement with Mr. Salvati, Pond Creek Pocahontas Company during July, 1949, instructed Laburnum Construction Corporation to construct a Schoolhouse near the No. 1 Mine of Pond Creek Pocahontas Company. Laburnum Construction Corporation commenced work on said Schoolhouse during the week ended July 17, 1949, and was working on that project on July 26, 1949, when its work was interrupted by the actions of the Defendants herein as shown in the Notice of Motion for Judgment. The

Schoolhouse was to be constructed by Laburnum Construction Corporation on the basis of cost plus a fee of five per cent.

Also pursuant to the above agreement with Mr. Salvati, during July, 1949, Pond Creek Pocahontas Company advised Laburnum Construction Corporation that it should prepare to install concrete foundations for the Coal Preparation Plant for the No. 2 Mine (now called No. 3 Mine) of Pond Creek Pocahontas Company. It was estimated that the cost of this work would amount to approximately \$25,000.00. The work was to be commenced by Laburnum Construction Corporation during August, 1949, and was to be performed on a basis of cost plus a fee of five per cent. Laburnum Con-

page 86 } struction Corporation did not commence work on this job, having been prevented from doing so by the actions of the Defendants herein as shown in the Notice of Motion for Judgment.

Also pursuant to the above agreement with Mr. Salvati, Pond Creek Pocahontas Company advised Laburnum Construction Corporation during July, 1949, that it should prepare to install asbestos shingles on the 25 dwellings referred to above. This work was to be commenced by Laburnum Construction Corporation during August, 1949, and was to be performed on the basis of cost plus a fee of five per cent. Laburnum Construction Corporation did not commence work on this job, having been prevented from doing so by the actions of the Defendants herein as shown in the Notice of Motion for Judgment.

After August 4, 1949, Pond Creek Pocahontas Company decided to enlarge the Coal Preparation Plant at the No. 1 Mine by constructing an addition on the rear thereof. This was additional work which, pursuant to the above agreement with Mr. Salvati, would have been performed by Laburnum Construction Corporation on a basis of cost plus five per cent. Laburnum Construction Corporation was prevented from performing this work by the actions of the Defendants herein as shown in the Notice of Motion for Judgment.

With respect to the additional work which, under the above agreement with Mr. Salvati, was to be performed by Laburnum Construction Corporation for Pond Creek Pocahontas Company in Breathitt County, Kentucky, on a basis of cost plus a fee of five per cent, this additional work page 87 } amounted to a sum in excess of \$600,000.00. Laburnum Construction Corporation would have earned a net job profit of over \$30,000.00 on this additional work. The actions of the Defendants herein as shown in the Notice of Motion for Judgment destroyed the opportunity of

Laburnum Construction Corporation to perform the additional work and to earn profits therefrom.

A tabulation of this additional work is as follows:

Machine Shop	\$ 60,000.00
Lamp House, Supt. Office and Oil House	12,000.00
Warehouse Building	25,000.00
200 Houses	300,000.00
10 Supervisors' Houses	60,000.00
1 Large Store	75,000.00
1 Service Store	15,000.00
Heating Plant for Tipple at Mine No. 1	23,000.00
Tipple Shop	3,000.00
Foundations for Tipple at Mine No. 2 (now called Mine No. 3)	25,000.00
Sand House	7,000.00
Water System	12,500.00
	<hr/>
	\$617,500.00

During the years 1947, 1948 and 1949 Pond Creek Pocahontas Company and Island Creek Coal Company and their associated or subsidiary companies awarded to Laburnum Construction Corporation twelve separate contracts for construction work in the States of Kentucky and West Virginia amounting to a total of more than \$650,000.00. Laburnum Construction Corporation earned a substantial net profit on these jobs. Pond Creek Pocahontas Company and Island Creek Coal Company, though separate corporations, have a common management.

Since August 4, 1949, the date as of which the two contracts dated October 28, 1948, and December 15, 1948, page 88 } were terminated, no other contract for additional work has been awarded to Laburnum Construction Corporation by either Pond Creek Pocahontas Company or Island Creek Coal Company or their associated or subsidiary companies. The business relationship and connection which Laburnum Construction Corporation had built up with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies had resulted in substantial net job profits to Laburnum Construction Corporation. This business relationship and connection would have continued to result in substantial profits to Laburnum Construction Corporation. This business relationship and connection has been completely destroyed by the actions of

the Defendants herein as shown in the Notice of Motion for Judgment. This has resulted in a large loss to Laburnum Construction Corporation.

15. (a) Q. What was the net profit, before taxes, of the Plaintiff in 1949 and in each of the five years next preceding 1949?

A. Plaintiff declines to answer this question except under order of the Court.

16. (a) Q. What is the net worth of the Plaintiff?

A. Plaintiff declines to answer this question except under order of the Court.

17. (a) Q. Furnish a copy of Plaintiff's balance sheet for 1948 and 1949.

A. Plaintiff declines to furnish this information except under order of the Court.

page 89 } (b) Q. On what date was Plaintiff domesticated, i. e., qualified to do business in Kentucky?

A. Plaintiff became domesticated, i. e., qualified to do business in Kentucky on October 28, 1948.

(c) Q. Is it still so qualified, and if not, when was such qualification terminated?

A. Yes, Plaintiff is still so qualified.

18. (a) Q. What was the total dollar volume of work performed by the Plaintiff in the State of Kentucky in 1949 and in each of the five years next preceding 1949?

A. Plaintiff declines to answer this question except under order of the Court.

(b) Q. Furnish same for Virginia and West Virginia.

A. Plaintiff declines to furnish this information except under order of the Court.

19. (a) Q. What was the value placed on "goodwill" in the Plaintiff's balance sheet as of December 31, 1949?

A. Plaintiff declines to answer this question except under order of the Court.

(b) Q. As of December 31, 1948?

A. Plaintiff declines to answer this question except under order of the Court.

20. (a) Q. What is each and every item comprising the plaintiff's alleged damages of \$500,000?

A. Plaintiff declines to answer this question except under order of the Court.

21. (a) Q. On July 13, 1949, which employees of the plaintiff, requested in question (11), were employed in connection with the Pond Creek Pocahontas contract and which were employed in connection with the Spring Fork Depage 90 } velopment Company contract?

A. Plaintiff declines to answer this question except under order of the Court.

(b) Q. What was the minimum number of such employees with which the Plaintiff could have prosecuted the work on each of these contracts?

A. Plaintiff declines to answer this question except under order of the Court.

22. (a) Q. What is the actual cost value of all the tools and equipment owned by Plaintiff which were located on the situs of the work on the day the contracts were cancelled?

A. \$16,047.90.

LABURNUM CONSTRUCTION CORPORATION

By A. HAMILTON BRYAN, Pres.

page 91 } State of Virginia,  
City of Richmond, to-wit:

This day A. Hamilton Bryan personally appeared before me, Phyllis C. Burkey, a Notary Public in and for the City and State aforesaid in my City aforesaid and made oath that he is President and agent of Laburnum Construction Corporation and as such he is authorized to make this affidavit, and the said A. Hamilton Bryan further made oath that the matters and things stated in the foregoing Answer of Laburnum Construction Corporation to Summons of the Defendants to Answer Interrogatories are in all respects true and correct to the best of his information, knowledge and belief.

Given under my hand this 19th day of September, 1950.

My commission expires August 31, 1951.

PHYLLIS C. BURKEY  
Notary Public

page 92 } CONSTRUCTION AGREEMENT.

CONSTRUCTION OF COAL PREPARATION PLANT AT  
NO. 1 KENTUCKY MINE, BREATHITT COUNTY,  
KENTUCKY.

THIS AGREEMENT, made this 28th day of October, 1948, by and between LABURNUM CONSTRUCTION CORPORATION, a Virginia Corporation, of Richmond, Virginia, hereinafter called "Contractor"; and POND CREEK POCAHONTAS COMPANY, Kentucky Division, a Maine Corporation, of Huntington, West Virginia, hereinafter called "Pond Creek";

WITNESSETH:

WHEREAS, Pond Creek desires the Contractor to perform certain work in connection with the construction of a Coal Preparation Plant, including a Washery, at its No. 1 Kentucky Mine located on Spring Branch of Quicksand Creek in Breathitt County, Kentucky; and,

WHEREAS, the Contractor is willing to undertake such work;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for and in consideration of the premises, the parties hereto do hereby agree as follows:

ARTICLE I.

**SCOPE OF WORK:** The work shall consist of installing concrete foundations, erecting wood structures complete, erecting plate work, the installation of machinery and equipment, electrical installations and power and light wiring, plumbing, heating and piping, a Rope and Button Conveyor approximately 1,000' in length, a Headhouse with bins and other work required for the operation of the Coal Preparation Plant and the machinery and equipment to be located therein.

Contractor shall furnish labor, supervision and services, together with all construction tools and equipment, supplies and materials not furnished by Pond Creek, necessary to perform the work in accordance with designs and specifications furnished or to be furnished by Pond Creek to Contractor.

It is understood that Pond Creek intends to furnish to Con-

tractor at the job site materials, supplies, tools and equipment necessary for the work. Pond Creek, however, may request Contractor to furnish any of these items, or page 93 } portions thereof, and in that event Contractor shall undertake to comply with such request as promptly as possible.

With respect to subcontracts made and purchase orders issued by Contractor for necessary materials, supplies, tools, equipment and services to be furnished by it, Contractor agrees that, subject to prior approval by Pond Creek as provided in Article V, all such subcontracts and purchase orders shall be made or issued in Contractor's own name, title to materials to pass to Pond Creek upon delivery at site of work, excepting, however, equipment, tools and other items brought to site on rental basis.

## ARTICLE II.

**CONSIDERATION:** Pond Creek agrees to pay the Cost of the Work as defined in the "Statement of Cost of Work" attached hereto and made a part of this agreement. In addition, Pond Creek agrees to pay Contractor a sum equal to five (5) per cent of the Cost of Work, Items (a) to (r), inclusive, in the "Statement of Cost of Work", as its fee for doing the work covered in Article I of this Agreement, the total fee, however, not to exceed the sum of \$12,000.00. The fee shall be paid in weekly installments, based upon amount of work done, as evidenced by weekly billings.

In addition to payment for the Cost of the Work to be performed by Contractor, Pond Creek shall pay Contractor the actual traveling and living costs (but not salaries) of Contractor's main office and executive personnel when traveling to and from and while present at the job site in furtherance of the work, but not to exceed, however, the sum of \$2,500.00 for the first six months of the duration of the job, and not to exceed thereafter an amount equal to two (2) per cent of such straight time labor costs as may be incurred after that six months period.

## ARTICLE III.

**ESTIMATED COST:** It is estimated that the Cost of the Work will amount to approximately \$200,000.00. However, neither the Contractor nor Pond Creek guarantees the accuracy of this estimate.

# ARTICLE IV.

**TIME OF COMPLETION:** Work at the site shall be started on or about November 1, 1948, and every effort shall be made to complete the work at the earliest possible date. Pond Creek states that present delivery promises for materials indicate that this work can be completed by May 1, 1949.

Pond Creek agrees that Contractor shall not be liable to Pond Creek for failure of or delay in performance hereof, when such failure or delay is occasioned by act of God, or the public enemy, fire, explosion, perils of the sea, page 94 } flood, drought, war, riots sabotage, vandalism, accident, embargo government priority, requisition or allocation or other action of any governmental authority, or any circumstance of like or different character beyond Contractor's reasonable control, or by interruption of or delay on transportation, shortage or failure of supply of material or equipment, failure of manufacturers or suppliers to make delivery or complete the installation of equipment to be furnished by them.

And provided further, if Pond Creek shall be in default with respect to any of the terms or conditions hereof, Contractor, at its option, may defer further performance hereunder until such default be remedied (in which event the Agreement period shall be deemed extended for a period of time equal to that during which performance shall be so deferred), or, without prejudice to any other legal remedy, may decline further performance of this Agreement. In the event of a postponement or declination of performance hereunder, on account of Pond Creek's default, Pond Creek shall reimburse Contractor for all damage, cost or expense suffered by it on account of such postponement and or declination.

# ARTICLE V.

**APPROVALS REQUIRED:** Pond Creek designates Mr. W. A. Haslam as its representative to act for it in connection with this Agreement. He shall be available as often as may be necessary for inspecting and approving the work, or authorizing changes therein, and for approving currently all purchases, payrolls, invoices, and other records of Contractor.

Contractor shall procure the representative's written approval before entering into any single subcontract involving work on the property of Pond Creek, or before issuing any single purchase order for a sum in excess of \$500.00.

The representative may delegate his work and authority to others as he may desire, confirming such action in writing to Contractor.

#### ARTICLE VI.

**CANCELLATION:** Contractor agrees that Pond Creek may stop the work at any stage during its progress and terminate Contractor's employment thereon upon ten (10) day's written notice. In case of such termination, Contractor shall receive, under the terms of this Agreement, payment for all expenditures made and obligations incurred which are chargeable as Cost of the Work; the fee for the portion of the work performed; and such amount as may be due Contractor for actual traveling and living costs of its main office and executive personnel.

#### ARTICLE VII.

**COOPERATION:** It is the intent of this Agreement that Pond Creek and Contractor shall cooperate, and  
page 95 } use every effort to execute the work in a manner  
consistent with the interests of Pond Creek and  
in accordance with Pond Creek's requests and approvals.

#### ARTICLE VIII.

**COMPLIANCE WITH LAW:** Contractor shall comply with all local, state, Federal, or other public laws applicable to the work; provided, however, that Pond Creek shall obtain all permits which may be required in connection with the performance of this Agreement.

#### ARTICLE IX.

**LIENS:** In the event that Contractor allows any indebtedness to accumulate for labor and/or materials, which indebtedness has become or may become a lien upon the property of Pond Creek, or which may become a claim against Pond Creek, Contractor, upon receipt of written request from Pond Creek, shall pay the same or cause the same to be dissolved, or discharged by giving a bond or otherwise, and in case Contractor fails so to do, Pond Creek may withhold from any moneys due Contractor an amount sufficient to indemnify Pond Creek until such indebtedness is paid.

### ARTICLE X.

**INSURANCE:** Contractor covenants that, during the progress of the work described herein, it will comply with the laws of Kentucky respecting Workmen's Compensation Insurance; and will procure and maintain during the progress of the work Public Liability and Property Damage Insurance satisfactory to Pond Creek and also such other insurance as may be required by Pond Creek. Prior to the commencement of work hereunder, Contractor will furnish proof to Pond Creek that it has complied with the above requirements.

Pond Creek shall carry and maintain during the progress of the work adequate Builders' Risk Insurance with extended coverage, protecting the work and materials at the job site against loss, which insurance shall be for its benefit as well as for the benefit of the Contractor.

### ARTICLE XI.

**INDEMNIFICATION:** Contractor shall indemnify and save harmless Pond Creek from and against all loss, damage, expense or liability for injury (including death) to persons or property that may occur or may be alleged to have occurred in the course of the performance of this Agreement by the Contractor; provided, however, that Contractor's liability hereunder shall not exceed the monetary limits of the Contractual Liability Insurance Contractor is required to carry by Pond Creek.

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### ARTICLE XII.

**ASSIGNMENT:** This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

### ARTICLE XIII.

**COMPLETENESS OF AGREEMENT:** This Agreement constitutes the entire contract between the parties, and there are no understandings, representations or warranties of any kind not expressly set forth herein.

IN WITNESS WHEREOF, the parties hereto have duly

executed this Agreement, in duplicate, as of the day and year above written.

LABURNUM CONSTRUCTION CORPORATION

By /s/ A. HAMILTON BRYAN  
President.

ATTEST:  
.....

POND CREEK POCAHONTAS COMPANY

By /s/ R. E. SALVATI, Vice President.

ATTEST:  
.....

page 97 } STATEMENT OF COST OF WORK.

"Cost of Work" means:

All costs and expenses incurred by Contractor at the site of the work (subject to the approval of Pond Creek's representative) for the following items:

a. Wages (on both straight time and overtime basis) of mechanics and laborers at the site of the work, including salaries for supervision and accounting at the site of the work. All wage rates and salaries shall be subject to Pond Creek's prior approval.

b. Traveling expenses and traveling time, or either of them, paid to journeymen and apprentices when required by Union rules and regulations or when necessary to man the job properly; provided, however, this expense shall be subject to prior approval by Pond Creek.

c. Taxes assessed on reimbursable payrolls for Old Age Benefits and Unemployment Insurance.

d. Assessments paid to the National Electrical Benefit Fund on gross wages paid to electrical workers on reimbursable payrolls and other like assessments which are in accordance with the rules and regulations of the local unions.

e. Work at the site sublet to others provided subletting shall have been with Pond Creek's approval.

f. Services furnished by others, provided such services shall have been rendered with Pond Creek's approval.

g. Rental of Contractor's tools and equipment while at the site of the work at rates mutually agreed upon, which rates shall not be in excess of Associated Equipment Distributors' rental rates; the cost of delivering same to the job site and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

page 98 } h. Rental of tools and equipment rented from others specifically for use in connection with the work; the cost of delivering same to the site of the work and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

i. Erection tools and equipment purchased specifically for the work, such items to become the property of Pond Creek upon delivery to the job site.

j. Cost of materials and supplies required for or in connection with the work and not furnished by Pond Creek, including sales or use taxes thereon, if any, and the cost of delivering same to the site of the work.

k. Premiums on Workmen's Compensation Insurance, Public Liability Insurance in the amount of \$100,000/\$300,000, Property Damage Insurance in the amount of \$100,000, Payroll Robbery Insurance and also premiums on any other insurance that Contractor is required by Pond Creek to carry at the site of the work.

l. All freight, trucking or other transportation charges in connection with bringing materials, supplies, tools, equipment or other items to the job site in connection with prosecution of the work.

m. Telegrams, long distance telephone calls, postage, office supplies and equipment and other similar expense incurred directly in connection with the work.

n. The cost of reconstructing and replacing any of the work destroyed or damaged not covered by insurance and not caused by failure on the part of the corporate officers or members of the firm of Contractor, or its other representatives having supervision or direction of the operation of the work as a whole, to exercise good faith or the standard of care which they normally exercise in the conduct of the business of the Contractor, but expenditures under this paragraph must have written approval of Pond Creek in advance.

o. Any sales or use taxes imposed upon the Contractor by the State of Kentucky and resulting from the work covered by this contract.

p. All other items of cost and expense not expressly excluded by the provisions of this contract incurred by the Contractor directly in connection with the prosecution of the work at the job site; provided same shall be approved by Pond Creek.

Cost of the work shall not include the value of power light, water or other facilities furnished by Pond Creek, nor the value of materials or supplies furnished by Pond Creek or rebates accruing to the Contractor on the purchase or return of equipment for the work, nor salaries or expenses of Contractor's home office, or employees regularly assigned thereto.

page 100 } CONSTRUCTION AGREEMENT.

CONSTRUCTION OF TWENTY-FIVE DWELLINGS ON  
SITES NEAR NO. 1 KENTUCKY MINE,  
BREATHITT COUNTY, KENTUCKY.

THIS AGREEMENT, made this 15th day of December, 1948, by and between LABURNUM CONSTRUCTION CORPORATION, a Virginia Corporation, of Richmond, Virginia, hereinafter called "Contractor"; and Spring Fork Development Company, a West Virginia Corporation, of Huntington, W. Va., hereinafter called "Owner":

WITNESSETH:

WHEREAS, Owner desires the Contractor to perform certain work in connection with the construction of twenty-five dwellings to be erected on sites near No. 1 Kentucky Mine of Pond Creek Pocahontas Company, located on Spring Branch of Quicksand Creek in Breathitt County, Kentucky; and,

WHEREAS, the Contractor is willing to undertake such work:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for an in consideration of the premises, the parties hereto do hereby agree as follows:

ARTICLE I.

SCOPE OF WORK: The work shall consist of erecting twenty-five one-story, four-room frame dwellings for miners,

electric wiring and other things necessary to complete said dwellings.

Contractor shall furnish labor, supervision and services, together with all construction tools and equipment, supplies and materials not furnished by Owner, necessary to perform the work in accordance with designs and specifications furnished or to be furnished by Owner to Contractor.

It is understood that Owner intends to furnish to Contractor at the job site materials, supplies, tools and equipment necessary for the work. Owner, however, may request Contractor to furnish any of these items, or portions thereof, and in that event Contractor shall undertake to comply with such request as promptly as possible.

page 101 } With respect to subcontracts made and purchase orders issued by Contractor for necessary materials, supplies, tools, equipment and services to be furnished by it, Contractor agrees that, subject to prior approval by Owner as provided in Article V, all such subcontracts and purchase orders shall be made or issued in Contractor's own name, title to materials to pass to Owner upon delivery at site of work, excepting, however, equipment, tools and other items brought to site on rental basis.

## ARTICLE II.

**CONSIDERATION:** Owner agrees to pay the Cost of the Work as defined in the "Statement of Cost of Work" attached hereto and made a part of this Agreement. In addition, Owner agrees to pay Contractor a sum equal to five (5) per cent of the Cost of Work, Items (a) to (r), inclusive, in the "Statement of Cost of Work", as the fee for doing the work covered in Article 1 of this agreement, the total fee, however, not to exceed the sum of \$2,500.00. The fee shall be paid in weekly installments, based upon the amount of work done, as evidenced by weekly billings.

In addition to payment for the Cost of the Work to be performed by Contractor, Owner shall pay Contractor the actual traveling and living costs (but not salaries) of Contractor's main office and executive personnel when traveling to and from and while present at the job site in furtherance of the work, but not to exceed, however, the sum of \$2,500.00 for the first six months of the duration of the job, and not to exceed thereafter an amount equal to two (2) per cent of such straight time labor costs as may be incurred after that six months period.

## ARTICLE III.

**ESTIMATED COST:** It is estimated that the Cost of the Work will amount to approximately \$20,000.00. However, neither the Contractor nor the Owner guarantees the accuracy of this estimate.

## ARTICLE IV.

**TIME OF COMPLETION:** Work at the site shall be started on or about November 1, 1948, and every effort shall be made to complete the work at the earliest possible date. Owner states that present delivery promises for materials indicate that this work can be completed by May 1, 1949.

Owner agrees that Contractor shall not be liable to Owner for failure of or delay in performance hereof, when such failure or delay is occasioned by act of God, or the public enemy, fire, explosion, périls of the sea, flood, drought, war, riots, sabotage, vandalism, accident, embargo, government priority requisition or allocation or other action of any governmental authority, or any circumstance of like or different character beyond Contractor's reasonable control, or by interruption of or delay on transportation, shortage or failure of supply of material or equipment, failure of manufacturers or suppliers to make delivery or complete the installation of equipment to be furnished by them.

And provided further, if Owner shall be in default with respect to any of the terms or conditions hereof, Contractor, at its option, may defer further performance hereunder until such default be remedied (in which event the Agreement period shall be deemed extended for a period of time equal to that during which performance shall be so deferred), or, without prejudice to any other legal remedy, may decline further performance of this Agreement. In the event of a postponement or declination of performance hereunder, on account of Owner's default, Owner shall reimburse Contractor for all damage, cost of expense suffered by it on account of such postponement and/or declination.

## ARTICLE V.

**APPROVALS REQUIRED:** Owner designates Mr. W. A. Haslam as its representative to act for it in connection with

this Agreement. He shall be available as often as may be necessary for inspecting and approving the work, or authorizing changes therein, and for approving currently all purchases, payrolls, invoices, and other records of Contractor.

Contractor shall procure the representative's written approval before entering into any single subcontract involving work on the property of Owner, or before issuing any single purchase order for a sum in excess of \$500.00.

The representative may delegate his work and authority to others as he may desire, confirming such action in writing to Contractor.

#### ARTICLE VI.

**CANCELLATION:** Contractor agrees that Owner may stop the work at any stage during its progress and terminate Contractor's employment thereon upon ten (10) days' written notice. In case of such termination, Contractor shall receive, under the terms of this Agreement, payment for all expenditures made and obligations incurred which are chargeable as Cost of the Work; the fee for the portion of the work performed; and such amount as may be due Contractor for actual traveling and living costs of its main office and executive personnel.

#### ARTICLE VII.

**COOPERATION:** It is the intent of this Agreement that Owner and Contractor shall cooperate, and use page 103 } every effort to execute the work in a manner consistent with the interests of Owner and in accordance with Owner's requests and approvals.

#### ARTICLE VIII.

**COMPLIANCE WITH LAW:** Contractor shall comply with all local, state, Federal, or other public laws applicable to the work; provided, however, that Owner shall obtain all permits which may be required in connection with the performance of this Agreement.

#### ARTICLE IX.

**LIENS:** In the event that Contractor allows any indebted-

ness to accumulate for labor and/or materials, which indebtedness has become or may become a lien upon the property of Owner, or which may become a claim against Owner, Contractor, upon receipt of written request from Owner, shall pay the same or cause the same to be dissolved, or discharged by giving a bond or otherwise, and in case Contractor fails so to do, Owner may withhold from any moneys due Contractor an amount sufficient to indemnify Owner until such indebtedness is paid.

#### ARTICLE X.

**INSURANCE:** Contractor covenants that, during the progress of the work described herein, it will comply with the laws of Kentucky respecting Workmen's Compensation Insurance; and will procure and maintain during the progress of the work Public Liability and Property Damage Insurance satisfactory to Owner and also such other insurance as may be required by Owner. Prior to the commencement of work hereunder, Contractor will furnish proof to Owner that it has complied with the above requirements.

Owner shall carry and maintain during the progress of the work adequate Builders' Risk Insurance with extended coverage, protecting the work and materials at the job site against loss, which insurance shall be for its benefit as well as for the benefit of the Contractor.

#### ARTICLE XI.

**INDEMNIFICATION:** Contractor shall indemnify and save harmless Owner from and against all loss, damage, expense or liability for injury (including death) to persons or property that may occur or may be alleged to have occurred in the course of the performance of this Agreement by the Contractor; provided, however, that Contractor's liability hereunder shall not exceed the monetary limits of the Contractual Liability Insurance Contractor is required to carry by Owner.

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#### ARTICLE XIII.

**COMPLETENESS OF AGREEMENT:** This Agreement constitutes the entire contract between the parties, and there are no understandings, representations or warranties of any kind not expressly set forth herein.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement, in duplicate, as of the day and year above written.

LABURNUM CONSTRUCTION CORPORATION

By /s/ A. HAMILTON BRYAN  
President.

ATTEST:

/s/ ELLA O. SPIERS  
Secretary.

SPRING FORK DEVELOPMENT COMPANY,

By /s/ W. A. OGG  
President.

ATTEST:

/s/ CHARLES L. VILES  
Secretary.

Approved

/s/ R. D. C.  
Counsel.

page 105 } STATEMENT OF COST OF WORK.

"Cost of Work" means:

All costs and expenses incurred by Contractor at the site the work (subject to the approval of Owner's representative) for the following items:

a. Wages (on both straight time and overtime basis) of mechanics and laborers at the site of the work, including salaries for supervision and accounting at the site of the work. All wage rates and salaries shall be subject to Owner's prior approval.

b. Traveling expenses and traveling time, or either of them, paid to journeymen and apprentices when required by Union rules and regulations or when necessary to man the job properly; provided, however, this expense shall be subject to prior approval by Owner.

c. Taxes assessed on reimbursable payrolls for Old Age Benefits and Unemployment Insurance.

d. Assessments paid to the National Electrical Benefit Fund on gross wages paid to electrical workers on reimbursable payrolls and other like assessments which are in accordance with the rules and regulations of the local unions.

e. Work at the site sublet to others provided subletting shall have been with Owner's approval.

f. Services furnished by others, provided such services shall have been rendered with Owner's approval.

g. Rental of Contractor's tools and equipment while at the site of the work at rates mutually agreed upon, which rates shall not be in excess of Associated Equipment Distributors' rental rates; the cost of delivering same to the job site and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

page 106 } h. Rental of tools and equipment rented from others specifically for use in connection with the work; the cost of delivering same to the site of the work and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

i. Erection tools and equipment purchased specifically for the work, such items to become the property of Owner upon delivery to the job site.

j. Cost of materials and supplies required for or in connection with the work and not furnished by Owner, including sales or use taxes thereon, if any, and the cost of delivering same to the site of the work.

k. Premiums on Workmen's Compensation Insurance, Public Liability Insurance in the amount of \$100,000 \$300,000, Property Damage Insurance in the amount of \$100,000, Payroll Robbery Insurance and also premiums on any other insurance that Contractor is required by Owner to carry at the site of the work.

l. All freight, trucking or other transportation charges in connection with bringing materials, supplies, tools, equipment or other items to the job site in connection with prosecution of the work.

m. Telegrams, long distance telephone calls, postage, office supplies and equipment and other similar expense incurred directly in connection with the work.

n. The cost of reconstructing and replacing any of the work destroyed or damaged not covered by insurance and not caused by failure on the part of the corporate officers or members of the firm of Contractor, or its other representatives having supervision or direction of the operation of the work as a whole, to exercise good faith or the standard of care

which they normally exercise in the conduct of the business of the Contractor, but expenditures under this paragraph must have written approval of Owner in advance.  
page 107 } o. Any sales or use taxes imposed upon the Contractor by the State of Kentucky and resulting from the work covered by this contract.

p. All other items of cost and expense not expressly excluded by the provisions of this contract, incurred by the Contractor directly in connection with the prosecution of the work at the job site; provided same shall be approved by Owner.

Cost of the work shall not include the value of power, light, water or other facilities furnished by Owner, nor the value of materials or supplies furnished by Owner or rebates accruing to the Contractor on the purchase or return of equipment for the work, nor salaries or expenses of Contractor's home office, or employees regularly assigned thereto.

page 108 } CONSTRUCTION AGREEMENT.

CONSTRUCTION OF APPROXIMATELY ELEVEN MILES OF TELEPHONE LINE FROM CARVER, KENTUCKY, TO CAMP NO. 1 AT NO 1 KENTUCKY MINE, BREATHITT COUNTY, KENTUCKY.

THIS AGREEMENT, made this 8th day of December, 1948, by and between LABURNUM CONSTRUCTION CORPORATION, a Virginia Corporation, of Richmond, Virginia, hereinafter called "Contractor"; and POND CREEK POCAHONTAS COMPANY, Kentucky Division, a Maine Corporation, of Huntington, West Virginia, hereinafter called "Pond Creek";

WITNESSETH:

WHEREAS, Pond Creek desires the Contractor to construct a telephone line approximately eleven miles in length extending from Carver, Kentucky, to its Camp No. 1 located at its No. 1 Kentucky Mine on Spring Branch of Quicksand Creek in Breathitt County, Kentucky; and,

WHEREAS, the Contractor is willing to undertake such work:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

That for an in consideration of the premises, the parties hereto do hereby agree as follows:

ARTICLE I.

**SCOPE OF WORK:** The work shall consist of installing a telephone line approximately eleven miles in length, the line to be constructed of No. 14 twisted pair, weather-proof, copper wire, to be strung on trees and to be attached to the trees through a slip type insulator to prevent breakage when the wind sways the trees.

Contractor shall furnish labor, supervision and services, together with all construction tools and equipment, supplies and materials not furnished by Pond Creek, necessary to perform the work in accordance with designs and specifications furnished or to be furnished by Pond Creek to Contractor.

With respect to subcontracts made and purchase orders issued by Contractor for necessary materials, supplies, tools, equipment and services to be furnished by it, Contractor agrees that, subject to prior approval by Pond Creek as provided in Article V, all such subcontracts and purchase orders shall be made or issued in Contractor's own name, page 109 } title to materials to pass to Pond Creek upon delivery at site of work, excepting, however, equipment, tools and other items brought to site on rental basis.

ARTICLE II.

**CONSIDERATION:** Pond Creek agrees to pay the Cost of the Work as defined in the "Statement of Cost of Work" attached hereto and made a part of this Agreement. In addition, Pond Creek agrees to pay Contractor a sum equal to five (5) per cent of the Cost of Work, Items (a) to (p), inclusive, in the "Statement of Cost of Work," as its fee for doing the work covered in Article I of this Agreement. The fee shall be paid in weekly installments, based upon amount of work done, as evidenced by weekly billings.

In addition to payment for the Cost of the Work to be performed by Contractor, Pond Creek shall pay Contractor the actual traveling and living costs (but not salaries) of Contractor's main office and executive personnel when traveling to and from and while present at the job site in furtherance of the work.

### ARTICLE III.

**ESTIMATED COST:** It is estimated that the Cost of the Work will amount to approximately \$4,500.00. However, neither the Contractor nor Pond Creek guarantees the accuracy of this estimate.

### ARTICLE IV.

**TIME OF COMPLETION:** Work shall be started as promptly as possible and every effort shall be made to complete the work on or before December 31, 1948.

Pond Creek agrees that Contractor shall not be liable to Pond Creek for failure of or delay in performance hereof, when such failure or delay is occasioned by act of God, or the public enemy, fire, explosion, perils of the sea, flood, drought, war, riots, sabotage, vandalism, accident, embargo, government priority, requisition or allocation or other action of any governmental authority, or any circumstance of like or different character beyond Contractor's reasonable control, or by interruption of or delay on transportation, shortage or failure of supply of material or equipment, failure of manufacturers or suppliers to make delivery or complete the installation of equipment to be furnished by them.

And provided further, if Pond Creek shall be in default, with respect to any of the terms or conditions hereof, Contractor, at its option, may defer further performance hereunder until such default be remedied (in which event the Agreement period shall be deemed extended for a period of time equal to that during which performance shall be so deferred), or, without prejudice to any other legal remedy, may decline further performance of this Agreement.  
page 110 } In the event of a postponement or declination of performance hereunder, on account of Pond Creek's default, Pond Creek shall reimburse Contractor for all damage, cost or expense suffered by it on account of such postponement and/or declination.

### ARTICLE V.

**APPROVALS REQUIRED:** Pond Creek designates Mr. W. A. Haslam as its representative to act for it in connection with this Agreement. He shall be available as often as may be necessary for inspecting and approving the work, or authorizing changes therein, and for approving currently all purchases, payrolls, invoices, and other records of Contractor.

Contractor shall procure the representative's written approval before entering into any single subcontract involving work on the property of Pond Creek, or before issuing any single purchase order for a sum in excess of \$500.00.

The representative may delegate his work and authority to others as he may desire, confirming such action in writing to Contractor.

#### ARTICLE VI.

**CANCELLATION:** Contractor agrees that Pond Creek may stop the work at any stage during its progress and terminate Contractor's employment there on upon ten (10) days' written notice. In case of such termination, Contractor shall receive, under the terms of this Agreement, payment for all expenditures made and obligations incurred which are chargeable as Cost of the Work; the fee for the portion of the work performed; and such amount as may be due Contractor for actual traveling and living costs of its main office and executive personnel.

#### ARTICLE VII.

**COOPERATION:** It is the intent of this Agreement that Pond Creek and Contractor shall cooperate, and use every effort to execute the work in a manner consistent with the interests of Pond Creek and in accordance with Pond Creek's requests and approvals.

#### ARTICLE VIII.

**COMPLIANCE WITH LAW:** Contractor shall comply with all local, state, Federal, or other public laws applicable to the work; provided, however, that Pond Creek shall obtain all permits which may be required in connection with the performance of this Agreement.

#### ARTICLE IX.

**LIENS:** In the event the Contractor allows any indebtedness to accumulate for labor and/or materials, which indebtedness has become or may become a lien upon the page 111 } property of Pond Creek, or which may become a claim against Pond Creek, Contractor, upon receipt of written request from Pond Creek, shall pay the same or cause the same to be dissolved, or discharged by giving a bond or otherwise, and in case Contractor fails so to do, Pond

Creek may withhold from any moneys due Contractor an amount sufficient to indemnify Pond Creek until such indebtedness is paid.

#### ARTICLE X.

**INSURANCE:** Contractor covenants that, during the progress of the work described herein, it will comply with the laws of Kentucky respecting Workmen's Compensation insurance; and will procure and maintain during the progress of the work Public Liability and Property Damage insurance satisfactory to Pond Creek and also such other insurance as may be required by Pond Creek. Prior to the commencement of work hereunder, Contractor will furnish proof to Pond Creek that it has complied with the above requirements.

Pond Creek shall carry and maintain during the progress of the work adequate Builders' Risk insurance with extended coverage, protecting the work and materials at the job site against loss, which insurance shall be for its benefit as well as for the benefit of the Contractor.

#### ARTICLE XI.

**INDEMNIFICATION:** Contractor shall indemnify and save harmless Pond Creek from and against all loss, damage, expense or liability for injury (including death) to persons or property that may occur or may be alleged to have occurred in the course of the performance of this Agreement by the Contractor; provided, however, that Contractor's liability hereunder shall not exceed the monetary limits of the Contractual Liability insurance Contractor is required to carry by Pond Creek.

#### ARTICLE XII.

**ASSIGNMENT:** This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

#### ARTICLE XIII.

**COMPLETENESS OF AGREEMENT:** This Agreement constitutes the entire contract between the parties, and there are no understandings, representations or warranties of any kind not expressly set forth herein.

page 112 } IN WITNESS WHEREOF, the parties hereto  
have duly executed this Agreement, in duplicate,  
as of the day and year above written.

LABURNUM CONSTRUCTION CORPO-  
RATION

By /s/ A. HAMILTON BRYAN  
President

ATTEST:

/s/ HUBERT GRAVES

POND CREEK POCAHONTAS COM-  
PANY

By /s/ JAMES D. FRANCIS

ATTEST:

/s/ ROUSE  
Assistant Secretary

Approved  
/s/ R. D. C.  
Counsel

Approved

/s/ C. V. W.  
Real Est. Agt.

page 113 } STATEMENT OF COST OF WORK.

"Cost of Work" means:

All costs and expenses incurred by Contractor at the site of the work (subject to the approval of Pond Creek's representative) for the following items:

a. Wages (on both straight time and overtime basis) of mechanics and laborers at the site of the work, including salaries for supervision and accounting at the site of the work. All wage rates and salaries shall be subject to Pond Creek's prior approval.

b. Traveling expenses and traveling time, or either of them, paid to journeymen and apprentices when required by Union rules and regulations or when necessary to man the job prop-

erly; provided, however, this expense shall be subject to prior approval by Pond Creek.

c. Taxes assessed on reimbursable payrolls for Old Age Benefits and Unemployment insurance.

d. Assessments paid to the National Electrical Benefit Fund on gross wages paid to electrical workers on reimbursable payrolls and other like assessments which are in accordance with the rules and regulations of the local unions.

e. Work at the site sublet to others provided subletting shall have been with Pond Creek's approval.

f. Services furnished by others, provided such services shall have been rendered with Pond Creek's approval.

g. Rental of Contractor's tools and equipment while at the site of the work at rates mutually agreed upon, which rates shall not be in excess of Associated Equipment Distributors' rental rates; the cost of delivering same to the job site and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

h. Rental of tools and equipment rented from others specifically for use in connection with the work; the cost of delivering same to the site of the work and return transportation to the point of original shipment or to another point not further distant than the point of original shipment.

page 114 } i. Erection tools and equipment purchased specifically for the work, such items to become the property of Pond Creek upon delivery to the job site.

j. Cost of materials and supplies required for or in connection with the work and not furnished by Pond Creek, including sales or use taxes thereon, if any, and the cost of delivering same to the site of the work.

k. Premiums on Workmen's Compensation insurance, Public Liability insurance in the amount of \$100,000/\$300,000, Property Damage insurance in the amount of \$100,000, Payroll Robbery insurance and also premiums on any other insurance that Contractor is required by Pond Creek to carry at the site of the work.

l. All freight, trucking or other transportation charges in connection with bringing materials, supplies, tools, equipment or other items to the job site in connection with prosecution of the work.

m. Telegrams, long distance telephone calls, postage, office supplies and equipment and other similar expense incurred directly in connection with the work.

n. The cost of reconstructing and replacing any of the work destroyed or damaged not covered by insurance and not caused by failure on the part of the corporate officers or mem-

bers of the firm of Contractor, or its other representatives having supervision or direction of the operation of the work as a whole, to exercise good faith or the standard of care which they normally exercise in the conduct of the business of the Contractor, but expenditures under this paragraph must have written approval of Pond Creek in advance.

o. Any sales or use taxes imposed upon the Contractor by the State of Kentucky and resulting from the work covered by this contract.

p. All other items of cost and expense not expressly excluded by the provisions of this contract incurred by the Contractor directly in connection with the prosecution of the work at the job site; provided same shall be approved by Pond Creek.

Cost of the work shall not include the value of power, light, water or other facilities furnished by Pond Creek, nor the value of materials or supplies furnished by Pond Creek or rebates accruing to the Contractor on the purchase or return of equipment for the work, nor salaries or expenses of Contractor's home office, or employees regularly assigned thereto.

page 115 } SPECIFICATIONS FOR CONSTRUCTION OF  
APPROXIMATELY ELEVEN MILES OF  
TELEPHONE LINE FROM CARVER, KENTUCKY,  
TO CAMP NO. 1 NEAR POND CREEK POCA-  
HONTAS COMPANY'S KENTUCKY MINE NO. 1,  
BREATHITT COUNTY, KENTUCKY.

(1)—LOCATION: To be designated by Pond Creek Pocahontas Company's engineer and, in general, will begin at the Southern Bell Telephone & Telegraph Company's terminal near Carver, Kentucky. Telephone wire is to be strung on Buchanan Coal Company's telephone poles to a point near the Buchanan Coal Company's office; thence leaving said poles and extending in a southerly direction over lands owned by the Buchanan Coal Company to the top of the ridge at a point to be designated; thence continuing in a southerly direction along the road extending down Laurel Branch, on the eastern side of said branch; to the mouth of Laurel Branch; thence down Hawes Fork to its mouth; thence up Spring Fork, paralleling as nearly as possible the new road now under construction, to Pond Creek Pocahontas Company's No. 1 Camp, a distance of approximately eleven miles, more or less.

(2)—WIRE AND INSULATORS: Number 14 twisted pair, weather proof, copper wire is to be used. With the ex-

ception of that part of the line that is to be strung on the Buchanan Coal Company's poles, the wire is to be strung on trees, and is to be attached to the tree with No. 408 catalog No. 60 Heming Gray cable insulator; insulators to be attached to standard wooden pins. Wire is to be fastened to the insulator in such manner that movement of the tree by wind action will not break the wire. Wire is to be fastened to insulators at not less than 150 foot intervals, and where line crosses roadway, will be at least 30 feet above roadway. In general, line will not be placed closer than 25 feet from edge of roadway.

(3)—TEST STATIONS: Contractor will provide one or more test stations, as designated by Pond Creek Pocahontas Company. Test station will be located so as to be available to the roadway, and shall consist of a wooden box, weather proof, and secured with lock and key.

(4)—TELEPHONE EQUIPMENT AND INSTRUMENTS: Pond Creek Pocahontas Company will furnish necessary instruments, or may elect to authorize the contractor to furnish and install necessary instruments and equipment.

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# CONTRACT.

THIS AGREEMENT, made and entered into this the 14th of December, 1948, by and between Construction Contractors, Builders and associations signatory hereto, hereinafter referred to as Operators, parties of the first part, and carpenter's Local Union No. 646, United Brotherhood of Carpenters and Joiners of America, on behalf of each member thereof, parties of the second part, and covering all the operations of said first parties, in the territory or jurisdiction of said Local Union No. 646.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set out in the agreement. It is agreed that the Local Carpenters Union No. 646, United Brotherhood of Carpenters and Joiners of America is recognized as the exclusive bargaining agency, representing the employees of the parties of the first part in the territory and in connection with work over which the parties of the second part have jurisdiction.

This agreement shall be effective, for duration of this job from and after the date of this agreement, the job being work

for Pond Creek Pocahontas Company in connection with a Coal Preparation Plant at its No. 1 Kentucky Mine, Breathitt County, Ky.

IT IS AGREED, that the following wage scale be established, as the prevailing wages to be paid under this contract, and the parties of the first part agree to pay wages, in accordance with the scale as set out in this contract, for all work performed by parties of the second part, as follows:

\$1.75 per hour for straight time, up to eight (8) Hours work performed in one day.

Time (1½) One half per hour for all time worked over Eight (8) Hours in any one day.

Time (1½) One Half per hour for all time worked on Saturdays.

Time (1½) One Half per hour for all time worked on Sundays or holidays.

HOLIDAYS, shall include the following named days, New Years days, 4th of July, Labor Day, Thanksgiving and Christmas day.

page 117 } This Agreement is made subject to any laws, State or Federal, which may be applicable thereto.

It is agreed that all disputes, grievances, and complaints, arising between the Operators and Employees, parties to this contract, shall be settled in accordance with the provisions and by-laws now in force and adopted by said Carpenters Union No. 646 U. B. of C. & J. OF A., of Paintsville, Ky.

Payments of wages earned, shall be made at the time or times as agreed on by the parties hereto.

IN WITNESS WHEREOF, each of the parties hereto, pursuant to proper authority, has caused this Agreement, to be signed by its proper Officers or Representatives, on this the 14th day of December, 1948.

OPERATORS

LABURNUM CONSTRUCTION CORPORATION

By: /s/ A. HAMILTON BRYAN

President

/s/ S. B. RITTENHOUSE

**CARPENTERS:**

/s/ MONROE F. SUBLETT, R. S.  
Chairman

/s/ HOBART WELCH, Pres.  
Local Union No. 646  
United Brotherhood of Carpenters  
and Jointers of America.

By /s/ L. R. WARD, Fin. Sect.  
Business Agent

**SEAL**

Local Union No. 646  
Paintsville, Ky.  
United Brotherhood of Carpenters  
& Jointers of America

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\* \* \* \* \*

1950, Sept. 26. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

**FURTHER ANSWER OF LABURNUM CONSTRUCTION  
CORPORATION TO SUMMONS OF THE DEFEND-  
ANTS TO ANSWER INTERROGATORIES.**

For further answer to the summons directed by the Defendants to Plaintiff, Laburnum Construction Corporation, to answer certain interrogatories filed in the Clerk's Office of the Circuit Court of the City of Richmond, Plaintiff, Laburnum Construction Corporation, answers and says:

11. (a) Q. With respect to all persons who were employed by the Plaintiff in the performance of the contracts with Pond Creek Pocahontas Company and Spring Fork Development Company between the dates of July 10, 1949, and August 4, 1949, what are their names; what were their addresses on August 4, 1949; what are their present addresses; in what capacity and at what rate of pay were they employed by the Plaintiff?

A. In connection with performing the contracts with Pond Creek Pocahontas Company and Spring Fork Development Company, a statement showing the names and addresses of all persons employed by Plaintiff at the site of the work at any time between the dates July 10, 1949, and August 4, 1949, and further showing the capacities in which they were employed and their rates of pay is as follows:

<i>Superintendent</i>		<i>Rate of Pay</i>
C. M. Delinger, Richmond, Virginia		\$150.00 per wk.
Louis G. Veltry, Richmond, Virginia		150.00 per wk.
<i>Chief Clerk</i>		
Maynard C. Ragan, Richmond, Virginia		100.00 per wk.
<i>Ironworkers</i>		
Carl B. Rice, Oil Springs, Kentucky		2.25 per hr.
John W. McClellan, Van Lear, Ky.		2.25 per hr.
<i>Hoist Operator</i>		
D. T. Miller, Millboro, Virginia		2.15 per hr.
<i>Millwright Foreman</i>		
Harold Goad Princeton, West Virginia		2.25 per hr.
<i>Millwrights</i>		
Charles L. Bassham, Ragland, West Va.		2.00 per hr.
E. H. May, Leander, Kentucky		2.00 per hr.
Lowell H. May, Salyersville, Kentucky		2.00 per hr.
<i>Gen. Carpenter Foreman</i>		
Henry Starr, Paintsville, Kentucky . . . . .		2.25 per hr.
<i>Carpenter Foreman</i>		
Howard Williams, Benton, Kentucky		2.00 per hr.
Chalmers Patrick, Paintsville, Kentucky		2.00 per hr.
<i>Carpenter Layout Man</i>		
Thomas Green, Paintsville, Kentucky		2.00 per hr.
<i>Carpenters</i>		
Jack Patrick, Lowmansville, Kentucky		1.75 per hr.
M. F. Sublett, Paintsville, Kentucky		1.75 per hr.
Verner Conley, Riceville, Kentucky		1.75 per hr.
Harrison Daniels, Paintsville, Kentucky		1.75 per hr.

Lonnie Dixon, Nippa, Kentucky	1.75 per hr.
Alfred Dotson, Ivyton, Kentucky	1.75 per hr.

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M. M. Price, Salyersville, Kentucky	\$1.75 per hr.
Robert Poe, Ivyton, Kentucky	1.75 per hr.
Robert Hackworth, Riceville, Kentucky	1.75 per hr.
John E. Hackworth, Jr., Riceville, Ky.	1.75 per hr.
W. P. Wright, Riceville, Kentucky	1.75 per hr.
Otto Preston, West Van Lear, Kentucky	1.75 per hr.
Clarence Endicott, Paintsville, Ky.	1.75 per hr.
B. F. Pelphrey, Volga, Kentucky	1.75 per hr.
H. H. Hounsshell, Wilstacy, Kentucky	1.75 per hr.
Thomas Litteral, Riceville, Kentucky	1.75 per hr.
Roger H. Ray, Detroit, Michigan	1.75 per hr.
Charles Collett, Paintsville, Kentucky	1.75 per hr.
Thomas B. Arms, Staffordsville, Kentucky	1.75 per hr.
John T. Arnett, Arthurmable, Kentucky	1.75 per hr.
Tonie Wireman, Arthurmable, Kentucky	1.75 per hr.
Charles Marshall, Ivyton, Kentucky	1.75 per hr.
Norman Hackworth, Riceville, Kentucky	1.75 per hr.
Grant Davis, Thealka, Kentucky	1.75 per hr.
Homer Salyer, Royalton, Kentucky	1.75 per hr.
Harry J. Watson, Royalton, Kentucky	1.75 per hr.
LeGrand Mayo, Auxier, Kentucky	1.75 per hr.
Chester Trimble, Barnett's Creek, Ky.	1.75 per hr.
Bert E. Preston, Jr., West Van Lear, Ky.	1.75 per hr.
Estle Robinson, East Point, Kentucky	1.75 per hr.
P. L. Trimble, Barnett's Creek, Kentucky	1.75 per hr.
Lindon Higgins, Salyersville, Kentucky	1.75 per hr.
Edmond Dobbins, Gallup, Kentucky	1.75 per hr.
Leslie I. Myers, Hardin, Kentucky	1.75 per hr.
Wishard LeMasters, Salyersville, Ky.	1.75 per hr.

*Labor Foreman*

Lee Bach, Noctor, Kentucky	1.00 per hr.
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*Laborers*

Dan Combs, Decoy, Kentucky	.90 per hr.
Jerry Barnett, Noctor, Kentucky	.90 per hr.
Green Trusty, Decoy, Kentucky	.90 per hr.
Donald Trimble, Oil Springs, Kentucky	.90 per hr.
Matt Miller, Decoy, Kentucky	.90 per hr.
Green Stacy, Decoy, Kentucky	.90 per hr.
Green Conlev, Arthurmable, Kentucky	.90 per hr.
Burl King, Tip Top, Kentucky	.90 per hr.

Hargus H. Howard, Fredville, Kentucky	.90 per hr.
Avis Salyers, Arthurmable, Kentucky	.90 per hr.
Luther Litteral, Royalton, Kentucky	.90 per hr.
Ossie Lovely, Royalton, Kentucky	.90 per hr.
Earnest Howard, Swampton, Kentucky	.90 per hr.
John Jordan, Royalton, Kentucky	.90 per hr.
George P. Miller, Decoy, Kentucky	.90 per hr.
Homer Rowe, Tip Top, Kentucky	.90 per hr.

*Painter*

Walter S. Moore, Jr., Evanston, Kentucky	1.50 per hr.
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Most of the persons named above were employed by Plaintiff at the site of the work only a portion of the time between the dates July 10, 1949, and August 4, 1949.

page 121 } With reference to addresses, the above listed addresses are the only addresses which Plaintiff is able to furnish for the persons in question.

12. (a) Q. It is alleged on page 4 of the Notice of Motion for Judgment that "Said Hart and the mob of men headed by him were informed that workmen on said job were members of Local Unions affiliated with the American Federation of Labor or had made application to become members of such local unions". Who allegedly so informed Hart?

A. When Hart and his mob went to the coal tippie on July 26, 1949, they demanded that the employees of Plaintiff immediately become members of United Construction Workers, and said that such employees would not be permitted to continue their work unless they became members of United Construction Workers. Various employees of Plaintiff informed Hart and his mob that they were already members of Local Unions affiliated with the American Federation of Labor and showed Hart and his mob their Union cards signifying such membership. Some of the employees of Plaintiff had a heated discussion with Hart and his mob about the right of the latter to interfere with the employees of Plaintiff in their work and to demand that they join United Construction Workers. During this discussion Hart and his mob were informed that workmen of Plaintiff were members of Local Unions affiliated with the American Federation of Labor. Shortly

page 122 } thereafter on the same day, July 26, 1949, A. Hamilton Bryan, President of Plaintiff, met Hart and some of his mob at or near the job site. Bryan informed Hart and the persons with Hart that the employees of Plaintiff were members of Local Unions affiliated with the American Federation of Labor or had made application to become members of such Local Unions. Hart stated that the persons

employed by Plaintiff as laborers were not organized. Bryan then told Hart that all persons employed by Plaintiff as laborers has made application to join Salyersville, Kentucky, Carpenters' Local Union No. 697, American Federation of Labor, as Carpenter Helpers. Hart stated that this made no difference; that Plaintiff was working in United Mine Worker territory, and that they "were taking over", and that it would be necessary for Plaintiff to sign an agreement with United Construction Workers and to pay laborers at a rate of \$1.36 per hour and carpenters at a rate of \$1.86 per hour.

13. (a) Q. What is the name of the Kentucky State Police Officer to whom the Plaintiff allegedly appealed for assistance?

A. On July 27, 1949, at about 12:00 o'clock, noon, A. Hamilton Bryan, President of Plaintiff, and C. M. Delinger, Superintendent for Plaintiff, saw Homer Howard, a Kentucky State Policeman, in Salyersville, Kentucky. Delinger introduced Bryan to Howard. Bryan told Howard what had happened at the job site in Breathitt County the previous day and also that day, i. e., on July 26, and 27, 1949. Howard said he had heard about it. Bryan told Howard that some of the employees of Plaintiff were afraid that they might be shot by persons hiding in the mountains and using high powered rifles. Howard was asked if he thought there was any danger of this happening. Howard said that he was sure that there was such a danger. Howard was asked if he had ever seen any one shot that way, and he replied "I have not only seen them shot that way, but have picked them up after they were shot". Howard said that he had just gotten out of a hospital after being shot himself. He showed Bryan and Dilinger some of his scars from bullet wounds. Bryan asked Howard if he would go to the job site to preserve order in case of any trouble. Bryan said that the presence of Howard at the job would help the morale of the employees of the Plaintiff. Howard said that he would not go to the job site because he had orders not to take part in any labor dispute except on express instructions from the Governor of Kentucky.

20. (a) Q. What is each and every item comprising the Plaintiff's alleged damages of \$500,000.00?

A. With respect to the actual and punitive damages in the sum of \$500,000.00 claimed by Plaintiff, a statement showing the approximate amounts of the items comprising these damages is as follows:

Damage from loss of fee on contract for construction of 25 Dwellings	\$ 534.19
Damage from loss of fee on work in connection with construction of Schoolhouse	319.67
Damage from loss of fee in connection with work for installation of Asbestos Shingles on said 25 Dwellings	250.00
Damage from loss of fee in connection with work for installation of Concrete Foundations for Coal Preparation Plant for No. 2 (now called No. 3 Mine)	1,250.00
Damage from loss of fee on other additional work in Breathitt County, Kentucky, amounting to approximately \$542,500.00 which Pond Creek Pocahontas Company had agreed to have Laburnum Construction Corporation handle on a basis of cost-plus a fee of five (5) per cent	27,125.00
Damage by reason of the destruction of the business relationship and connection which Laburnum Construction Corporation had built up and developed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies	120,000.00
Damage to Plaintiff's reputation	100,000.00
Punitive damages	250,521.14
	<hr/> \$500,000.00 <hr/>

21. (a) Q. On July 13, 1949, which employees of the Plaintiff, requested in question (11), were employed in connection with the Pond Creek Pocahontas contract and which were employed in connection with the Spring Fork Development Company contract?

A. With respect to the contract with Pond Creek Pocahontas Company dated July 28, 1948, the following persons were employed by Plaintiff on July 13, 1949, in connection with the construction of the Coal Preparation Plant at No. 1 Kentucky Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky:

page 125 } John W. McClellan  
               D. T. Miller  
               Harold Goad  
               Charles L. Bassham

Lowell H. May  
Henry Starr  
Chalmers Patrick  
Thomas Greene  
E. H. May  
M. F. Sublett  
Verner Conley  
Alfred Dotson  
W. P. Wright  
Tonie Wireman  
Charles Marshall  
N. Hackworth  
Jack Patrick  
Lonnie Dixon  
M. M. Price  
Otto Preston  
Clarence Endicott  
Charles Collett  
John T. Arnett  
LeGrand Mayo  
Chester Trimble  
Bert E. Preston, Jr.  
Estle Robinson  
Paris Trimble  
Lee Bach  
Green Conley  
Jerry Barnett  
Luther Litteral  
Donald B. Trimble  
Avis Salvers  
Matt Miller  
Ossie Lovely  
Earnest Howard

With respect to the contract with Spring Fork Development Company, dated December 15, 1948, the following persons were employed by Plaintiff on July 13, 1949, in connection with the construction of 25 Dwellings on sites near the No. 1 Kentucky Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky:

Roger H. Ray  
Thomas Litteral  
J. E. Hackworth  
B. F. Pelphrey  
Thomas Arms

## Supreme Court of Appeals of Virginia.

Lindon Higgins  
 Homer Salyer  
 Harry J. Watson  
 Robert Hackworth (5 hrs.)  
 H. H. Hounshell (5 hrs.)  
 Howard Williams  
 Walter S. Moore, Jr.  
 page 126 } John Jordan  
                   Burl King  
                   George P. Miller

On July 13, 1949, the Plaintiff employed the following persons in connection with the construction of a Schoolhouse near said No. 1 Kentucky Mine:

Robert Hackworth (3 hrs.)  
 H. H. Hounshell (3 hrs.)  
 Dan Combs  
 Green Trusty  
 Hargus Howard  
 Green Stacy

On July 13, 1949, C. M. Delinger, Superintendent, and Maynard C. Ragan, Chief Clerk, were also employed by the Plaintiff on the work in Breathitt County, Kentucky. The services of these two employees related to all of the work mentioned above.

## LABURNUM CONSTRUCTION CORPORATION

By A. HAMILTON BRYAN, Pres.

page 127 } State of Virginia,  
                   City of Richmond, to-wit:

This day A. Hamilton Bryan personally appeared before me, Mamie M. Anderson, a Notary Public in and for the City and State aforesaid in my City aforesaid and made oath that he is President and agent of Laburnum Construction Corporation and as such he is authorized to make this affidavit, and the said A. Hamilton Bryan further made oath that the matters and things stated in the foregoing Further Answer of Laburnum Construction Corporation to Summons of the Defendants to Answer Interrogatories are in all respects true and correct to the best of his information, knowledge and belief.

Given under my hand this 26th day of September, 1950.  
My commission expires August 8, 1953.

MAMIE M. ANDERSON,  
Notary Public

page 128 }

. . . . .

This day came the plaintiff by counsel and came also the defendants by counsel and the plaintiff filed further answer to interrogatories heretofore filed in this action by the defendants; and the plaintiff likewise filed further interrogatories addressed to these defendants.

Upon consideration whereof, the Court doth order that the defendants file their grounds of defense herein on or before October 16, 1950 and that they file their answer to all interrogatories filed in this action by the plaintiff, which the Court has heretofore ordered the defendants to answer, or which the Court may hereafter order the defendants to answer on or before the 15th day of November, 1950.

Enter.

HAROLD F. SNEAD  
Judge.

9/26/50.

. . . . .

page 129 }

. . . . .

Received & Filed Oct. 2, 1950.

Teste:

WILBUR J. GRIGGS, Clerk  
By LUTHER C. MONTGOMERY, D. C.

**FURTHER ANSWER OF LABURNUM CONSTRUCTION  
CORPORATION TO SUMMONS OF THE DEFEND-  
ANTS TO ANSWER INTERROGATORIES**

For further answer to the summons directed by the Defendants to Plaintiff, Laburnum Construction Corporation,

## Supreme Court of Appeals of Virginia.

to answer certain interrogatories filed in the Clerk's Office of the Circuit Court of the City of Richmond, Plaintiff, Laburnum Construction Corporation, answers and says:

18. (a) Q. What was the total dollar volume of work performed by the Plaintiff in the State of Kentucky in 1949 and in each of the five years next preceding 1949?

A. The total dollar volume of work performed by Plaintiff in the State of Kentucky in 1949 and in each of the five years next preceding 1949 was as follows:

1944	None
1945	None
1946	None
1947	None
1948	\$ 33,827.88
1949	278,053.01
	<hr/>
Total	\$311,880.89
	<hr/>

page 130 } 18. (b) Q. Furnish same for Virginia and West Virginia. The Court has ruled Plaintiff need not furnish the information requested so far as the State of Virginia is concerned.

A. The total dollar volume of work performed by Plaintiff in the State of West Virginia in 1949 and in each of the five years next preceding 1949 was as follows:

1944	\$314,078.97
1945	None
1946	None
1947	62,511.11
1948	121,306.78
1949	174,838.92
	<hr/>
Total	\$672,735.78
	<hr/>

With reference to the work in 1944 amounting to \$314,078.97, this work was performed by Laburnum Construction Corporation and Riggs Distler & Company, Inc., as joint venturers.

LABURNUM CONSTRUCTION CORPORATION  
By A. HAMILTON BRYAN, President.

I certify that copies of the foregoing further answer of Laburnum Construction Corporation to summons of the defendants to answer interrogatories were delivered to Messrs. Williams, Mullen and Hazelgrove, counsel for all defendants, on or about Sept. 28, 1950, and that prior to October 2nd, 1950, said counsel for all defendants, verbally acknowledged receipt of said further answer.

ARCHIBALD G. ROBERTSON  
of Counsel for plaintiff.

October 2nd, 1950.

page 131 } State of Virginia:  
City of Richmond, to-wit:

This day A. Hamilton Bryan personally appeared before me, Phyllis C. Burkey, a Notary Public in and for the City and State aforesaid in my City aforesaid and made oath that he is President and agent of Laburnum Construction Corporation and as such he is authorized to make this affidavit, and the said A. Hamilton Bryan further made oath that the matters and things stated in the foregoing Further Answer of Laburnum Construction Corporation to Summons of the Defendants to Answer Interrogatories are in all respects true and correct to the best of his information, knowledge and belief.

Given under my hand this 27th day of September, 1950.  
My commission expires August 31, 1951.

PHYLLIS C. BURKEY  
Notary Public.

page 132 }

. . . . .

Received and Filed Oct. 12, 1950.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

GROUND'S OF OBJECTION TO INTERROGATORIES  
ADDRESSED TO UNITED MINE WORKERS OF  
AMERICA BY THE COMPLAINANT.

(1) The interrogatories as a whole and in special categories violate the Fourth Amendment to the Constitution of the

United States, and the Statutes of Virginia, and are contrary to the decisions of the United States Supreme Court in that they constitute a fishing expedition and impose an impossible task on the defendant.

(2) A large percentage of the questions asked are irrelevant and immaterial, and the periods for which information is asked is likewise irrelevant and immaterial.

(3) That the extensive duplication of questions imposes an undue burden on the defendant.

(4) That a large percentage of questions call for interpretation of written instruments and is an invasion of the functions of the court.

page 133 } (5) That the answers to certain categories of questions are known to, or information necessary to answer same is in the possession of, complainant.

(6) That certain categories are specifically intended to create prejudice and the interrogatories as a whole are directed to creating prejudice and to confuse the jury.

page 134 }

\* \* \* \* \*

Received & Filed Oct. 16, 1950.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

### GROUNDS OF DEFENSE.

#### *First Defense.*

(1) The defendants deny the allegations contained in the second unnumbered paragraph beginning on the first page of the Notice of Motion for Judgment

(2) With respect to the unnumbered paragraph beginning on page 2 of the Notice of Motion for Judgment, the defendants deny that William O. Hart was, or is, an officer of United Construction Workers, affiliated with United Mine Workers of America. Defendants deny that William O. Hart said Mr. David Hunter was an officer of District 50 United Mine Workers of America, and deny that David Hunter was such an officer. The defendants deny that William O. Hart stated to the agent of the plaintiff over the telephone that he "understood that Pond Creek Pocahontas Company intended to

award to the plaintiff considerable additional  
 page 134 } work in Breathitt County, Kentucky, which would  
 include, among other things, approximately 500  
 dwellings, stores and other buildings." The defendants deny  
 that William O. Hart stated "that the territory in which this  
 work was being performed was the territory of the United  
 Construction Workers." The defendants deny that William  
 O. Hart stated "that he intended 'to take over' all of the  
 plaintiff's work for the Pond Creek Pocahontas Company  
 in Breathitt County, Kentucky." The defendants deny that  
 William O. Hart stated "that the United Construction  
 Workers had closed down a job of Beckett Construction Com-  
 pany at Wheelwright, Kentucky." The defendants deny  
 that William O. Hart stated that "and unless the plaintiff  
 agreed to recognize immediately United Construction Work-  
 ers as the sole bargaining agent for the employees of plain-  
 tiff on said projects in Breathitt County, Kentucky, that he,  
 William O. Hart, as Field Representative and an officer of  
 United Construction Workers, District 50, would close down  
 the work of plaintiff in Breathitt County, Kentucky."

(3) With respect to the unnumbered paragraph beginning  
 on page 3 of the Notice of Motion for Judgment, the defend-  
 ants deny that "the superintendent in charge of the works  
 of the plaintiff in Breathitt County, Kentucky, learned that  
 the said William O. Hart had arranged to bring a large group  
 of men to the job site of the plaintiff in Breathitt County,  
 Kentucky, at about noon on the following day, 'July 26,  
 1949' ' for the purpose of forcibly stopping the work of plain-  
 tiff on said job," and defendants deny that William O. Hart  
 had arranged to bring a large group of men to the  
 page 136 } job site of the plaintiff in Breathitt County, Ken-  
 tucky, at about noon on the following day, July  
 26, 1949, or at any other time for the purpose of forcibly  
 stopping the work of the plaintiff on said job. The defend-  
 ants deny that "the said superintendent was also informed  
 that the said group of men with said Hart would be armed,"  
 and deny that it was ever intended that the said group of men  
 with said Hart would be armed and they deny that they were,  
 in fact, ever armed. Defendants deny there were any threats.  
 The defendants deny that the group of men accompanying  
 William O. Hart constituted a mob and the defendants deny  
 that the group of men accompanying William O. Hart num-  
 bered as many as 75 men. The defendants deny that William  
 O. Hart acted as an officer of United Construction Workers,  
 or District 50, or as a Field Representative of District 50.  
 The defendants deny that the plaintiff inquired of said Hart  
 as to his authority to interfere with and prevent plaintiff

from continuing its work. The defendants deny that said Hart said "he was acting under the orders of Tom (Thomas) Rainey and that he was carrying out Rainey's orders." The defendants deny that said Tom (Thomas) Rainey "is authorized to give orders for and on behalf of United Mine Workers of America to said District 50 and United Construction Workers, and the said Hart." The defendants again deny that the group of men accompanying Hart constituted a mob and they deny that such persons harangued workmen employed by the plaintiff with threats and abuses, and they deny that these persons then demanded that workmen employed by plaintiff immediately became members of United Construction Workers. The defendants deny that said Hart used violent language to workmen employed by the plaintiff. The defendants deny that Hart said "to these men that they would not be permitted to continue their work unless  
page 137 } they became members of United Construction Workers." The defendants again deny that the group of men accompanying Hart constituted a mob and they deny that such persons were informed that "workmen on said job were members of local unions affiliated with American Federation of Labor, or had made application to become members of such local unions." The defendants deny that "the employees on the job promptly refused to become members of said United Construction Workers, and defendants again deny that the group of men accompanying William O. Hart constituted a mob. The defendants deny that William O. Hart was ever an officer of United Construction Workers, or of District 50, or that he acted as a Field Representative of District 50. The defendants deny that the group of men accompanied by William O. Hart "swarmed around most of the laborers on said job and demanded that these laborers sign application blanks to become members of United Construction Workers." The defendants deny that any of the laborers on said job "signed application blanks to become members of United Construction Workers under duress since they feared they would be injured or killed by the persons accompanying Hart if they refused to sign such cards." The defendants deny that the persons accompanying William O. Hart constituted a mob, and the defendants deny that any of the persons accompanying said Hart had been drinking or were intoxicated, or seemingly intoxicated, or were carrying pistols or guns. The defendants deny that any employees saw the outline of pistol handles or bullet cylinders concealed under the shirts of, or in the pockets of some of the men  
page 138 } accompanying said Hart, and that the group of men accompanying said Hart constituted a mob;

and that pistol shots were heard while the group of men accompanied by Hart were approaching the said coal tippie. The defendants deny that the group of men accompanying said Hart constituted a mob. The defendants deny that Hart violently addressed a group of plaintiff's employees. The defendants deny that "said Hart then again emphatically and violently affirmed that he and his mob had come to the job for the purpose of stopping the plaintiff's men from working unless they joined United Construction Workers." The defendants deny that "the said Hart further stated that excepting some few laborers, plaintiff's employees had refused to join United Construction Workers and that the employees who had not joined his (Harts) union would not be permitted to work." The defendants deny that the group of men accompanying Hart constituted a mob. The defendants deny that Hart stated "that he and his mob were establishing a picket line and that they were prepared to use all force necessary to hold the picket line and prevent the employees of plaintiff from working" and again deny there was a mob. The defendants deny that "the said Hart further stated that the United Construction Workers intended to see that the plaintiff's men did not work and that if anyone did not believe this, he, the said Hart, would bring to the job 300 tough men from Beaver Creek, Kentucky, and that these men would come 'rough' and that they would kick the plaintiff's men off the job." The defendants deny that the group of men accompanying William O. Hart constituted a mob. The defendants deny the last sentence of this paragraph.

page 139 } (4) With respect to the first unnumbered paragraph on page 6 of the Notice of Motion for Judgment the defendants deny all of the allegations contained in such paragraph.

(5) With respect to the second unnumbered paragraph beginning on page 6 of the Notice of Motion for Judgment, the defendants deny that on or about July 27, 1949, many of the employees of the plaintiff returned to their work. The defendants deny that on or about July 27, 1949, United Construction Workers had any "spotters". The defendants deny that H. G. Robinson represented himself to be an officer of United Construction Workers. The defendants deny that the employees of the plaintiff "refused to return to work for the reason that the men had been informed in the event they undertook to work more than 100 United Construction Workers would come upon the job and force them to stop and that possibly something might happen to them if they returned to work on the tippie." The defendants deny that anything might have happened to them if they returned to work on the

tipple. The defendants deny that "It was also rumored that certain of the mob were hiding in the hills with rifles and would shoot any of the men who might return to work." The defendants deny that "shortly thereafter, all of the employees of the plaintiff left the said work because of said threats and rumors and have not since returned to their work. The plaintiff in the meantime had appealed to a Kentucky State Police Officer for assistance, but had received no adequate assistance to maintain law and order upon the said works. The Kentucky State Police Officer knew of the disturbance page 140 } but stated that he had orders not to take part in any such disturbance. The said state policeman stated that he was convinced there was real danger to the men should they return to their work, and further stated that "I have not only seen them shot that way, but have picked them up after they were shot." The defendants deny that approximately 250 persons attended a meeting of the United Construction Workers on or about August 1, 1949, at a place known as "Tiptop". The defendants deny "the said Mr. William O. Hart at that meeting again insisted upon preventing the plaintiff from proceeding with its work under said contracts in Breathitt County, Kentucky." The defendants deny the allegations contained in the last two sentences of this paragraph.

(6) With respect to the unnumbered paragraph beginning on page 8 of the Notice of Motion for Judgment the defendants deny all of the allegations in such paragraph through the allegation "he then threatened the men with bodily harm if they attempted to go to work." The defendants deny that Mr. Davis said "he was very sympathetic with people in plaintiff's position, but that it was caught between two big unions and he would not, although urgently requested so to do by plaintiff, direct the said Mr. Hunter, or the said Hart not to disturb or interfere with the employees of the plaintiff." The defendants deny that Hart agreed to attend on August 2, 1949, at 10:00 o'clock A. M., a meeting upon condition that the plaintiff would not attempt to perform any work until said meeting. The defendants deny all of the remaining allegations in this paragraph beginning on page 9 of the Notice of Motion for Judgment with the sentence page 141 } "One of the representatives of the American Federation of Labor asked the question "Do you want to wait until somebody is killed before you do something?"', except the statement "While the meeting was in progress, the representatives of American Federation of Labor refused to meet with the said Hart."

(7) With respect to the first unnumbered paragraph beginning on page 10 of the Notice of Motion for Judgment, the defendants deny that Exhibits "B" and "C" said that the contracts were cancelled "because of plaintiff's inability to proceed with said work."

(8) With respect to the second unnumbered paragraph beginning on page 10 of the Notice of Motion for Judgment, defendants deny the statement "between the international conventions, the supreme executive and judicial powers of the United Mine Workers of America shall be vested in its Executive Officers and the Executive Board" is a complete statement of the terms of the Constitution, and say it leaves off the words "in accordance with and subject to the provisions of this Constitution."

(9) With respect to the unnumbered paragraph beginning on page 12, defendants deny that the Rules of District 50 provide that sub-districts may be set up by said District 50. They deny that District 50 has caused to be set up a number of sub-districts among which is the United Construction Workers. These defendants deny that United Construction Workers were organized by and pursuant to the direction and control of District 50. Defendants deny that the by-laws page 142 } or rules adopted by United Construction Workers must not be inconsistent with the rules and by-laws of District 50. They deny that "a portion of said dues after payment to United Construction Workers is transferred to District 50 and to United Mine Workers of America."

(10) With respect to the first unnumbered paragraph beginning on page 13, defendants deny that David Hunter or William O. Hart was, or is, a duly authorized representative of United Mine Workers of America. These defendants deny that "The said United Construction Workers is and was at all times hereinbefore mentioned, the agent of United Mine Workers of America, and of said District 50, and all of the acts of said William O. Hart and his mob, and the acts of the said United Construction Workers in and about their efforts unlawfully and maliciously to prevent the plaintiff from continuing its work in Breathitt County, Kentucky, were duly authorized, ratified and confirmed by said United Construction Workers, by said District 50, and by said United Mine Workers of America as their own acts jointly and severally," and again deny that the group of men accompanying William O. Hart constituted a mob.

(11) With respect to the last unnumbered paragraph beginning on page 13, these defendants deny that an officer of United Construction Workers is domiciled and has his office

in the said City of Richmond, and also deny that an officer of District 50 is domiciled and has his office in the City of Richmond.

(12) With respect to the unnumbered paragraph beginning on page 14, the defendants admit that William page 143 } O. Hart, David Hunter and Thomas Davis were agents of United Construction Workers and of District 50. The defendants deny all other allegations contained in this paragraph.

*Second Defense.*

The supposed cause of action arose in Kentucky and the substantive law governing the case is the law of Kentucky. The provisions of the Kentucky Revised Statutes of 1948 (4th Biennial Edition) §336.130 give the right to strike, the right to engage in peaceful picketing, and the right to assemble collectively for peaceful purposes.

*Third Defense.*

The plaintiff did not suffer any injuries or damages.

*Fourth Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they are the result of peaceful picketing in the course of a lawful strike in a labor dispute.

*Fifth Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they are uncertain, remote, speculative, and contingent.

*Sixth Defense.*

The plaintiff is not entitled to any punitive damages for the reason that under the law of Kentucky no defendant and no person for whose conduct the defendants, or any page 144 } of them, are legally responsible, has been guilty of wantonness, oppressiveness, recklessness, or of such malice as implies a spirit of mischief or gross indifference to the welfare or civil rights of others.

*Seventh Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they were not caused by the defendants or persons for whose conduct the defendants, or any of them, are legally responsible

*Eighth Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they are the result of the exercise by the defendants, and the persons for whom they are legally responsible, of their rights under the First Amendment to the Constitution of the United States.

UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA; DISTRICT  
50 UNITED MINE WORKERS OF  
AMERICA; AND U N I T E D M I N E  
WORKERS OF AMERICA, Defendants.  
By Counsel.

WILLIAMS, MULLEN & HAZELGROVE  
By FRED G. POLLARD  
Counsel.

CRAMPTON HARRIS  
1018-1019 First National Building  
Birmingham, Alabama.  
Counsel.

. . . . .

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. . . . .

1950, Oct. 24th. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

FURTHER INTERROGATORIES ADDRESSED TO  
UNITED CONSTRUCTION WORKERS, AFFILI-  
ATED WITH UNITED MINE WORKERS OF  
AMERICA.

SPECIFIC QUESTIONS OBJECTED TO BY THE DE-  
FENDANT, UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE WORKERS OF  
AMERICA, AND GROUNDS OF OBJECTION.

THE NUMBERS REFER TO THE NUMBERED QUES-  
TIONS IN THE INTERROGATORIES REFERRED  
TO, WHICH WERE FILED IN COURT AND SERVED  
ON DEFENDANT ON OCTOBER 12, 1950.

(5) Defendant objects to this interrogatory on the follow-  
ing grounds:

(a) Said interrogatory calls for testimony that is imma-  
terial, irrelevant and incompetent.

(b) Said interrogatory calls for testimony relative to trans-  
actions *res inter alios acta*.

(c) Said interrogatory calls for testimony that would  
throw no light on the issues in this case.

(d) The matters inquired about in this interrogatory rela-  
tive to Thomas Raney would shed no light on the actions or  
statements of Thomas Raney in connection with any business  
or claims of the plaintiff, Laburnum Construction Corpora-  
tion.

(e) Said interrogatory calls for testimony which would only  
serve to confuse the jury.

page 158 } (f) Said interrogatory is propounded with the  
purpose of creating prejudice against the de-  
fendant.

\* \* \* \* \*

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\* \* \* \* \*

1950, Oct. 24th. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

FURTHER INTERROGATORIES ADDRESSED TO DISTRICT 50, UNITED MINE WORKERS OF AMERICA.

SPECIFIC QUESTIONS OBJECTED TO BY THE DEFENDANT, DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AND GROUNDS OF OBJECTION.

THE NUMBERS REFER TO THE NUMBERED QUESTIONS IN THE INTERROGATORIES REFERRED TO, WHICH WERE FILED IN COURT AND SERVED ON DEFENDANT ON OCTOBER 12, 1950.

(5) Defendant objects to this interrogatory on the following grounds:

(a) Said interrogatory calls for testimony that is immaterial, irrelevant and incompetent.

(b) Said interrogatory calls for testimony relative to transactions *res inter alios acta*.

(c) Said interrogatory calls for testimony that would throw no light on the issues in this case.

(d) The matters inquired about in this interrogatory relative to Thomas Raney would shed no light on the actions or statements of Thomas Raney in connection with any business or claims of the plaintiff, Laburnum Construction Corporation.

(e) Said interrogatory calls for testimony which would only serve to confuse the jury.

page 160 } (f) Said interrogatory is propounded with the purpose of creating prejudice against this defendant.

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1950, Oct. 24th. Received and filed.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

FURTHER INTERROGATORIES ADDRESSED TO  
UNITED MINE WORKERS OF AMERICA.

SPECIFIC QUESTIONS OBJECTED TO BY THE DE-  
FENDANT, UNITED MINE WORKERS OF AMERICA,  
AND GROUNDS OF OBJECTION.

THE NUMBERS REFER TO THE NUMBERED QUES-  
TIONS IN THE INTERROGATORIES REFERRED  
TO, WHICH WERE FILED IN COURT AND SERVED  
ON DEFENDANT ON OCTOBER 12, 1950.

(5) Defendant objects to this interrogatory on the follow-  
ing grounds:

(a) Said interrogatory calls for testimony that is imma-  
terial, irrelevant and incompetent.

(b) Said interrogatory calls for testimony relative to trans-  
actions *res inter alios acta*.

(c) Said interrogatory calls for testimony that would  
throw no light on the issues in this case.

(d) The matters inquired about in this interrogatory rela-  
tive to Thomas Raney would shed no light on the actions or  
statements of Thomas Raney in connection with any busi-  
ness or claims of the plaintiff, Laburnum Construction Cor-  
poration.

(e) Said interrogatory calls for testimony which would  
only serve to confuse the jury.  
page 162 } (f) Said interrogatory is propounded with the  
purpose of creating prejudice against this defend-  
ant.

(6) Defendant objects to answering this question, and for  
grounds of objection assigns the following:

(a) Said interrogatory calls for testimony that is irrele-  
vant, immaterial and incompetent.

(b) Said interrogatory calls for thirty-eight different is-  
sues of the publication United Mine Workers Journal, and  
the answer thereto would serve to confuse the jury.

(c) Said interrogatory is designed to prejudice the jury  
against this defendant for the reason that the issues of the  
United Mine Workers Journal contain various and sundry  
expressions of opinion and discussions of economic, social  
and political questions which would tend to arouse debates  
and disagreements on the part of the members of the jury  
who hold opinions contrary to the opinions expressed or posi-

tion taken in said Journal, and would arouse the feelings of such jurors against the defendant

(d) Said interrogatory calls for testimony that would unduly burden the record in this case.

(f) The requirements of Section 8-324, Code of Virginia 1950, as amended, have not been met with respect to this interrogatory.

. . . . .

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**AMENDED MOTION TO CONSOLIDATE.**

United Construction Workers, by Counsel, moves the Court to consolidate the captioned cases and respectfully requests that they be tried together at the same time.

**UNITED CONSTRUCTION WORKERS**  
By Counsel.

**WILLIAMS, MULLEN & HAZELGROVE,**  
1001 E. Main Street,  
Richmond, Virginia.

**FRED G. POLLARD**  
Counsel

November 8, 1950:

I have this day mailed a copy of this motion to Geo. E. Allen.

**FRED G. POLLARD**

1950, Nov. 8th. Received and Filed.

Teste:

**WILBUR J. GRIGGS, Clerk**  
By **E. M. EDWARDS, D. C.**

. . . . .

page 177 } Virginia:

In the Circuit Court of the City of Richmond.

Nov. 28, 1950

. . . . .

### ORDER ON INTERROGATORIES.

On June 19, 1950, defendants filed interrogatories addressed to plaintiff, and on June 19, 1950, summons was issued and served calling upon plaintiff to answer said interrogatories on July 10, 1950; but by order entered on July 7, 1950, the time for answering said interrogatories was extended until September 20, 1950, said interrogatories being now designated "Interrogatories (1)".

On August 25, 1950, plaintiff filed interrogatories addressed to defendant, United Construction Workers, Affiliated With United Mine Workers of America, and summons issued on August 25, 1950, was served upon said defendant on August 28, 1950, calling upon said defendant to answer said interrogatories on September 20, 1950; said interrogatories being now designated "Interrogatories (2)".

On August 29, 1950, plaintiff filed interrogatories addressed to defendant, District 50, United Mine Workers of America, and summons issued on August 29, 1950, was served upon said defendant on August 30, 1950, calling upon said page 178 } defendant to answer said interrogatories on September 20, 1950; said interrogatories being now designated "Interrogatories (3)".

On September 13, 1950, plaintiff filed interrogatories addressed to defendant, United Mine Workers of America, and summons issued on September 13, 1950, was served upon said defendant on September 14, 1950, calling upon said defendant to answer said interrogatories on September 20, 1950; said interrogatories being now designated "Interrogatories (4)".

On September 20, 1950, all parties came by counsel, and plaintiff filed its answer to Interrogatories (1), said answer being now designated "Answer of Laburnum Construction Corporation to Summons of the Defendants to Answer Interrogatories (1)", and plaintiff answered questions in Interrogatories (1) numbered 1 through 10, both inclusive, 14 and 22; but except under order of court plaintiff declined to answer questions numbered 11 through 13, both inclusive, and 15 through 21, both inclusive, in said Interrogatories (1).

Thereupon Interrogatories (1) were argued by counsel and the court ruled as follows:

(1) Plaintiff must answer questions numbered 11, 13, 20 and 21 in Interrogatories (1);

(2) Plaintiff need not answer questions numbered 12, 15, 16, 17 and 19 in Interrogatories (1); and

(3) Plaintiff need not answer question 18 as framed in Interrogatories (1), but must answer question 18 in Interrogatories (1) re-framed as follows:

(18) What was the total dollar volume of work performed by the Plaintiff in the State of Kentucky in 1949 and in each of the five years next preceding 1949? Furnish same for West Virginia.

On September 20, 1950, the court deferred all rulings upon the admissibility in evidence of all answers to Interrogatories until trial of the action.

page 179 } On September 20, 1950, none of the defendants answered any interrogatories, and the court deferred argument and rulings upon Interrogatories (2), Interrogatories (3) and Interrogatories (4) until September 26, 1950.

On September 26, 1950, after argument by counsel upon Interrogatories (2) and Interrogatories (3) the court ruled that on or before November 15, 1950, defendant, United Construction Workers, Affiliated with United Mine Workers of America,

(1) Must answer the questions in Interrogatories (2) numbered 1 through 14, both inclusive, 17 through 77, both inclusive, 82, 83 and 92 through 94, both inclusive;

(2) Need not answer questions numbered 15, 16, 78, 79, 80, 81, 87, 88 and 89 in Interrogatories (2) as framed, but that said defendant must answer questions 15, 16, 78, 79, 80, 81, 87, 88 and 89 re-framed as follows:

15. Who are the persons who served as directors of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what other offices has each director of Region 58 held between the dates October 28, 1948, and August 4, 1949; when and by whom was each director appointed a Regional Director or other officer; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each director of Region 58 serve in

that office or in any other office; and what were the locations of their respective offices?

16. Who are the persons who have served as directors of Region 58 of United Construction Workers since August 4, 1949, and what other offices has each director of Region 58 held since August 4, 1949; when and by whom was each director appointed a Regional Director or other officer; during what period or periods since August 4, 1949, did each director of Region 58 serve in that office or in any other office; and what were the locations of their respective offices?

78. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of United Construction Workers were submitted by United Construction Workers or by its National Director or National Comptroller to District 50 or to the Administrative Officer or Secretary-Treasurer of District 50 between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

79. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of United Construction Workers were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer to United Construction Workers or to the National Director or National Comptroller of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

80. What written instructions, statements, reports, memoranda, letters and other papers, pertaining to Region 58 of United Construction Workers were submitted by the United Construction Workers or by its National Director or National Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

81. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of United Construction Workers were submitted by United Mine Workers of America or by the International Executive Board or the President or any other International Officer of United Mine Workers of America to United Construction Workers or to the National Director or National Comptroller of United

Construction Workers between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

87. Were charter fees, initiation fees and dues paid to United Construction Workers by its Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and was any portion of such fees and dues paid by United Construction Workers to District 50 or to United Mine Workers of America; and, if so, why?

88. State the following for the years 1948 and 1949 each:

(a) Were funds advanced or paid by United Construction Workers to or for the account of District 50 or United Mine Workers of America; and, if so, why?  
page 181 } (b) Were funds advanced or paid by District 50 or United Mine Workers of America to or for the account of United Construction Workers; and, if so, why?

89. Has United Mine Workers of America or District 50 during the years 1948 or 1949 guaranteed payment of any debt or obligations of United Construction Workers or acted as endorser on any notes or bonds of United Construction Workers; and, if so, why?

(3) Need not answer questions numbered 90 and 91 in Interrogatories (2).

(4) Need not answer questions 84, 85 and 86, but that questions 84 and 85 must be answered by defendant, United Mine Workers of America, and that question 86 must be answered by defendant, District 50, United Mine Workers of America.

On September 26, 1950, plaintiff filed its first further answer to Interrogatories (1), said further answer being now designated "First Further Answer of Laburnum Construction Corporation to Summons of Defendants to Answer Interrogatories (1)". On September 26, 1950, after argument by counsel, the court ruled that on or before November 15, 1950, defendant, District 50, United Mine Workers of America,

(1) Must answer the questions in Interrogatories (3) numbered 1 through 13, both inclusive, 16 through 53, both inclusive, 55 through 80, both inclusive, 85, 88, 94, 95 and 96.

(2) Need not answer questions 14, 15, 54, 81, 82, 83, 84, 89, 90 and 91 as framed, but that said defendant must answer questions 14, 15, 54, 81, 82, 83, 84, 89, 90 and 91 re-framed as follows:

14. Who are the persons who served as directors of Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what other offices has each director of Region 58 held between the dates October 28, 1948, and August 4, 1949 and when and by whom was each such person appointed Regional Director or other officer; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as Regional Director or other officer; and what were the locations of their respective offices?

15. Who are the persons who have served as directors of Region 58 of District 50 since August 4, 1949, and what other offices has each director of Region 58 held since August 4, 1949; and when and by whom was each such person appointed Regional Director or other officer; during what  
page 182 } period or periods since August 4, 1949, did each serve as Regional Director or other officer; and what were the locations of their respective offices?

54. What work, occupations and industries were claimed by District 50 to be within its jurisdiction between the dates October 28, 1948, and August 4, 1949; and what work, occupations and industries have been claimed by District 50 to be within its jurisdiction since August 4, 1949?

81. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50, or to Region 58 of United Construction Workers, were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer or Comptroller to United Construction Workers or to the National Director or National Comptroller of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

82. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50, or to Region 58 of United Construction Workers, were submitted by United Construction Workers or by its National Director or National Comptroller to District 50 or to the Administrative Officer or Secretary-Treasurer or Comptroller of District 50 between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

83. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50, or to Region 58 of United Construction Workers, were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer or Comptroller to United Mine Work-

ers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

84. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50, or to Region 58 of United Construction Workers, were submitted by United Mine Workers of America or by the International Executive Board or the President or any other International Officer of United Mine Workers of America to District 50 or to the Administrative Office or Secretary-Treasurer or Comptroller of District 50 between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

89. Were charter fees, initiation fees and dues paid to District 50 by its Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and was any portion of such fees and dues paid by District 50 to United Construction Workers or to United Mine Workers of America; and, if so, why?

90. State the following for the years 1948 and page 183 } 1949 each:

(a) Were funds advanced or paid by District 50 to or for the account of United Construction Workers or United Mine Workers of America; and, if so, why?

(b) Were funds advanced or paid by United Construction Workers or United Mine Workers of America to or for the account of District 50; and, if so, why?

91. Has United Mine Workers of America or United Construction Workers during the years 1948 or 1949 guaranteed payment of any debts or obligations of District 50, or acted as endorser on any notes or bonds of District 50; and, if so, why?

(3) Need not answer questions 86 and 87, but that questions 86 and 87 must be answered by defendant, United Mine Workers of America.

(4) Need not answer questions 92 and 93.

On September 26, 1950, the court deferred argument and rulings upon Interrogatories (4) until October 12, 1950.

On September 26, 1950, plaintiff submitted to the court and

to counsel for defendants further interrogatories addressed respectively to defendant, United Construction Workers, Affiliated with United Mine Workers of America, said interrogatories being now designated "Further Interrogatories (5)"; further interrogatories addressed to defendant, District 50, United Mine Workers of America, said interrogatories being now designated "Further Interrogatories (6)"; and further interrogatories addressed to defendant, United Mine Workers of America, said interrogatories being now designated "Further Interrogatories (7)"; and counsel for all said defendants accepted said further interrogatories, and said Further Interrogatories (5), Further Interrogatories (6) and Further Interrogatories (7) were filed in court on October 2, 1950.

On October 2, 1950, plaintiff filed its second further answer to Interrogatories (1), said second further answer being now designated "Second Further Answer of Labor-  
page 184 } num Construction Corporation to Summons of the  
Defendants to Answer Interrogatories (1)".

On October 2, 1950, plaintiff filed further interrogatories addressed to defendant, United Construction Workers, Affiliated With United Mine Workers of America, said further interrogatories being now designated "Further Interrogatories (8)"; further interrogatories addressed to defendant, District 50, United Mine Workers of America, said further interrogatories being now designated "Further Interrogatories (9)"; and further interrogatories addressed to defendant, United Mine Workers of America, said further interrogatories being now designated "Further Interrogatories (10)"; and on or about October 2, 1950, copies of said Further Interrogatories (8), Further Interrogatories (9) and Further Interrogatories (10) were delivered to counsel for all defendants and were accepted by said counsel.

On October 12, 1950, all parties came by counsel and defendant, United Mine Workers of America, filed its "Grounds of Objection to Interrogatories Addressed to United Mine Workers of America by the Complainant"; and after argument by counsel upon Interrogatories (4), Further Interrogatories (5), Further Interrogatories (6), Further Interrogatories (7), Further Interrogatories (8), Further Interrogatories (9) and Further Interrogatories (10), the court overruled Grounds of Objection to Interrogatories Addressed to United Mine Workers of America by the Complainant; and the court ruled further that on or before November 15, 1950, defendant, United Mine Workers of America,

(1) Must answer the questions in Interrogatories (4) numbered 1, 3 through 12, both inclusive, 13(a), (b), (c), 14 through 23, both inclusive, 24(a), (b), (c), (d), (e), 25, 26, 27(a), (b), (c), (d), (e), 28(a), (b), (c), (d), 29 through 33, both inclusive, 34(a), (b) 35(a), (b), 36, 37(a), (b), 38, 39, 40(a), (c), 41, 42 43(a), (b), 44, 46, 47 through page 185 } 60, both inclusive, 65 through 77, both inclusive, 79 through 94, both inclusive, 104, 113 through 117, both inclusive.

(2) Need not answer questions in Interrogatories (4) numbered 78, 123, 124 and 125, but counsel for defendant United Mine Workers of America, stated to the court that they would recommend to said defendant that said defendant submit to the court the minutes of all meetings of the International Executive Board of United Mine Workers of America held between the dates October 28, 1948; and August 4, 1949, and also since August 4, 1949, for inspection by the court in order that the court may determine what parts of such minutes, if any, must be furnished plaintiff; but counsel for defendant, United Mine Workers of America, contending that portions of said minutes contain confidential information, the court ruled tentatively over objection and exception of counsel for plaintiff that counsel for plaintiff shall not have access to the aforesaid minutes; and counsel for defendant, United Mine Workers of America, agreed to advise the court on or before October 24, 1950, whether or not defendant, United Mine Workers of America, will follow the aforesaid recommendation of counsel. Counsel for said defendant on or before said date advised the Court that said defendant would follow said recommendation, and said minutes covering said period have been made available to the Court.

(3) Need not answer questions 2, 13(d), 24(f), 27(f), 28(e), 34(c), 35(c), 37(c), (d), 40(b), 45, 61, 62, 63, 64, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 118, 119, 120, 121 and 122, as framed, but must answer questions 2, 13(d), 24(f), 27(f), 28(e), 34(c), 35(c), 37(c), (d), 40(b), 45, 61, 62, 63, 64, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 118, 119, 120, 121 and 122, re-framed as follows:

2. Furnish a copy of the Charter, Constitution, Rules, Laws and By-Laws of United Mine Workers of America in effect between the dates October 28, 1948, and August 4, 1949, together with a copy of all changes or revisions made in same since August 4, 1949.

13(d). As used in the language quoted above what is meant by the words "joint agreements"?

24(f). As used in the language quoted above, what is meant by the words "joint agreement"?

27(f). As used in the language quoted above, what is meant by the words "joint agreements"?

28(e). As used in the language quoted above, what is meant by the words "joint agreements"?

34(c). During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did any person or member having been appointed for the purpose by the President of United Mine Workers of America collect and compile or attempt to collect or compile statistics relating to Region 58 of District 50 and United Construction Workers, or to the work and industries claimed by them, respectively? If so, what statistics were collected and compiled and what reports thereon were furnished to the President of United Mine Workers of America? Furnish a copy of all these reports.

35(c). What organizers, field and office workers did the President of United Mine Workers of America appoint or cause to be appointed to conduct or to assist in conducting the affairs of Region 58 of District 50 and the affairs of United Construction Workers, or either of them, during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and what organizers, field and office workers appointed or caused to be appointed by the President of United Mine Workers of America outside Region 58 of District 50 have come within the territorial limits of Region 58 of District 50 to conduct or to assist in conducting the affairs of Region 58 of District 50 and the affairs of United Construction Workers or either of them during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949?

37(c). Were interpretations of the meaning of said "International Constitution" made by the President of United Mine Workers of America (were in effect) between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949?

(d). During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did the President of United Mine Workers of America have the right to interpret or to cause to be interpreted the meaning of the constitutions or rules of District 50 and of United Construction Workers? If so, what interpretations of the meaning of

the said constitutions or rules made by the President of United Mine Workers of America were in effect between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949?

40(b). During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, how many appointments, suspensions and removals done by the President of United Mine Workers of America were approved by the International Executive Board, and how many appointments, suspensions and removals done by the President of United Mine Workers of America were disapproved by the International Executive Board.

45. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows:

"\* \* \* the President \* \* \* Vice President \* \* \* Secretary-Treasurer \* \* \* International Executive Board members \* \* \* tellers and auditors \* \* \* when employed \* \* \* shall receive, in addition to their salaries, such additional sums for additional service rendered as may be authorized and approved by the President; together with all legitimate expenses when employed by the organization away from their places of residence," and, if so, state the following:

(a) During what period or periods did said Constitution so provide?

(b) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did United Mine Workers of America pay to Thomas Raney, as a member of the International Executive Board of United Mine Workers of America, in addition to his salary, "additional sums for additional service rendered"? If so, what "additional sums" were paid to Thomas Raney; for what "additional service rendered" were such payments made; and when were such payments authorized and approved by the President of United Mine Workers of America?

(c) As used in the language quoted above, does the word "Organization" mean the United Mine Workers of America and its Districts, Sub-Districts, branches and subordinate branches, including District 50 and United Construction Workers? If not, what does that word mean?

61. Who are the persons who served as Regional Directors

of Region 58 of District 50 between the dates October 188 } tober 28, 1948, and August 4, 1949; when and by whom was each of these persons appointed a Regional Director; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as a Regional Director; and what were the locations of their respective offices?

62. Who are the persons who served as Regional Directors of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949; when and by whom was each of these persons appointed a Regional Director; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as a Regional Director; and what were the locations of their respective offices?

63. Who are the persons who have served as Regional Directors of Region 58 of District 50 since August 4, 1949, and when and by whom was each of these persons appointed a Regional Director; during what period or periods since August 4, 1949, has each served as a Regional Director; and what were the locations of their respective offices?

64. Who are the persons who have served as Regional Directors of Region 58 of United Construction Workers since August 4, 1949, and when and by whom was each of these persons appointed a Regional Director; during what period or periods since August 4, 1949, has each served as a Regional Director; and what were the locations of their respective offices?

95. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did John L. Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to the International Executive Board of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

96. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did A. D. Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

97. What written reports on work performed, page 189 } on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did Kathryn Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

98. What written reports on work performed, on matters of policy or on organization activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did O. B. Allen, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

99. What written reports on work performed on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did Thomas Raney, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

100. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did Thomas Davis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

101. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region

58 of District 50 or to Region 58 of United Construction Workers, did David Hunter, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

102. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did William O. Hart, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

103. What written reports on work performed, on matters of policy or on organizational activities pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, did H. G. Robinson, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.

105. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer or Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

106. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by United Mine Workers of America or by the International Executive Board or the President or any

other International Officer of United Mine Workers of America to District 50 or to the Administrative Officer or Secretary- Treasurer or Comptroller of District 50 between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

107. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by United Construction Workers or by its National Director or National Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

108. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by United Mine Workers of America or by the International Executive Board or the President or any other International Officer of United Mine Workers of America to United Construction Workers or to the National Director or National Comptroller of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

109. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by Thomas Raney, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, to United Mine Workers of America or to the International Executive Board or President of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

110. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by United Mine Workers of America or the International Executive Board or President of United Mine Workers of America to Thomas Raney, as an employee or

representative of United Mine Workers of America or District 50 or United Construction Workers, between the dates October 28, 1948, and August 4, 1949, and also page 192 } since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

111. What written instructions, statements, reports, memoranda, letters and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers, were submitted by David Hunter, as an employee or representative of District 50 or United Construction Workers or United Mine Workers of America, to Thomas Raney, as an employee or representative of District 50 or United Construction Workers or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949; and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

112. What written instructions, statements, reports, memoranda, letters and other papers were submitted by Thomas Raney, as an employee or representative of District 50 or United Construction Workers or United Mine Workers of America, to David Hunter, as an employee or representative of District 50 or United Construction Workers or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers.

118. Were charter fees, initiation fees and dues paid to United Mine Workers of America by its District Unions, Sub-District Unions, Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and, if so, why?

119. Were charter fees, initiation fees and dues paid to District 50 by its Sub-District Unions, Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and were portion or portions of such fees and dues paid by District 50 to United Mine Workers of America; and, if so, why?

120. Were charter fees, initiation fees and dues paid to United Construction Workers by its Sub-District Unions, Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and were any portion or portions of such fees and dues paid by United Construction Workers to United Mine Workers of America; and, if so, why?

121. State the following for the years 1948 and 1949 each:

page 193 } (a) Were funds advanced or paid by United Mine Workers of America to or for the account of District 50 or United Construction Workers, and why were such advances or payments made?

(b) Were fund advanced or paid by District 50 or United Construction Workers to or for the account of United Mine Workers of America, and why were such advances or payments made?

122. Has United Mine Workers of America during the years 1948 or 1949 guaranteed payment of any debts or obligations of District 50 or United Construction Workers, or acted as endorser on any notes or bonds of District 50 or United Construction Workers; and, if so, why?

On October 12, 1950, the court ruled that defendant, United Construction Workers, Affiliated With United Mine Workers of America need not answer the questions in Further Interrogatories (5) numbered 1 and 2, but must answer questions in Further Interrogatories (5) numbered 3 and 4 on or before November 15, 1950; that defendant, District 50, United Mine Workers of America, need not answer the questions in Further Interrogatories (6) numbered 1 and 2, but must answer questions in Further Interrogatories (6) numbered 3 and 4 on or before November 15, 1950; that defendant, United Mine Workers of America, need not answer the questions in Further Interrogatories (7) numbered 1 and 2, but must answer questions in Further Interrogatories (7) numbered 3 and 4 on or before November 15, 1950.

On October 12, 1950, the court ruled that defendant, United Construction Workers, Affiliated With United Mine Workers of America, must answer questions in Further Interrogatories (8) numbered 87, 88 and 89 on or before November 15, 1950; that defendant, District 50, United Mine Workers of America, must answer the questions in Further Interrogatories (9) numbered 89, 90 and 91 on or before November 15, 1950; and that defendant United Mine Workers of America, must answer questions in Further Interrogatories (10) numbered 118, 119, 120, 121 and 122 on or before November 15, 1950.

On October 12, 1950, plaintiff submitted to the court and to counsel for defendants further interrogatories addressed respectively to defendant, United Construction Workers, Affiliated with United Mine Workers of America, page 194 } said further interrogatories being now designated "Further Interrogatories (11)"; further interrogatories addressed to defendant, District 50, United Mine Workers of America, said further interrogatories being now

designated "Further Interrogatories (12)"; and further interrogatories addressed to defendant, United Mine Workers of America, said further interrogatories being now designated "Further Interrogatories (13)", and counsel for all said defendants accepted said further interrogatories which were filed in court on October 18, 1950.

On October 12, 1950, the court continued argument and rulings upon said Further Interrogatories (11), Further Interrogatories (12) and Further Interrogatories (13) until three o'clock p. m., October 24, 1950; it being understood that counsel for all parties at all times reserve all exceptions to all rulings of the court adverse to any party entitled to exception; and subject to their aforesaid exceptions the defendants filed their answers to said interrogatories (11), (12) and (13) on November 15, 1950.

HAROLD F. SNEAD

11/28/50.

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Received and filed Jan. 11, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By L. C. M., D. C.

**MOTION FOR AN ORDER ALLOWING DEFENDANTS  
TO AMEND THEIR GROUNDS OF DEFENSE  
BY ADDING ADDITIONAL DEFENSES.**

Now come the defendants and move the Court for an order allowing them to amend their Grounds of Defense by adding thereto the following additional defenses:

*Ninth Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they are the result of the exercise by the defendants of rights granted by the Constitution and laws of the United States, including the Norris-LaGuardia

Act, 29 U. S. A. Sections 101-110, 113-115, the Clayton Act, 15 U. S. C. A. Sections 12-13, 14-21, 22-27, 29 U. S. C. A. Section 52, and the Labor Management Relations Act of 1947, 29 U. S. C. A. Section 141-197.

*Tenth Defense.*

To allow a recovery by the plaintiff would deprive the defendants of liberty and property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

page 198 } UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA; DISTRICT  
50, UNITED MINE WORKERS OF  
AMERICA; AND UNITED MINE  
WORKERS OF AMERICA, Defendants.  
By Counsel.

WILLIAMS, MULLEN, POLLARD & ROGERS  
By FRED G. POLLARD  
Counsel.

. . . . .

page 200 }

In the Circuit Court of the City of Richmond.

Jan. 15, 1951

. . . . .

ORDER.

This day came the parties by counsel, and upon consideration of the motion of the defendants filed herein for an order allowing them to amend their Grounds of Defense by adding additional defenses, and the arguments of counsel, it is

ADJUDGED AND ORDERED that the said motion be, and it is hereby, granted, and it is further

ADJUDGED AND ORDERED that the Grounds of Defense of the defendants be, and they are hereby, amended by adding the following additional defenses:

*Ninth Defense.*

The plaintiff's injuries and damages, if any, are not actionable for the reason that they are the result of the exercise by the defendants of rights granted by the Constitution and laws of the United States, including the Norris-LaGuardia Act, 29 U. S. C. A. Sections 101-110, 113-115, the Clayton Act, 15 U. S. C. A. Sections 12-13, 14-21, 22-27, 44; 29 U. S. C. A. Section 52, and the Labor Management Relations Act of 1947, 29 U. S. C. A. Sections 141-197.

page 201 }

*Tenth Defense.*

To allow a recovery by the plaintiff would deprive the defendants of liberty and property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Enter.

HAROLD F. SNEAD

1/15/51.

. . . . .

page 202 }

. . . . .

Received and filed Jan. 17, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

**FURTHER ANSWER OF LABURNUM CONSTRUCTION  
CORPORATION TO SUMMONS OF THE DEFEND-  
ANTS TO ANSWER INTERROGATORIES.**

For further answer to the summons directed by the Defendants to the Plaintiff, Laburnum Construction Corporation, to answer certain interrogatories filed in the Clerk's Office of the Circuit Court of the City of Richmond, Plaintiff answers and says:

14. Pursuant to the request of the Defendants that the Plaintiff make a further and more complete answer to Question No. 14 in the interrogatories filed by the Defendants in said Clerk's Office, the Plaintiff makes this further and supplemental answer.

Prior to October 28, 1948, Laburnum Construction Corporation was advised by representatives of Island Creek Coal Company and Pond Creek Pocahontas Company that they wished Laburnum Construction Corporation to handle the building program which those companies had in West Virginia. This program included the construction of stores, a lunch room, a beauty shop, a warehouse, churches, theaters, a community house and other work.

page 203 } Laburnum Construction Corporation was requested to prepare plans and specifications for the work covered by this building program and to submit them to representatives of Island Creek Coal Company and Pond Creek Pocahontas Company for approval, together with estimates of the cost of the work.

Under date of September 3, 1948, C. V. White, Real Estate Agent of Island Creek Coal Company and Pond Creek Pocahontas Company, wrote a letter to Laburnum Construction Corporation regarding this building program. A copy of this letter is attached hereto.

On or about October 28, 1948, Pond Creek Pocahontas Company awarded to Laburnum Construction Corporation a contract dated October 28, 1948, for the construction of a Coal Preparation Plant at the No. 1 Mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky.

When the contract dated October 28, 1948, was awarded to Laburnum Construction Corporation, R. E. Salvati, President of Pond Creek Pocahontas Company, Island Creek Coal Company and various associated companies (at that time Mr. Salvati was Vice-President in charge of operations of Pond Creek Pocahontas Company, Island Creek Coal Company and various associated companies) said that Pond Creek Pocahontas Company had considerable work to be performed in Breathitt County, Kentucky, in addition to the construction of the Coal Preparation Plant at the No. 1 Mine. This additional work included, among other things, 200 Houses, 10 Supervisors' Houses, one large Store, one Service Store, a Change House, a Lamp House, a Superintendent's Office, Machine Shops, a Warehouse Building, a Sand House, a Church, a Schoolhouse, a water system and concrete foundations for a Coal Preparation Plant at the proposed No. 2 Mine (new

called No. 3 mine) of Pond Creek Pocahontas Company. The estimated cost of this additional work was \$617,500.00.

Mr. Salvati discussed this additional work with page 204 } Laburnum Construction Corporation and it was agreed that Laburnum Construction Corporation would handle same on a basis of cost plus a fee of five per cent. This was a part of the consideration which Laburnum Construction Corporation would receive for constructing the Coal Preparation Plant at the No. 1 Mine under the contract dated October 28, 1948. Mr. Salvati stated that Pond Creek Pocahontas Company felt obligated to have Laburnum Construction Corporation perform this additional work because of the extremely difficult conditions under which the Coal Preparation Plant would be constructed. The additional work, for the most part, would be constructed under much more favorable conditions.

Pursuant to the agreement with Mr. Salvati regarding this additional work in Breathitt County, Kentucky, Pond Creek Pocahontas Company from time to time awarded certain other contracts and jobs to Laburnum Construction Corporation. One of these contracts was a contract between Laburnum Construction Corporation and Spring Fork Development Company (a wholly owned subsidiary of Pond Creek Pocahontas Company) dated December 15, 1948, for the construction of 25 dwellings.

A full statement regarding this additional work in Breathitt County, Kentucky, is set out in a previous answer filed by Laburnum Construction Corporation to Question No. 14.

As alleged in the Notice of Motion for Judgment, the said contracts dated October 28, 1948, and December 15, 1948, were terminated by Pond Creek Pocahontas Company and Spring Fork Development Company, respectively, on August 4, 1949. Between September 6, 1947, and August 4, 1949, Pond Creek Pocahontas Company, Island Creek Coal Company and their associated or subsidiary companies awarded to Laburnum Construction Corporation twelve separate contracts for construction work in the States of Kentucky and page 205 } West Virginia amounting to a total of more than \$650,000.00. Laburnum Construction Corporation earned a substantial net profit on these jobs. Pond Creek Pocahontas Company and Island Creek Coal Company, though separate corporations, have a common management.

Since August 4, 1949, Laburnum Construction Corporation has submitted proposals to Pond Creek Pocahontas Company and Island Creek Coal Company for work in West Virginia and Kentucky. None of these proposals, however, have been

accepted. A statement regarding these proposals is as follows:

(a) On September 5, 1949, Laburnum Construction Corporation submitted a proposal to Pond Creek Pocahontas Company to furnish labor and materials necessary to install a heating plant in connection with the Coal Preparation Plant at the No. 1 Kentucky Mine for the lump sum of \$25,595.00.

Laburnum Construction Corporation was not awarded a contract for this work.

(b) On September 7, 1949, Laburnum Construction Corporation submitted a proposal to Pond Creek Pocahontas Company to furnish labor and materials necessary to construct a Store, two 6-room frame dwellings and thirteen 5-room frame dwellings at Evanston, Kentucky, near the No. 1 Kentucky Mine in Breathitt County, Kentucky, all for the lump sum of \$205,047.00. The proposal provided that Pond Creek Pocahontas Company would carry and maintain adequate insurance protecting the work and materials at the job sites against loss, damage or destruction resulting from vandalism and acts of mischief, malicious or otherwise, and that this insurance would be for its benefit as well as for the benefit of Laburnum Construction Corporation. The proposal further provided that if a contract should be awarded to Laburnum Construction Corporation, it intended to use craft labor employees affiliated with the A. F. of L.

Laburnum Construction Corporation was not awarded a contract for this work.

(c) On September 29, 1949, Laburnum Construction Corporation submitted a proposal to Pond Creek Pocahontas Company to construct an Addition to a Store Building at Bartley, West Virginia, on a basis of cost plus a fee of eight per cent. Laburnum Construction Corporation estimated that the cost of this work would amount to \$28,877.00. There were, however, no drawings and specifications for this job.

Laburnum Construction Corporation also offered to perform this work on a lump sum basis of \$28,877.00; provided, however, drawings and specifications should be prepared so that there would be no misunderstanding as to what the price included.

page 206 } Laburnum Construction Corporation did not receive a contract for the work covered by that proposal.

(d) On or about November 4, 1949, Laburnum Construction Corporation submitted a proposal to Island Creek Coal Company to construct a Community Building near Ragland or Delbarton, West Virginia, for a lump sum of \$94,359.00.

Laburnum Construction Corporation was thereafter advised that this proposal would not be acted on because Island Creek Coal Company had decided to make considerable changes in the building and that it would be necessary to revise the drawings and specifications.

(e) On November 23, 1949, Laburnum Construction Corporation submitted another proposal to Pond Creek Pocahontas Company to construct an Addition to the Store at Bartley, West Virginia, for the lump sum of \$37,308.00. The work to be performed was considerably different from the work covered by the proposal submitted by Laburnum Construction Corporation dated September 29, 1949.

As of November 23, 1949, Laburnum Construction Corporation was in the course of constructing a Boiler Plant at Bartley, West Virginia, for Pond Creek Pocahontas Company. Representatives of United Mine Workers of America on or about November 10, 1949, protested to representatives of Pond Creek Pocahontas Company against Pond Creek Pocahontas Company permitting Laburnum Construction Corporation to construct the Boiler Plant with A. F. of L. labor. These representatives of United Mine Workers of America said that all work in, near or in connection with coal mines must be performed by workers who were members of United Mine Workers of America. They advised the representatives of Pond Creek Pocahontas Company that unless this matter was straightened within five days, the miners employed by Pond Creek Pocahontas Company at the No. 1 Tipple at Bartley, West Virginia, would stop work.

Laburnum Construction Corporation did not receive a contract for the construction of the Addition to the Store at Bartley, West Virginia, in accordance with the proposal dated November 23, 1949.

(f) On December 29, 1949, Laburnum Construction Corporation submitted a proposal to Pond Creek Pocahontas Company to construct a proposed Service Station at Bartley, West Virginia, on a basis of cost plus eight per cent. It was estimated that the cost of this work would amount to \$5,596.00.

Laburnum Construction Corporation did not receive a contract for the work covered by its proposal dated December 29, 1949.

(g) On or about January 16, 1950, Laburnum Construction Corporation submitted a proposal to Island Creek Coal Company to construct a Main Office Building, near Ragland or Delbarton, West Virginia, for the lump sum of \$28,012.00.

Laburnum Construction Corporation did not receive a contract for this work. A contract for same was awarded by Island Creek Coal Company

to R. H. Hamill Company, of Huntington, West Virginia. The work of R. H. Hamill Company on this job was interrupted by representatives of District 50 and United Construction Workers, and R. H. Hamill Company was unable to complete same. This work was taken over and completed by Frederick Engineering Company, a contractor which had an agreement with United Construction Workers.

(h) During April and May, 1950, Laburnum Construction Corporation was preparing and had substantially completed an estimate of the cost of constructing a Church and a Recreation Building for Island Creek Coal Company near Ragland or Delbarton, West Virginia. Laburnum Construction Corporation intended to submit a proposal for this work during May, 1950.

Just prior to the time when Laburnum Construction Corporation intended to submit this proposal, it learned that the work of R. H. Hamill Company in connection with the Office Building near Ragland or Delbarton, West Virginia, had been interrupted by representatives of District 50 and United Construction Workers. In view of this, Laburnum Construction Corporation decided that, before submitting a proposal for the Church and the Recreation Building, it should investigate what had occurred in connection with the work of R. H. Hamill Company on the Office Building.

On May 15, 1950, a representative of Laburnum Construction Corporation went to the office of A. D. Hunter, Regional Director of District 50 and United Construction Workers, in Pikeville, Kentucky. Mr. Hunter was informed that Laburnum Construction Corporation wished to submit a proposal to construct a Church Building and a Recreation Building for Island Creek Coal Company near Ragland or Delbarton, West Virginia, and that it would like to have an understanding with Mr. Hunter that if Laburnum Construction Corporation obtained a contract for that work, neither United Construction Workers nor District 50 would interfere with same and intimidate the workers of Laburnum Construction Corporation as was done in the case of the work in Breathitt County. Mr. Hunter was informed that if Laburnum Construction Corporation performed the work near Ragland or Delbarton, it would do so with A. F. of L. labor.

Mr. Hunter said that he would not agree to this; that Mingo County, West Virginia, was the territory of  
 page 208 } United Construction Workers; and that the A. F.  
 of L. had no business coming in there. Mr. Hunter said that if Laburnum Construction Corporation obtained additional work in Mingo County, West Virginia, Paintsville,

Kentucky, or elsewhere in his area, he would attempt to organize the laborers and other workers of Laburnum Construction Corporation as was done in connection with the work in Breathitt County, Kentucky, and that Laburnum Construction Corporation would be expected to make an agreement with United Construction Workers.

Mr. Hunter was also asked about the work of R. H. Hamill Company on the Office Building near Ragland or Delbarton, West Virginia. He confirmed the fact that representatives of District 50 and United Construction Workers had stopped the work of R. H. Hamill Company on that job; that R. H. Hamill Company had not continued with the work; and that the job had been taken over by Frederick Engineering Company which had an agreement with United Construction Workers.

On the following day, May 16, 1950, a representative of Laburnum Construction Corporation reported to Mr. R. E. Salvati, President of Island Creek Coal Company and Pond Creek Pocahontas Company, the above conversation with Mr. A. D. Hunter which occurred on May 15, 1950.

Mr. Salvati was told that it would not be possible for Laburnum Construction Corporation to construct the Church and the Recreation Building near Ragland or Delbarton, West Virginia, unless a sufficient number of guards should be brought in to protect the work while under construction and also to protect the employees of Laburnum Construction Corporation while performing the work. It was pointed out to Mr. Salvati that unless a sufficient number of guards were on hand, the employees of Laburnum Construction Corporation would be driven from their work as was done in the case of the job in Breathitt County, Kentucky, and that the work under construction might be destroyed by fire or  
page 209 } dynamite. The representative of Laburnum Construction Corporation said that it was not possible to estimate the cost involved in furnishing a sufficient number of guards to protect the work, and asked Mr. Salvati if Island Creek Coal Company would furnish the guards.

The representative of Laburnum Construction Corporation also informed Mr. Salvati that Laburnum Construction Corporation would not care to enter into a lump sum contract which it could not complete. He asked Mr. Salvati if Island Creek Coal Company would consider having Laburnum Construction Corporation perform that work on a cost-plus basis.

Mr. Salvati said that Laburnum Construction Corporation should not submit a proposal for the Church and Recreation Building if there was any question as to whether same could be completed by it. Mr. Salvati said that he would think

about the matter and would talk about it with Mr. J. D. Francis, Chairman of the Board of Island Creek Coal Company and Pond Creek Pocahontas Company, and that he would then let Laburnum Construction Corporation hear from him.

On May 18, 1950, Mr. R. E. Salvati wrote a letter to A. Hamilton Bryan, President of Laburnum Construction Corporation, suggesting that Laburnum Construction Corporation refrain from bidding on the Church Building and Recreation Building. A copy of this letter dated May 18, 1950, is attached hereto.

Under date of May 23, 1950, A. Hamilton Bryan wrote a letter replying to Mr. Salvati's letter of May 18, 1950. A copy of this letter is attached hereto.

Since May 18, 1950, the date of the letter from Mr. R. E. Salvati, President, referred to above, Laburnum Construction Corporation has not been invited by Island Creek Coal Company or Pond Creek Pocahontas Company or any of their associated or subsidiary companies to submit proposals to perform additional work.

page 210 } Laburnum Construction Corporation has been advised that it has not been invited by Island Creek Coal Company or Pond Creek Pocahontas Company or any of their associated or subsidiary companies to submit proposals to perform additional work because Island Creek Coal Company and Pond Creek Pocahontas Company could not be assured that Laburnum Construction Corporation would be able to complete a job which they might award to it at or near the coal mines; and for the further reason that, in the opinion of Mr. Salvati and the operating management of Island Creek Coal Company and Pond Creek Pocahontas Company, it was inadvisable to award work to Laburnum Construction Corporation because labor trouble might spread to the operation of the coal mines and to other work which Island Creek Coal Company and Pond Creek Pocahontas Company might be doing, and that because of this situation, they have felt it inadvisable to ask Laburnum Construction Corporation for bids on further work.

Since August 4, 1949, the date as of which the two contracts dated October 28, 1948, and December 15, 1948, were terminated, no contract for additional work has been awarded to Laburnum Construction Corporation by either Pond Creek Pocahontas Company or Island Creek Coal Company or their associated or subsidiary companies.

The Plaintiff is advised and believes that the actions of the Defendants herein caused the Plaintiff to lose the additional work in Breathitt County, Kentucky, amounting to a

sum in excess of \$600,000.00, which work it had been agreed would be performed by Laburnum Construction Corporation on a basis of cost-plus five per cent.

The Plaintiff is advised and believes that the actions of the Defendants herein further caused the Plaintiff to lose contracts for all the work on which it submitted proposals to Pond Creek Pocahontas Company or Island Creek Coal Company after August 4, 1949.

page 211 } The Plaintiff is advised and believes that the actions of the Defendants herein further caused Plaintiff to lose contracts for work in connection with the building program of Island Creek Coal Company and Pond Creek Pocahontas Company in West Virginia, which work it had been agreed Laburnum Construction Corporation would handle.

The business relationship and connection which Laburnum Construction Corporation had built up with Pond Creek Pocahontas Company and Island Creek Coal Company and their associated and subsidiary companies had resulted in substantial net profits to Laburnum Construction Corporation. This business relationship and connection would have continued to result in substantial profits to Laburnum Construction Corporation. The actions of the Defendants herein have completely destroyed this business relationship and connection. This has resulted in a large loss to Laburnum Construction Corporation.

#### LABURNUM CONSTRUCTION CORPORATION

By A. HAMILTON BRYAN, Pres.

I certify that a copy of the foregoing was delivered January 16, 1951, to Williams, Mullen, Pollard and Rogers by delivering a copy to Mr. Robert N. Pollard.

ARCHIBALD G. ROBERTSON

Counsel

page 212 } State of Virginia,  
City of Richmond, to-wit:

This day A. Hamilton Bryan personally appeared before me, Phyllis C. Burkey, a Notary Public in and for the City and State aforesaid in my City aforesaid and made oath that he is President and agent of Laburnum Construction Corporation and as such he is authorized to make this affidavit, and the said A. Hamilton Bryan further made oath that the mat-

ters and things stated in the foregoing Further Answer of Laburnum Construction Corporation to Summons of the Defendants to Answer Interrogatories are in all respects true and correct to the best of his information, knowledge and belief.

Given under my hand this 16th day of January, 1951.

My commission expires August 31st, 1951.

PHYLLIS C. BURKEY  
Notary Public

page 213 } ISLAND CREEK COAL COMPANY

Huntington, West Virginia

September 3, 1948

C. V. White  
Real Estate Agent

Laburnum Construction Corporation  
918 East Main Street  
Richmond, Virginia

Attention: Mr. A. Hamilton Bryan

Gentlemen:

*Re: Building Program*

Mr. Christie, Mr. Beattie, Mr. Saxe, Mr. Flint, and the writer discussed proposed Bartley Store, to replace one that burned recently. Mr. Beattie made a rough estimate of the cost, which I understand he will check and we will be advised within a few days. I am unable to give you the floor plan of this building at this time; but Mr. Flint expects to have it ready within a few days and we will forward it to you.

In connection with our building program, about which we have had considerable correspondence, I would like to have you keep in mind the priority for the completion of these buildings, which is as follows:

1. Bartley Store (mentioned above).
2. No. 15 Store. Floor plan for this building was furnished Mr. Beattie and we request that you prepare plans and speci-

fications and forward to Mr. Saxe, with copy to me, as soon as possible.

3. Club Lunch Room.
4. Beauty Shop.
5. Appliance Warehouse.

I will advise you later on the matter of Churches and Theaters. We are also drawing a floor plan for a Community House which will be approximately 64' wide and 100' in length, with a basket-ball court, bowling alley, and other recreational facilities. All of the above buildings will be at Holden or Pigeon Creek with the exception of Bartley Store.

As pointed out above, Bartley Store and No. 15 page 214 } Store have first priority, and we would like to have them completed before the first of the year. As soon as agreement can be reached on the above, we would like for you to be ready to put additional crews on these projects.

I am suggesting that you send the plans, pending final approval, to Mr. Saxe in order that time may be saved.

Very truly yours,

/s/ C. V. WHITE  
C. V. WHITE  
Real Estate Agent

CVW:ss

cc: Mr. J. A. Sax  
Holden, W. Va.

page 215 } ISLAND CREEK COAL COMPANY

Huntington  
West Virginia

May 18, 1950

R. E. Salvati,  
President

Mr. A. Hamilton Bryan, President  
Laburnum Construction Company  
Richmond, Virginia

Dear Mr. Bryan:

I have seriously considered your bidding on the recreation building and church at Rockhouse. Since I talked to you, I find that we have about four or five other reputable and well

qualified concerns, which have contracts with the United Mine Workers, that are going to bid. In view of this situation, it seems to me that it would be better that you refrain from bidding because of the facts outlined to me in our conversation Monday evening.

I regret that these circumstances prevail, but I believe it is better to go along with the suggestion which I have outlined.

I was glad to have an opportunity to talk and be with you.

With kindest regards.

Sincerely,

/s/ R. E. SALVATI

RES:es

page 216 } LABURNUM CONSTRUCTION CORPORATION

918 East Main Street  
Richmond, Virginia  
P. O. Box 1234

May 23, 1950

Mr. R. E. Salvati, President  
Island Creek Coal Company  
Huntington, West Virginia

Dear Mr. Salvati:

I thank you for your letter dated May 18, 1950, advising that you have seriously considered our bidding on the Recreation Building and Church at Rockhouse, and that, because of the facts which I outlined to you last Tuesday evening, you think that it would be better for us to refrain from bidding.

I am sorry to say that the United Construction Workers appear determined to try to prevent us from performing and completing work for you in the coal field unless we enter into an agreement with that organization. As you know, we are not in a position to do this.

We also regret that these circumstances prevail. We have valued highly the connections established between our company and your organization, and had hoped that from time to time we would be able to perform additional work for you.

May I take this opportunity to thank you personally for the splendid cooperation which your organization has always given to us in connection with our work as well as for the cordial relations which have been maintained throughout.

I hope that in the future circumstances will be changed so that we can again undertake to perform some of your work

With kindest regards, I am

Sincerely yours,

/s/ A. HAMILTON BRYAN  
President

AHB/eos

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page 220 }

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#### ORDER FILING AFFIDAVIT.

This day came Fred G. Pollard and tendered his affidavit in which he made oath that he is the attorney and agent of the defendants in the above entitled action; that there are, the defendants verily believe, in the possession of A. Hamilton Bryan certain books of account and certain periodic audit statements showing the amount of work performed by the plaintiff in the last ten years and for whom such work was performed; and the defendants desire that a summons be issued pursuant to the provisions of Section 8-301, Code of Virginia 1950, requiring A. Hamilton Bryan, president of plaintiff corporation to produce said documents, it is

ORDERED that said affidavit be, and the same hereby is, filed.

Enter:

HAROLD F. SNEAD.

1/23/51

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. . . . .

AFFIDAVIT

State of Virginia:

City of Richmond: to-wit:

This day in the City of Richmond Fred G. Pollard personally appeared before me, Florence Wood, Notary Public in and for the City aforesaid, State of Virginia, and made oath that he is the attorney and agent of the defendants in the above entitled action; that there are, the defendants verily believe, in the possession of A. Hamilton Bryan certain books of account and certain periodic audit statements showing the amount of work performed by the plaintiff in the last ten years and for whom such work was performed; and the defendants desire that a summons be issued pursuant to the provisions of Section 8-301, Code of Virginia 1950, as amended, requiring A. Hamilton Bryan, President of plaintiff corporation, to produce documents herein referred to as the defendants verily believe that said documents are in the possession of said A. Hamilton Bryan inasmuch as he has testified that the plaintiff has done over the last ten years "over \$20,000,000 worth of work".

FRED G. POLLARD,  
Agent for Company.

Filed Jan. 23, 1951.

Teste:

WILBUR J. GRIGGS, Clerk.

BY E. M. ERWARDS, D. C.

. . . . .

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. . . . .

ORDER FILING AFFIDAVIT.

This day came Fred G. Pollard and tendered his affidavit in which he made oath that he is the attorney and agent of the defendants in the above entitled action; that there are, the defendants verily believe, in the possession of A. Hamilton Bryan certain income tax returns for the states of Virginia, West Virginia and Kentucky showing the income of the

plaintiff for the years 1947, 1948 and 1949, as well as books of accounts and certain periodic audit statements showing the amount of net profits on the work performed by the plaintiff in the years 1947, 1948 and 1949, for Island Creek Coal Company and Pond Creek Pocahontas Coal Company, and the defendants desire that a summons be issued pursuant to the provisions of Section 8-301, Code of Virginia 1950, requiring A. Hamilton Bryan, president of plaintiff corporation to produce said documents, it is

ORDERED that said affidavit be, and the same hereby is, filed.

Enter.

HAROLD F. SNEAD

1/24, 51.

page 224 }

#### AFFIDAVIT.

State of Virginia:

City of Richmond: to-wit:

This day in the City of Richmond Fred G. Pollard personally appeared before me, Florence Wood, a Notary Public in and for the City aforesaid, State of Virginia, and made oath that he is the attorney and agent of the defendants in the above entitled action; that there are, the defendants verily believe in the possession of A. Hamilton Bryan, certain Income Tax returns for the States of Virginia, West Virginia, and Kentucky showing the income of the plaintiff for the years 1947, 1948, and 1949, as well as books of account and certain periodic audit statements showing the amount of net profits on the work performed by the plaintiff in the years 1947, 1948, and 1949 for Island Creek Coal Company and Pond Creek Pocahontas Coal Company; and the defendants desire that a summons be issued pursuant to the provisions of Section 8-301. Code of Virginia 1950, as amended, requiring A. Hamilton Bryan, President of plaintiff corporation, to produce documents herein referred to as the defendants verily believe that said documents are in the

possession of said A. Hamilton Bryan insamuch as he has testified that the plaintiff has earned a net profit of over \$28,000 on such work in such years.

FRED G. POLLARD,  
Agent for Company.

Filed Jan. 24, 1951.

Teste:

WILBUR J. GRIGGS, Clerk.  
By E. M. EDWARDS, D. C.

. . . . .

page 227 }

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ORDER.

This day came the defendants District 50, United Mine Workers of America, and United Construction Workers affiliated with United Mine Workers of America by counsel and moved the Court for an order permitting them to file their amended answers to plaintiff's Interrogatory No. 85 addressed to the defendant, District 50, United Mine Workers of America, and plaintiff's Interrogatory No. 83 addressed to United Construction workers affiliated with United Mine Workers of America on the ground that the answers heretofore filed by these defendants to the aforementioned Interrogatories contain typographical errors.

And upon consideration of the said motion and the arguments of counsel for plaintiff and defendants it is

ADJUDGED AND ORDERED that the said amended answers be, and the same are hereby, filed.

HAROLD F. SNEAD.

24 day of January, 1951.

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ANSWER OF DISTRICT 50, UNITED MINE WORKERS  
OF AMERICA TO INTERROGATORY 85 AD-  
DRESSED TO UNITED MINE WORKER OF  
AMERICA TO AMEND AND CORRECT THE AN-  
SWER HERETOFORE MADE TO QUESTION 85.

85. As to the National Director of United Construction Workers, no; as to the Comptroller of United Construction Workers, no; as to Thomas Raney, no; as to Thomas Davis, no; as to David Hunter, yes; as to William O. Hart, yes; as to H. J. Robinson, no.

(a) Chairman, Organizing Committee, District 50, United Mine Workers of America.

(b) Answered.

(c) During all periods inquired about.

(d) No set rules to govern. It is a matter of administrative practice.

DISTRICT 50,  
UNITED MINE WORKERS OF  
AMERICA

By JOHN V. JOHNSON

Assistant to the Chairman, Organizing  
Committee, District 50, United Mine  
Workers of America,  
In Charge of Files and Records

Filed Jan. 24, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

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ANSWER OF UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE WORKERS OF  
AMERICA TO INTERROGATORY 83 ADDRESSED  
TO IT TO AMEND AND CORRECT THE ANSWER  
HERETOFORE MADE TO QUESTION 83.

83. As to the National Director of United Construction Workers, no; as to the Comptroller of United Construction Workers; no; as to Thomas Raney, no; as to Thomas Davis, no; as to David Hunter, yes; as to William O. Hart, yes; as to H. J. Robinson, no.

(a) Chairman, Organizing Committee, District 50, United Mine Workers of America.

(b) Answered.

(c) During all periods inquired about.

(d) No set rules to govern. It is a matter of administrative practice.

UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA

By JOHN V. JOHNSON

Assistant to the Director United Construction Workers, affiliated with United Mine Workers of America,  
In Charge of Files and Records

Filed Jan. 24, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

page 236 }

ORDER.

This day came the parties by counsel, and the defendants by counsel having tendered their Motion for Mistrial to the Court, it is accordingly

ADJUDGED AND ORDERED that the said Motion be, and it is hereby, filed.

HAROLD F. SNEAD

29 day of January, 1951.

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. . . . .

Filed Jan. 29, 1951.

Teste :

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

## MOTION FOR MISTRIAL.

Now come the defendants separately and severally and jointly and move the court to discharge the jury and to declare a mistrial in this cause, and for grounds of this motion assign the following separately and severally:

(1) Counsel for the plaintiff has engaged in highly prejudicial, inflammatory, poisonous and false argument to the jury injected for the purpose of prejudicing the jury and piling up punitive damages as a part of the verdict sought by the plaintiff.

On Friday, January 26, 1951, near the conclusion of these proceedings, counsel for plaintiff used this language in the presence and hearing of the jury:

"They (referring to the defendants, United Construction Workers and the Mine Workers) are an outlaw organization. I state that. They are outlawed under the Taft-Hartley Act. I will talk a little law on that."

page 238 } (2) Immediately preceding the utterance of  
Counsel for the plaintiff, made the basis of  
Ground No. (1), Counsel for plaintiff made the following  
statement in the presence and hearing of the jury:

"I think he has a right to say it, your Honor. He (referring to Mr. Mullen, Counsel for Defendants) asked for it, and he (the witness, A. Hamilton Bryan) gave it to him."

(3) At or near the close of the day's proceedings in this cause on January 26, 1951, the question of adjournment to Monday, January 29, 1951, was under consideration. Counsel for the plaintiff used the following language in the presence of and in the hearing of the jury.

"I was going to say I think that is all right because they want it to go over until Monday anyway, you see, to keep Mr. Bryan on the stand."

And further in reply to Mr. Mullen's question as to whether plaintiff's counsel would want it to go over, plaintiff's counsel replied:

"Not if I were getting it like you are."

Defendants separately and severally and jointly assign as additional grounds for this motion to discharge the jury and declare a mistrial the statements made by A. Hamilton Bryan, witness for the plaintiff, and President of plaintiff corporation, while on the witness stand testifying as a witness as follows, to-wit:

(4) In response to the following question by Counsel for defendants:

page 239 } "Q. You followed the identical same plan in Hopewell to block off the Construction Workers, who had a perfect right to organize your unorganized labor, and you followed the same thing in Kentucky. Instead of sitting down and talking with them to see if you could reach an agreement, you immediately set out to fight them, didn't you, and to block them?"

The witness, A. Hamilton Bryan, made answer:

"A. United Construction Workers and the Mine Workers are outlaw organizations when you come down to it."

And to this statement of the witness, Counsel for the defendants then and there in open court in the presence and hearing of the jury stated:

"I object to that, if Your Honor please."

(5) Defendants charge that the statement of the witness, A. Hamilton Bryan, just quoted in the preceding *gound* hereof, was not responsive to the question asked him, was entirely voluntary, was highly inflammatory and prejudicial, was for the purpose of injecting poison and prejudice against the defendants in this cause, and that said statement was false and also injected for the purpose of wrongfully and illegally

prejudicing the jury against the defendants and piling up a verdict for punitive damages.

(6) The witness, A. Hamilton Bryan, President of the plaintiff, and while testifying as a witness for the plaintiff, was asked by Counsel for the defendants the following question:

"You went out to Kentucky on the 19th, and you didn't communicate with Mr. Hart. Did you ask Mr. Delinger what had been done?"

page 240 } And to said question the aforesaid witness, A. Hamilton Bryan, made answer as follows:

"Mr. Mullen, I would just as soon negotiate with Mr. Hart (referring to Mr. Hart, the District Representative of United Construction Workers affiliated with United Mine Workers of America and District Representative of District 50, United Mine Workers of America) as I would negotiate with a robber that threatened to rob my house."

And defendants do herewith and hereby charge that the quotation just made was not in response to any question by Counsel for defendants, was highly prejudicial, poisonous and inflammatory, and was injected for the purpose of piling up a verdict for punitive damages against the defendants.

(7) Defendants charge and represent to this Court that the foregoing remarks of both Counsel for plaintiff and of the witness, A. Hamilton Bryan, are each of such highly prejudicial, poisonous and inflammatory nature that the poison and prejudice injected in this cause thereby cannot be removed by any direction or instruction of this Honorable Court, and the only way these defendants can obtain justice and a fair and impartial trial is for this Court to order the jury discharged and to declare a mistrial in this cause.

(8) Defendants allege that the conduct hereinabove set forth, as a basis of grounds (1) through (7) inclusive, occurred near the close of the proceeding on January 26, 1951, and were cumulative of a course of conduct which had been indulged in by Counsel for plaintiff and by the witness, A. Hamilton Bryan, from the beginning of the testimony of the witness up to and including the occurrences hereinabove listed, said prior statements and testimony being as follows, to-wit:

When Counsel for defendants asked the witness, A. Hamilton Bryan, the following question:

"Q. You were not told it was because of any of the difficulties you had already had there, were you?"

He made answer as follows:

"A. No, we were not given any reason. We, frankly, conditioned the bid in certain ways that I think were objectionable to Pond Creek. For one thing, we said that we expected them to keep those roads in passable condition so we could get in and out, and I don't think they liked that very much.

"For the second thing, we asked that they provide builder's risk insurance with extended coverage, which would protect the buildings against loss or destruction from malicious mischief or acts of vandalism. That was put in there purposely in order to get some protection in case the United Construction Workers and that crowd should come in there and burn the building down."

(9) During the examination of the witness, A. Hamilton Bryan, President of the Plaintiff, by Mr. Archie G. Robertson, Attorney for the Plaintiff, on January 23, 1951, the aforesaid attorney made the following statement in the presence and hearing of the jury:

"We are suing here in all earnestness and good faith for the biggest lawsuit that I personally have ever been in."

And the defendants allege that the aforesaid statement of counsel was wholly without any evidence in the cause to justify this statement.

page 242 } (10) During the direct examination of the witness, A. Hamilton Bryan, President of the Plaintiff corporation, by Mr. Archie G. Robertson, Counsel for Plaintiff, a colloquy arose when defendants' counsel made objection as follows:

"Colonel Harris: We object to the witness reading from a document. I notice he keeps looking at the document and then turning the pages."

During the aforesaid colloquy Mr. Robertson, the aforesaid Counsel for Plaintiff in the presence and hearing of the jury made the following statement:

"It seems to me, your Honor, that the real purpose of my friend here is to break in on this story and destroy the effectiveness of the testimony."

And the defendant alleges that the purpose imputed to counsel for defendant was not the real purpose of counsel and the statement so made was false and highly prejudicial.

(11) During the direct examination of the witness, A. Hamilton Bryan, President of the Plaintiff, by Counsel for Plaintiff, on January 24, 1951, counsel for defendant made the following objection:

"Mr. Mullen: If your Honor please, if the only part relevant is the telephone number, it is improper to put in a whole newspaper in evidence in the record."

Whereupon, Mr. Robertson, Counsel for Plaintiff, in the presence and hearing of the jury made the following statement:

"Mr. Robertson: If your Honor please, I brought it here -- of course, if I had brought one sheet they would have said that looked might fishy."

(12) During the course of the direct examination of the witness A. Hamilton Bryan, President of the Plaintiff, Counsel, Mr. Fred G. Pollard, objected to a question by counsel for Plaintiff, which objection the court then and there overruled. Whereupon, the following occurred:

"Mr. Robertson: You ought to go to night school Freddie."

"Mr. Mullen: We object to a remark like that.  
page 243 } We are trying to facilitate the case.

"The Court: The jury will disregard sidebar remarks."

And the defendant alleges that the personal remark about Mr. Fred Pollard, one of the defendants' counsel, was highly prejudicial and was made for the purpose of intimating to the jury any further statement or argument made in their presence and hearing by Mr. Fred Pollard was not worthy of belief or consideration by them because he was an ignorant lawyer and needed to go to night school.

And defendant further alleges that the remark was false and unjustified for the reason that Honorable Fred Pollard

has already gone to Law School and received his LL.B. degree from the Law School of the University of Virginia during the year 1942, and defendants further allege that said Law School has a high reputation not only in the State of Virginia, but among educated and experienced lawyers throughout the boundaries of the United States.

(13) During the course of the cross examination of the witness, A. Hamilton Bryan, by Mr. Mullen, Attorney for the defendants, he asked the witness the following question:

"Q. By 'lay off', he meant recognition of the A. F. of L. by U. C. W.?"

"A. I don't see what you could say about that, because United Construction Workers certainly didn't recognize the A. F. of L. at Wheelright when they went there with 200 or 300 men and broke up a job."

And defendants allege that the quoted answer was made in order to arouse prejudice against the defendants, and particularly against United Construction Workers, and was the gratuitous introduction of a transaction which was not a part of the transactions complained of by the Plaintiff in its Notice of Motion for Judgment.

page 244 } (14) During the course of the cross examination of the witness, A. Hamilton Bryan, President of the Plaintiff, said witness disregarded the rulings of the Court, for instance, Counsel for the plaintiff objected to a question by Mr. Mullen whereupon the following proceedings were had:

"Q. Would you have done it?"

"Mr. Robertson: If your Honor Please, that is getting right into the realm of speculation. You can get into all sorts of things."

"The Court: I will sustain the objection."

"The Witness: We were trying our best to cooperate with the Paintsville Local."

"The Court: I sustained the objection."

"The Witness: To try to have friendly relations."

"Colonel Harris: Will your Honor exclude that statement made after you had ruled?"

"The Court: Gentlemen, the statement made by Mr. Bryan after the court sustained by objection should be disregarded by you."

(15) During the course of the cross examination of the witness, A. Hamilton Bryan, President of the Plaintiff, the following proceedings were had:

"Q. They were working there because they wanted a job, weren't they?

"A. Most of them had been working there since November, 1948. This was sometime in July, almost nine months, and there never had been any discussion, no trouble. Everything was going smoothly, as far as things could go on a job of that kind.

"Q. I am not asking you that question. I am asking you what chance was there that they would refuse when they were put on the spot by an employee of the company undertaking to say what union they must go in and presenting it to them at the direction of the boss of the job?

"A. Nobody was being put on the spot at all.

"Q. That is what you may call it.

"A. They were being given.

page 245 } "Mr. Robertson: If that is what you call it, it doesn't make it so. That is what you said.

"The Court: You gentlemen are even now.

"Mr. Mullen: That is a matter of inference for the jury.

"The Witness: Those laborers had sense enough to know that the United Construction Workers and the A. F. of L. people wouldn't work out very well together.

"Colonel Harris: Your Honor, will you exclude that statement as not responsive to any question?

"The Court: Gentlemen, I instruct you to disregard the last statement which was made by Mr. Bryan."

JAMES MULLEN  
CRAMPTON HARRIS  
Counsel for Defendants

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Virginia:

In the Circuit Court of the City of Richmond, Monday, the 12th day of February, 1951.

This day came the plaintiff and defendants, by counsel, and filed their stipulation in writing.

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### STIPULATION.

It is stipulated between the plaintiff and the defendants by their respective counsel that Pond Creek Pocahontas Company began to mine coal at its No. 1 mine at Evanston, Kentucky, during June, 1949, and that a substantial part of such coal was shipped by The Chesapeake and Ohio Railway Company from the place it was mined at Evanston, Kentucky, to points outside of the State of Kentucky during June and July, 1949.

ARCHIBALD G. ROBERTSON  
Counsel for Plaintiff  
GEO. E. ALLEN  
JAMES MULLEN  
Counsel for Defendants

Filed Feb. 12, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

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### INSTRUCTION NO. 1 A.

The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

"Section 336.130

(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-or-

ganization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

H. F. S.

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#### INSTRUCTION NO. 1 B.

The Court instructs the jury that the Revised Statutes of Kentucky provides:

"437.110 *Conspiracy: banding together for unlawful purpose.*

(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

H. F. S.

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#### INSTRUCTION NO. 2.

The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of United Construction Workers Division of District 50, United Mine Workers of America, or District 50, United Mine Workers of America, or

United Mine Workers of America without threats of violence or acts of violence against such men, or intimidation of such men by anyone to induce such men to join United Construction Workers.

H. F. S.

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### INSTRUCTION NO. 3.

The Court instructs the jury that United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America.

H. F. S.

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### INSTRUCTION NO. 4.

The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts in its officers and agents done within the scope of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were then also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them.

H. F. S.

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## INSTRUCTION NO. 5.

The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized.

H. F. S.

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## INSTRUCTION NO. 5-A.

The Court instructs the jury if you believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, Division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, then you will find for the plaintiff against the two defendants, District 50, United Mine Workers of America, and United Construction Workers, division of District 50, United Mine Workers of America, and assess plaintiff's damages in accordance with the instructions on damages.

And if you further believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's

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job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, and that at that time District 50, United Mine Workers of America, and United Construction Workers, Division of District 50, United Mine Workers of America, or either of them, were agents of United Mine Workers of America for the purpose of organizing workers in businesses other than the coal mining business, then you shall also find for the plaintiff against the defendant, United Mine Workers of America, and assess the plaintiff's damages in accordance with instructions on damages.

II. F. S.

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INSTRUCTION NO. 7.

The Court instructs the jury that while employees may, free from restraint or coercion by employers of their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, collectively and individually, strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

If you believe from the evidence that William O. Hart, was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America and for United Mine Workers of America within the scope of his authority, and if you believe from the evidence that while he was so acting he went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and if you believe from the evidence that he was then acting in furtherance of the business of all three defendants, and if you believe from the evidence that while so acting he, by intimidation, threats, acts of violence, or coercion, caused plaintiff's workmen to leave their job, and put them in such fear

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as to cause them to refuse to return to work thereafter, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instructions on damages.

H. F. S.

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INSTRUCTION NO. 8.

The Court instructs the jury if you believe from the evidence (1) that William O Hart was acting within the scope of his authority and employment and was acting for all the defendants for the purpose of "organizing the unorganized", and (2) that in furtherance of that purpose he was going about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force the workers on such jobs to join one of the Defendant unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the defendants, and (4) that in furtherance of this purpose Hart led men to plaintiff's job site in Breathitt County, for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees' wishes, and (5) that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to "sign up" with one of the defendant unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of forcing plaintiff to recognize one of the defendant unions or failing in that, forcing the plaintiff to get out of the territory, then defendants are liable to plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court.

H. F. S.

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INSTRUCTION NO. 9.

The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of

(1) Profits under its contract dated December 15, 1948, with Spring Fork Development Company, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(2) Profits the plaintiff might have realized from alleged promised cost plus 5% contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(3) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions; and

(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrong acts of the defendants or any of them

H. F. S.

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INSTRUCTION NO. 10.

The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and, (2) punitive damages.

(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company, Pond Creek Pocahontas Com-

pany and their subsidiaries or associates, if shown by the evidence; and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjectures and probable estimates does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damage has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty.

The plaintiff has a right to prove the nature of his his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

(2) Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or maliciously and with a design of injuring plaintiff in its business, or where the wrongful act is accompanied by insult, indignity, oppression, or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all of evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed. If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the dam-

ages allowed by way of compensation, but punitive damages must bear some relation to the injury and the cause thereof.

In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing any acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done.

H. F. S.

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INSTRUCTION "A"

The jury is instructed that:

Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this case.

H. F. S.

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INSTRUCTION "B"

The jury is instructed that:

The burden is upon the plaintiff to prove by a preponderance of the evidence all facts necessary to constitute a claim for damages against the defendants. And you may consider a fact established by the greater weight of the evidence as being proven by a preponderance of the evidence, but a greater number of witnesses for the proof of a fact does not necessarily constitute a preponderance of the evidence.

H. F. S.

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INSTRUCTION "C"

The jury is instructed that:

The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or

its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character.

H. F. S.

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#### INSTRUCTION "D"

The jury is instructed that:

In Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce plaintiff to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellow-men, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for the legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to

gain their ends, that is, use persuasive powers in a peaceful way.

H. F. S.

page 277 } INSTRUCTION "E"

The jury is instructed that:

If you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for the defendants.

H. F. S.

page 278 } INSTRUCTION "F-1"

The jury is instructed that:

Under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe that the plaintiff restrained or coerced such employees in the exercise of these rights, then the plaintiff acted unlawfully.

H. F. S.

page 279 } INSTRUCTION "J"

The jury is instructed that:

A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant.

(b) No damages can be awarded unless you also find that the damages were directly and proximately caused by the alleged wrongful acts of one or more of the defendants.

(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages. If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on the profits the plaintiff claims it would have earned.

(e) If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should not be included in the profits, if any, of the plaintiff then you must deduct such profits, if any, from the plaintiff's claim.

H. F. S.

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INSTRUCTION "M"

The jury is instructed that:

The plaintiff claims damage by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies. You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949, or was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date.

H. F. S.

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INSTRUCTION "O-2"

The jury is instructed that:

If you believe from the evidence in this case that none of the defendants, or any of their respective agents acting within the scope of their authority, have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

H. F. S.

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INSTRUCTION "P"

The jury is instructed that:

If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants.

H. F. S.

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INSTRUCTION "R"

The jury is instructed that:

None of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, Kentucky.

H. F. S.

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INSTRUCTION "S"

The jury is instructed that:

Any evidence introduced on behalf of plaintiff to the effect that any of the defendants has a bad reputation for failing to abide by the law in Eastern Kentucky is not to be considered as evidence that the defendants committed the specific wrongful acts alleged by the plaintiff.

H. F. S.

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INSTRUCTION NO. 1.

The Court instructs the jury it is unlawful to coerce, threaten or intimidate employees and thereby interrupt or destroy an employer's business. The law affords no protec-

tion for "striking" or "picketing" carried on by means of coercion, threats or intimidation.

Refused.

H. F. S.

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DEFENDANTS A.

The jury is instructed that:

Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this case, and the law of Kentucky includes the Constitution of the United States, the applicable Federal laws, the statutes of Kentucky and the decisions of the court of last resort of Kentucky.

Refused.

H. F. S.

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DEFENDANTS G.

The jury is instructed that:

None of the defendants can be held responsible or liable for any unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof.

Refused.

H. F. S.

page 288 }

DEFENDANTS H.

The jury is instructed that:

The defendants are not liable for any wrongful conduct of individuals unless they authorized, instructed or ratified that conduct. And no defendant is liable for the conduct of either of the other defendants unless it authorized, instructed or ratified that conduct. You cannot consider the declarations or

writings of any individuals to establish the fact of authorization, instruction or ratification of his conduct.

Refused.

H. F. S.

page 289 } DEFENDANTS I.

The jury is instructed that:

Neither the defendants nor any one of them can be held liable for any acts that may have been done unless it be clearly shown that what was done was done by their agents in accordance with their fundamental agreement of association, that is to say of their constitution.

Refused.

H. F. S.

page 290 } DEFENDANTS J.

The jury is instructed that:

A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant.

(b) No damages can be awarded unless you also find that the plaintiff was actually damaged; that the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants, and that such damage was intended by one or more of the defendants or could reasonably have been foreseen as a result of its wrongful conduct.

(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

(d) The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages. From its gross profits must be deducted all expenses of every kind (including taxes other than income taxes) properly chargeable to the earning of such gross profit. If you cannot deter-

mine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiffs net profits and you cannot award any damages based on the net profits the plaintiff claims it would have earned.

page 291 } (e) If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you must from the evidence determine with reasonable certainty the part of such work that Virginia Mechanical Corporation would have done and deduct such part from the plaintiff's claim. If you cannot do so, you cannot award any damages based on work the plaintiff claims it would have done.

(f) There is no evidence that the plaintiff had a reasonably assured gross earning capacity in Kentucky and West Virginia upon which you can award damages for future earnings based upon a gross profit of cost plus 5%.

(g) If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff.

Refused.

H. F. S.

Defendants offered another instruction designated "J" which was granted.

H. F. S.

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DEFENDANTS K.

The jury is instructed that:

The mere expectancy of a contract is not sufficient to justify recovery of alleged loss of profits therefrom. The plaintiff claims damages in the amount of \$27,125.00 representing the loss of gross profits in connection with approximately \$542,500.00 worth of work on a basis of cost plus a fee of 5% which the plaintiff claims Mr. Salvati had agreed to have the plaintiff perform. If you find that the defendants committed the acts complained of, and you further find that the plaintiff did not have an enforceable contract for this work, you cannot consider it as an item of damages.

If you believe that the work which the plaintiff claims would have been awarded to it has not been done or any part thereof has not been done, then you may not award damages with respect to any of such work which has not been done.

If you believe that any part of this work was let on bids, and if you further believe the plaintiff would have been awarded this work if it had bid on it and been the low bidder, then the plaintiff is not entitled to recover any damages for this item.

Refused.

H. F. S.

page 293 }

DEFENDANTS L.

The jury is instructed that :

The plaintiff claims damage in the amount of \$120,000.00 by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Coal Company, Island Creek Coal Company, and their associate and subsidiary companies, but the plaintiff has introduced no evidence of the alleged destruction of this business relationship and you cannot allow any recovery of damage for such destruction.

Refused.

H. F. S.

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DEFENDANTS N.

The jury is instructed that :

The plaintiff claims that its reputation has been damaged in the amount of \$100,000.00, but plaintiff has introduced no evidence of any damage to its reputation, and you cannot allow any recovery for damage to reputation.

Refused.

H. F. S.

page 295 }

## DEFENDANTS O.

The jury is instructed that :

There is no evidence in this case that any of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, and therefore you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

Refused.

H. F. S.

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## DEFENDANTS O-1.

The jury is instructed that :

If you believe from the evidence in this case that none of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

Refused.

H. F. S.

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## DEFENDANTS Q.

The jury is instructed that :

Any wanton, reckless or oppressive conduct of Hart or any person with him on the occasions complained of cannot be imputed to any of the defendants so as to authorize the award of any punitive damages against any of the defendants in the event you find for the plaintiff.

Refused.

H. F. S.

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. . . . .

Virginia:

In the Circuit Court of the City of Richmond, Saturday, the  
17th day of February, 1951.

. . . . .

This day came again the plaintiff and defendants, by counsel, and the jury sworn in this case again appeared in accordance with their adjournment on yesterday and having further consulted of a verdict, returned into Court with a verdict in the words and figures following, to-wit: "We, the Jury, on the issues joined, find for the plaintiff against all three defendants jointly and severally, and assess plaintiff's damages at \$275,437.19, representing \$175,437.19 compensatory damages, and \$100,000 punitive damages."

Thereupon the defendants, by counsel, moved the Court to withhold entering judgment on the verdict for a period of two weeks in order to give the defendants time to confer with its counsel in connection with any motions that it might desire to make as to the verdict; which motion the Court granted and the entry of judgment on the verdict of the jury is withheld until the further order of the Court.

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Virginia:

In the Circuit Court of the City of Richmond, Thursday, the  
1st day of March, 1951.

. . . . .

This day came again the plaintiff and defendants, by counsel, and thereupon the defendants, by counsel, filed herein their motion in writing to set aside the verdict of the jury heretofore rendered in this case, together with the grounds thereof; which motion the Court continued for argument to be heard thereon.

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. . . . .

Filed Mar. 1, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.MOTION TO SET VERDICT ASIDE AND GRANT  
NEW TRIAL.

Now come the defendants jointly and severally and move the Court to set aside the jury's verdict as contrary to the law and the evidence and to grant a new trial, and as grounds for their motion assign the following:

(1) The refusal of the Court to instruct the jury as requested by defendants, and particularly the refusal of the Court to grant defendants' instructions A, G, H, I, J, K, L, N, O, O-1, and Q.

(2) The granting by the Court of plaintiff's requested instructions to which objections and exceptions were noted by the defendants.

(3) The granting by the Court of modified instructions to which the defendants objected and excepted.

(4) The failure of the Court to exclude from the consideration and hearing of the jury hearsay evidence of acts and transactions introduced through plaintiff's witnesses, which evidence was objected to and excepted to by the defendants.

(5) The action of the Court over the objections and exceptions of the defendants in permitting the plaintiff to introduce into evidence as exhibits the interrogatories addressed by the plaintiff to the three defendants and the answers thereto made by the defendants.

(6) The action of the Court over the objections and exceptions of the defendants in permitting the plaintiff to read to the jury such portions as it selected of plaintiff's interrogatories addressed to the defendants and defendants' answers thereto.

(7) The action of the Court over the objections and exceptions of the defendants in requiring defendants to furnish writings in their possession as answer to interrogatories propounded to them by plaintiff in absence of compliance by plaintiff with the provisions of Section 8-324, Code of Virginia.

(8) The action of the Court over the objections and exceptions of the defendants in compelling defendants ~~under~~ Section 8-321, Code of Virginia, to answer interrogatories propounded to them by plaintiff, which said interrogatories and answers were not relevant.

(9) The action of the Court over the objections and exceptions of the defendants in failing to require plaintiff's witness to testify concerning income taxes of Laburnum Construction Corporation for the State of Kentucky.

(10) The failure of the Court over the objections and exceptions of the defendants to exclude evidence introduced by plaintiff of profits claimed by Laburnum Construction Corporation which were made by Virginia Mechanical Corporation.

page 302 } (11) The persistent improper conduct of counsel for plaintiff in making prejudicial and inflammatory remarks in the presence and hearing of the jury during the taking of evidence at the trial of the case, and during the argument of the case to the jury.

(12) The defendants renew in this motion to set the jury's verdict aside their motion made on January 29, 1951, for a mistrial on the grounds of prejudicial and inflammatory remarks made by counsel for plaintiff and similar remarks made by plaintiff's witness A. Hamilton Bryan, and further renew their said motion for mistrial upon the ground of further prejudicial and inflammatory statements made by counsel for plaintiff during the remainder of the trial.

(13) The appearance of a highly prejudicial and inflammatory editorial in the newspaper "Richmond News Leader" on February 13, 1951, entitled "Enemies of the Miner?"

(14) The defendants in this motion to set the verdict aside renew their motion for mistrial made on February 14, 1951, upon the ground of the appearance of the prejudicial and inflammatory editorial in the newspaper "Richmond News Leader" on February 13, 1951, entitled "Enemies of the Miner?"

(15) The amount of the jury's verdict for compensatory damages is excessive by reason of the fact that the jury has permitted itself to be actuated by partiality, sympathy, bias, prejudice and passion.

(16) The amount of the jury's verdict for compensatory damages is excessive for the reason that the jury has misconceived the case insofar as the elements of damages are concerned and taken into consideration improper elements of compensatory damages.

page 303 } (17) The amount of the jury's verdict for punitive damages is excessive for the reason that the

jury has permitted itself to be actuated by partiality, sympathy, bias, prejudice and passion.

(18) The misconduct of the jury in taking into consideration improper matters not in the record in arriving at a verdict, namely, the tax situation in the event of a recovery by the plaintiff.

(19) The verdict constitutes a denial to the defendants of the exercise of rights granted by the Constitution and laws of the United States, including the Norris-LaGuardia Act, 29 U. S. C. A. Sections 101-110, 113-115, the Clayton Act 15 U. S. C. A. Sections 12-13, 14-21, 22-27, 44; 29 U. S. C. A. Section 52, and the Labor Management Relations Act of 1947, 29 U. S. C. A. Sections 141-197.

(20) The verdict deprives the defendants of liberty and property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(21) The verdict constitutes a denial to the defendants of the exercise of rights granted to them by the First Amendment to the Constitution of the United States.

(22) The action of the Court over the objections and exceptions of the defendants in requiring the defendants to answer certain interrogatories propounded to them by the plaintiff constituting an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

(23) The action of the Court over the objections and exceptions of the defendants in admitting evidence of other acts allegedly committed by the defendants introduced page 304 } by plaintiff for the purpose of showing a course of conduct by the defendants.

(24) The action of the Court in failing to exclude evidence and testimony to which defendants objected and excepted during the course of the trial.

(25) The verdict of the jury that the defendants are jointly and severally liable to plaintiff is contrary to the evidence and without evidence to support it.

UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA; DISTRICT  
50, UNITED MINE WORKERS OF  
AMERICA; AND UNITED MINE  
WORKERS OF AMERICA

By JAMES MULLEN

Of Counsel

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. . . . .

MOTION TO DISMISS NOTICE OF MOTION FOR JUDG-  
MENT AND FOR ENTRY OF JUDGMENT FOR  
DEFENDANTS, AND EACH OF THEM.

Now come the defendants jointly and severally and move the Court to enter judgment for the defendants, and each of them, and to dismiss the plaintiff's Notice of Motion for Judgment, and assign the following ground in support thereof:

1. The Court is without power, authority and jurisdiction to hear and determine the issues in this action because such determination would be repugnant to and in violation of the Labor Management Relations Act, 1947, (61 Stat. 136, c. 120, Sections 1, *et seq.*, Public Law 101) and to Article I, Section 8, of the Constitution of the United States.

UNITED CONSTRUCTION WORKERS,  
AFFILIATED WITH UNITED MINE  
WORKERS OF AMERICA; DISTRICT  
50, UNITED MINE WORKERS OF  
AMERICA; AND UNITED MINE  
WORKERS OF AMERICA.

By JAMES MULLEN

WILLARD P. OWEN and  
M. E. BOIARSKY  
of Counsel for defendants

Received and filed Apr. 30, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

. . . . .

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. . . . .

Received and filed Jun. 27, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

Gentlemen:

After due consideration of the motion of the defendants, jointly and severally, filed March 1, 1951, to set aside the jury's verdict as contrary to the law and the evidence and to grant a new trial, the motion of the defendants, jointly and severally, filed April 30, 1951, to dismiss the plaintiff's notice of motion for judgment and for entry of judgment for the defendants, alleging the court is without power, page 316 } authority and jurisdiction to hear and determine the issues in this action, the oral argument and memoranda submitted by counsel, the court is of opinion that both of said motions should be overruled and that judgment should be entered on the verdict of the jury.

Upon presentation of a proper order, same will be entered.

Yours very truly,

JUDGE.

s/s

• • • • •

page 318 } Virginia:

In the Circuit Court of the City of Richmond.

Jul. 5, 1951

• • • • •

# JUDGMENT FOR PLAINTIFF UPON VERDICT AFTER MOTION TO SET SAME ASIDE.

THIS DAY came again the parties by counsel and the court, having maturely considered the motion of the defendants heretofore made to set aside the verdict of the jury and to grant them a new trial and the motion of the defendants to dismiss the plaintiff's notice of motion for judgment and enter final judgment for the defendants, is of opinion to overrule both motions and accordingly said motions are overruled upon each and every ground offered in support thereof; to which actions and rulings of the court the defendants by counsel excepted.

It is, therefore, ADJUDGED and ORDERED that the plaintiff, Laburnum Construction Corporation, recover of the

defendants, United Construction Workers Affiliated with United Mine Workers of America; District 50, United Mine Workers of America; and United Mine Workers of America, jointly and severally, the sum of \$275,437.19, the amount of the damages by the jury in its verdict awarded, with interest thereon at the rate of 6% per annum from the 17th day of February, 1951, the date said verdict was returned, until paid, together with the plaintiff's costs by it about its action herein expended.

The defendants having indicated their intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the judgment of the court herein pronounced, it is ORDERED that execution upon page 319 } this judgment be suspended until such petition shall have been acted on by the Supreme Court of Appeals of Virginia, or until the time for presenting such petition shall have expired, upon condition, however, that within ten days from the entry of this order the defendants, or one of them, or someone for them, enter into a bond in the penalty of \$325,000.00 in the clerk's office of this court, with surety to be approved by the clerk, which bond shall contain all the conditions prescribed in Section 8-477 of the Code of Virginia as amended, and shall be a bond conditioned as required for a *supersedeas* bond, according to law.

We ask for entry of the foregoing judgment.

ARCHIBALD G. ROBERTSON  
GEO. E. ALLEN  
T. JUSTIN MOORE, JR.

We object to and except to the entry of this order:

JAMES MULLEN  
WILLARD P. OWEN  
FRED G. POLLARD  
of Counsel for Defendants

Enter.

HAROLD F. SNEAD

7/5/51.

. . . . .

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## NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Pursuant to Rule 5:1, Section 4, of the Rules of Supreme Court of Appeals of Virginia, the defendants, United Construction Workers, Affiliated With United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America, and each of them, hereby give notice of appeal from the final judgment entered in the above case on July 5, 1951, wherein the Circuit Court of the City of Richmond ordered that the plaintiff, Laburnum Construction Corporation, recover of said defendants, jointly and severally, the sum of \$275,437.19, with interest and costs, and of their intention to apply for a writ of error and *superseas* in said case and also that they, and each of them, intend to rely upon the following assignments of error:

1. The Trial Court erred in refusing to sustain and in overruling the defendants' motion to dismiss the plaintiff's notice of motion for judgment and to enter final judgment for the defendants on the ground that the Court was without power, authority and jurisdiction to hear and determine the issues in this action because of the provisions of the Labor-  
page 322 } Management Relations Act, 1947 (61 Stat. 136, C. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8, of the Constitution of the United States. The Trial Court's action was repugnant to, and in violation of, said statutory and constitutional provisions.

2. The Trial Court erred in entering the judgment of July 5, 1951, on the verdict of the jury, that the plaintiff recover of the defendants, jointly and severally, the sum of \$275,437.19, with interest and costs, because the Trial Court was without power, authority and jurisdiction to enter said judgment because of the provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, C. 120, Sections 1 *et seq.*, Public Law 101) and Article I, Section 8, of the Constitution of the United States, and said judgment is void because it is repugnant to, and in violation of, said statutory and constitutional provisions.

3. The Trial Court erred in requiring the defendants, over their objections and exceptions, to answer the various interrogatories propounded to them by the plaintiff and to furnish certain writings in their possession as answers to such interrogatories for the reason that such action constituted an un-

reasonable and unconstitutional search and seizure, and in requiring defendants, in the absence of compliance by the plaintiff with the provisions of Section 8-324 of the Code of Virginia to furnish answers to interrogatories which were not relevant or material to the issues of this case, contrary to Section 8-321, Code of Virginia.

4. The Trial Court erred in requiring the defendants, over defendants' objections and exceptions, to answer certain interrogatories propounded to them by the plaintiff and such actions of the Trial Court constituted an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

page 323 } 5. The Trial Court erred in requiring defendant United Construction Workers, Affiliated With United Mine Workers of America, over said defendant's objections and exceptions, to answer the Interrogatories addressed to it by plaintiff in Interrogatories (2), Further Interrogatories (5), Further Interrogatories (8), Further Interrogatories (11), and Further Interrogatories (14).

6. The Trial Court erred in requiring defendant District 50, United Mine Workers of America, over said defendant's objections and exceptions, to answer the Interrogatories addressed to it by plaintiff in Interrogatories (3), Further Interrogatories (6), Further Interrogatories (9), Further Interrogatories (12), and Further Interrogatories (15).

7. The Trial Court erred in requiring the defendant United Mine Workers of America, over its objections and exceptions, to answer the Interrogatories addressed to it by the plaintiff in Interrogatories (4), Further Interrogatories (7), Further Interrogatories (10), Further Interrogatories (13), and Further Interrogatories (16).

8. The Trial Court erred in requiring the defendant United Construction Workers, Affiliated With United Mine Workers of America, over its objections and exceptions, to answer the following specific questions propounded to it by the plaintiff in Interrogatories, either as stated in said interrogatories or as reframed and stated in the order entitled "Order on Interrogatories", entered on November 28, 1950, or as reframed or directed by the Court in pre-trial conferences, to-wit: questions 1 through 83, both inclusive, 87 through 89, both inclusive, 92 through 94, both inclusive, of Interrogatories (2); questions 3 and 4 of Further Interrogatories (5); questions 87, 88, and 89 of Further Interrogatories (8); questions 1 through 7, both inclusive, of Further Interrogatories (11); and questions 1, 2, and 3 of Further Interrogatories (14).

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9. The Trial Court erred in requiring the Defendant District 50, United Mine Workers of America, over its objections and exceptions, to answer the following specific questions propounded to it by the plaintiff, in Interrogatories, either as stated in said interrogatories or as reframed and stated in the order entitled "Order on Interrogatories", entered on November 28, 1950, or as reframed or directed by the Court in pretrial conferences, to-wit: questions 1 through 85, both inclusive, 88 through 91, both inclusive, 94, 95 and 96 of Interrogatories (3); questions 3 and 4 of Further Interrogatories (6); questions 89, 90 and 91 of Further Interrogatories (9); questions 1 through 7, both inclusive, of Further Interrogatories (12); question 86 of Interrogatories (2) addressed by the plaintiff to United Construction Workers, Affiliated With United Mine Workers of America; and questions 1 through 4, both inclusive, of Further Interrogatories (15).

10. The Trial Court erred in requiring the Defendant United Mine Workers of America, over its objections and exceptions, to answer the following specific questions propounded to it by the plaintiff in interrogatories, either as stated in said interrogatories, or as reframed and stated in the order entitled "Order on Interrogatories", entered on November 28, 1950, or as reframed or directed by the Court in pre-trial conferences, to-wit: questions 1 through 77, both inclusive, 79 through 122, both inclusive, and 125 of Interrogatories (4); questions 3 and 4 of Further Interrogatories (7); questions 118 through 122, both inclusive, of Further Interrogatories (10); questions 1 through 7, both inclusive, of Further Interrogatories (13); questions 1 page 325 } through 9, both inclusive, in Further Interrogatories (16); questions 86 and 87 of Interrogatories (3) addressed by the plaintiff to District 50, United Mine Workers of America; and questions 84 and 85 of Interrogatories (2) addressed by the plaintiff to United Construction Workers, Affiliated With United Mine Workers of America.

11. The Trial Court erred in permitting, over the objections and exceptions of the defendants, the plaintiff to introduce into evidence as exhibits (plaintiff's exhibits 58-2 through 58-16, both inclusive), the interrogatories addressed by the plaintiff to the three defendants and the defendants' answers thereto (plaintiff's exhibits 59-1, 59-1-A, 59-1-B, 59-2, 59-2-A, 59-2-B, 59-3, 59-3-A, 59-3-B, 59-4, 59-5, 59-6, and 59-7, including the two booklets and pamphlets mentioned and described on pages 1227 and 1228 of the Transcript of Proceedings).

12. The Trial Court erred in permitting the plaintiff, over the objections and exceptions of the defendants, to read to the

jury only such portions of the several interrogatories addressed to the respective defendants (as shown by plaintiff's exhibits 58-2 through 58-16, both inclusive, or as reframed by the Court) and the defendants' answers thereto (plaintiff's exhibits 59-1, 59-1-A, 59-1-B, 59-2, 59-2-A, 59-2-B, 59-3, 59-3-A, 59-3-B, 59-4, 59-5, 59-6, and 59-7, including the two booklets and pamphlets mentioned and described on pages 1227 and 1228 of the Transcript of Proceedings) or portions of said answers thereto, as were selected by the plaintiff.

13. The Trial Court erred in permitting, over the objections and exceptions of the defendants, the plaintiff to read to the jury from Interrogatories (2) propounded by the plaintiff to United Construction Workers, Affiliated With United Mine Workers, questions numbered 5, 6, 7, 8, 15 as reframed, 18, 19, 20, 21, 25, 27, 32, 33, 35, 36, 37, 44, 47, 48, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, page 326 } 73, 74, 75, 76, 77, 82 and 83, and to read to the jury the answers to said questions including exhibit No. 1 attached to the answer to question 5, and exhibit 3 attached to the answer to question 25, exhibit 4-1, a portion of exhibit 4-6, exhibit 4-8, exhibit 4-9, exhibit 4-17, attached to the answers to question 27, and exhibit 5-16 attached to the answer to question 35, and in permitting plaintiff to read to the jury question 4 from Further Interrogatories (5) propounded to United Construction Workers Affiliated With United Mine Workers and the answer thereto; and in permitting plaintiff to read to the jury question 5 from Further Interrogatories (11) propounded to United Construction Workers Affiliated With United Mine Workers of America and the answer thereto.

14. The Trial Court erred, over the objections and exceptions of the defendants, in permitting the plaintiff to read to the jury three times a letter dated March 23, 1950, from David Hunter, Acting Director, Region 58, to "Mr. A. D. Lewis, Chairman of Organizing Committee, District 50, UMWA and UCW," and entitled "Weekly Report for the Two Weeks Ending March 11-18, 1950" (Tr., pp. 1263-1264, 1293-1294, 1609-1610).

15. The Trial Court erred, over the objections and exceptions of the defendants, in permitting the plaintiff to read to the jury from Interrogatories (3), propounded to District 50, United Mine Workers of America, questions numbered 5, 6, 14 as reframed, 17, 18, 19, 20, 24, 26, 27, 28, 35, 43, 46, 47, 49, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 77, 78, 79, 84 as reframed 85, 86, 87, 89 (as reframed), and 90, and to read to the jury the answers to said questions including exhibit 3,

attached to the answer to question 24, which was page 327 } exhibited to the jury, exhibits 4-1, 4-6, 4-8, 4-17, 4-28 and 5-1 attached to the answer to question 26, exhibit 6 attached to the answer to question 49, and exhibit 8 attached to the answer to question 84, and in permitting the plaintiff to read to the jury question 4 from Further Interrogatories (6) propounded to District 50 United Mine Workers of America and the answer thereto.

16. The Trial Court erred, over the objections and exceptions of the defendants, in permitting the plaintiff to read to the jury from Interrogatories (4), propounded by the plaintiff to defendant United Mine Workers of America questions numbered 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 22, 26, 38, 41, 44, 46, 47, 69, 70, 71, 72, 73, 74, 76, 82 and 83, and to read to the jury the answers to said questions, including copy of the charter of District 50 attached to the answer to question 6, and copy of charter of United Construction Workers Division attached to the answer to question 7, and in permitting the plaintiff to read to the jury question 4 from Further Interrogatories (7) propounded to United Mine Workers of America and the answer thereto.

17. The Trial Court erred, over the objections and exceptions of the defendants, in admitting in the evidence and in permitting plaintiff's witnesses to testify concerning the following exhibits offered by plaintiff: Exhibit 18 (Tr., pp. 213-215, both inclusive), Exhibit 27 (Tr., pp. 357-358), Exhibit 28 (Tr., pp. 358, 359, 360), Exhibit 29 (Tr., p. 361), Exhibit 30 (Tr., pp. 361-362), Exhibit 32 (Tr., pp. 417-420, both inclusive), Exhibit 33 (Tr., pp. 420-421), Exhibit 34 (Tr., pp. 421-424, both inclusive), Exhibit 35 (Tr., pp. 424-425), Exhibit 36 (Tr., pp. 425-426), Exhibit 37 (Tr., pp. 426-428, both inclusive), Exhibit 38 (Tr., pp. 463-464), Exhibit 39 (Tr., p. 464), Exhibit 40 (Tr., pp. 464-465), Exhibit 41 (Tr., pp. 465-466), Exhibit 42 (Tr., p. 468), Exhibit 43 (Tr., pp. 468-469),

Exhibit 45 (Tr., pp. 474), Exhibit 46 (Tr., pp. 476-477), Exhibit 47 (Tr., pp. 477-478), Exhibit 48 (Tr., pp. 478-479), Exhibit 49 (Tr., pp. 479-481, both inclusive), Exhibit 50 (Tr., pp. 481-482), and Exhibit 51 (Tr., pp. 482-484, both inclusive), Exhibit 54 (Tr., pp. 511-512), Exhibit 57, Sub 1 through 16, both inclusive (Tr., p. 587), Exhibit 60 (Tr., pp. 1228-1229), Exhibit 61 (Tr., p. 1229), Exhibit 62-1 through 62-36, both inclusive (Tr., pp. 1229-1234, both inclusive), Exhibit 95-1, 95-2, 95-3, 95-4, 95-5, 95-6, 95-7, 95-8, 95-9, 95-10, 95-11, 95-12 (Tr., pp. 1972-1978, both inclusive), the plaintiff's exhibit entitled "Constitution of the International Union, United Mine Workers of America, Washington, D. C., Adopted at Cincinnati, Ohio on September 19,

1944", with the notation in pen and ink: "UMWA, Ex., answering Int. No. 2," (Tr., pp. 1227- 1228), and plaintiff's exhibit, which is a pamphlet endorsed in pen and ink, "UMWA, Ex., answering Int. No. 2," (Tr., p. 1228).

18. The Trial Court erred, over defendants' objections and exceptions, in admitting in evidence the following exhibits offered by plaintiff; Exhibit 63 (Tr., pp. 1380-1383, both inclusive), Exhibit 64 (Tr., pp. 1384-1387, both inclusive), Exhibit 65 (Tr., pp. 1388-1391, both inclusive), Exhibit 66 (Tr., pp. 1391-1393, both inclusive), Exhibit 67 (Tr., pp. 1393-1396, both inclusive), Exhibit 68 (Tr., pp. 1396-1397), Exhibit 69 (Tr., pp. 1397-1400, both inclusive), Exhibit 70 (Tr., pp. 1400-1402, both inclusive), Exhibit 71 (Tr., pp. 1402, 1403, 1404), Exhibit 72 (Tr., p. 1405), Exhibit 73 (Tr., pp. 1405-1406), Exhibit 74 (Tr., pp. 1407-1408), Exhibit 76 (Tr., pp. 1413-1419, both inclusive), Exhibit 77 (Tr., pp. 1419-1420), Exhibit 78 (Tr., pp. 1420-1421), Exhibit 81 (Tr., pp. 1449-1450), Exhibit 82 (Tr., pp. 1450-1451), Exhibit 83 (Tr., pp. 1451-1455, both inclusive), Exhibit 84 (Tr., pp. 1455-1458, both inclusive), Exhibit 85 (Tr., pp. 1458- 1459), Exhibit 86 (Tr., pp. 1459-1461, both inclusive), Exhibit 87 (Tr., pp. 1462-1464, both inclusive), Exhibit 88 (Tr., pp. 1464-1466, both inclusive), Exhibit 89 (Tr., pp. 1466-1467), and Exhibit 90 (Tr., pp. 1467-1468), and in permitting plaintiff to read to the jury portions of said exhibits appearing on pages 1424-1448, both inclusive, and pages 1471-1487, both inclusive, of page 329 } the Transcript of Proceedings.

19. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 247-248), plaintiff's witness, Bryan, to give hearsay and self-serving testimony concerning conversations between Bryan and plaintiff's superintendent, Delinger (Tr., pp. 247-249, 253-255, all inclusive), and between Bryan and Jack Joinville (Tr., pp. 245-250, both inclusive).

20. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Bryan, to testify that reports came to him that the laborers were going to make application or had made application to become members of the Salversville Carpenter's Local No. 697 (Tr., p. 251), and that the laborers had all decided to join said Local (Tr., p. 252).

21. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 248), plaintiff's witness, Bryan, to give hearsay testimony concerning a conversation between himself and one Haslam (Tr., p. 289).

22. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 296), plaintiff's wit-

ness, Bryan, to give hearsay testimony concerning a report made to him by plaintiff's Chief Clerk Ragan (Tr., p. 260) and concerning a placard which "Ragan had taken down" and delivered to Bryan (Tr., pp. 296-297).

23. The Trial Court erred in permitting (Tr., p. 302), over defendants' objections and exceptions (Tr., pp. 301-302), the hearsay testimony of witness, Bryan, concerning a statement of Bert Preston (Tr., p. 301).

page 330 } 24. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 301-302, 325), plaintiff's witness, Bryan, to give testimony and detail conversations and transactions between himself and others at the special meeting of the Paintsville Carpenter's Local No. 646 on July 26, 1949 (Tr., pp. 299-304, both inclusive), and to testify concerning conversations, acts and transactions at plaintiff's job site on July 27, 1949 (Tr., pp. 304-311, both inclusive).

25. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 310, 325), plaintiff's witness, Bryan, to testify concerning a conversation between himself and Jack Patrick and quoting Patrick as saying "the job was unsafe" and that he had ordered the men back to work (Tr., pp. 309-310) and further quoting Patrick as saying that others had said that "if these men knew what was good for them, they would get out; and if they didn't, there would be 100 men there within an hour to stop them", and quoting others concerning their fears of being shot at with a rifle (Tr., p. 310) and that it was too dangerous to work (Tr., p. 311).

26. The Trial Court erred in permitting, over defendants' objections (Tr., pp. 248, 325) and exceptions, plaintiff's witness, Bryan, to testify concerning a conversation between himself and plaintiff's employees to the effect that they didn't want to be targets and that it was too dangerous to work (Tr., pp. 310-311).

27. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 310, 325), plaintiff's witness, Bryan, to testify concerning a conversation between himself and Homer Howard, a State Trooper (Tr., pp. 312-313).

28. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 310, 315, page 331 } 316, 325), plaintiff's witness, Bryan, to testify concerning a telephone conversation between himself and W. P. Freeman (Tr., pp. 314-315).

29. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 325), plaintiff's wit-

ness, Bryan, to testify concerning a telephone conversation, between himself and plaintiff's Superintendent Delinger about a report to Delinger that his life had been threatened (Tr., pp. 327-328).

30. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 325, 351-352), plaintiff's witness, Bryan, to testify and detail conversations had with persons at the Carpenter Hotel in Salyersville on August 2, 1949 (Tr., pp. 352, 351).

31. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 325), plaintiff's witness, Bryan, to testify to conversations:

- (1) Between himself and Henry Starr (Tr., p. 331);
- (2) Between himself and Charlie Williams (Tr., pp. 337-338);
- (3) Between himself and Robert Poe (Tr., pp. 336-337, 347, 1992);
- (4) Between himself and "representatives of Pond Creek and Island Creek that the situation out in Breathitt County had become so tense that they wanted to stop our work" (Tr., p. 355);
- (5) Between himself and Delinger, and also Ragan, asking that they let him know if United Construction Workers or District 50 "were trying to organize our workers" (Tr., p. 512).

32. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 325, 351, 356), plaintiff's witness, Bryan, to testify and detail a conversation between himself and Louis Veltry (Tr., pp. 355-356, 363-364).

33. The Trial Court erred in permitting, over page 332 } defendants' objections and exceptions (Tr., pp. 393, 406), plaintiff's witness, Bryan, to testify concerning conversation had between himself and Robert Poe about giving his deposition (Tr., pp. 407-410, both inclusive).

34. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 310, 325, 351, 356, 413-414), plaintiff's witness, Bryan, to testify that he had information that United Construction Workers had closed down the job of R. H. Hamill Company and in permitting said witness to testify concerning a conversation between himself and a Mr. Hughes, of the Hamill Company (Tr., pp. 410-414, both inclusive).

35. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 248, 310, 325, 746), plaintiff's witness, Frank Dixon, to testify concerning what took

place at a meeting at Salyersville at which the defendants were not present (Tr., p. 746).

36. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 748, 749, 750), plaintiff's witness, Frank Dixon, to testify concerning a message received by him in a "roundabout way" (Tr., pp. 748-750, both inclusive), and the Trial Court likewise erred in overruling (Tr., p. 763) defendants' motion (Tr., p. 750) to exclude the witness' answer appearing on page 750 of the Transcript of Proceedings, to which rulings defendants excepted (Tr., p. 763).

37. The Trial Court erred in permitting (Tr., p. 765), over defendants' objections and exceptions (Tr., pp. 764, 765), plaintiff's witness, Frank Dixon, to give hearsay testimony that "in a roundabout way the word has been sent on to me by various people that I had better keep my ass out page 333 { of the eastern part of the state" and in refusing defendants' motions (Tr., pp. 766, 767) to exclude such answer (Tr., p. 768), to which ruling defendants excepted (Tr., p. 768).

38. The Trial Court erred in overruling (Tr., p. 768) defendants' motion (Tr., p. 767) to exclude the testimony of plaintiff's witness, Dixon (Tr., pp. 766-767), that "I am trying to refrain from bringing somebody else into this case because bodily harm might come to them by using their name" and "it goes back to the conversation that happened at Ashland, Kentucky and the same thing was brought to me there from the same party, that Mr. Raney had offered to meet with me to make a deal with me, and if we did allow these men in Paintsville to testify I had better keep my ass out of the eastern part of the state".

39. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 768), plaintiff's witness, Dixon, to testify (Tr., pp. 768-769) that "the threat was sent to me again that if I testified and permitted these men in Paintsville, the carpenters in Paintsville to testify, that all the damned water and gravel in the Big Sandy River wasn't going to fill me up if they ever caught me in the eastern part of the State again."

40. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 780), in receiving in evidence plaintiff's witness Freeman's hearsay testimony concerning threats to the life of plaintiff's Superintendent Delinger (Tr., p. 780).

41. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 780), in permitting plaintiff's witness, Freeman, to testify (Tr., pp. 781-783) concerning a conversa-

tion between himself and witness Bryan on August 2, 1949, at the Salyersville meeting.

page 334 } 42. The Trial Court erred in permitting (Tr., p. 795), over defendants' objections and exceptions (Tr., pp. 794, 795), the answers to Questions 41 and 42 of the deposition of Henry Starr (Tr., pp. 794, 795), to be read to the jury and in failing to exclude said questions and answers and to instruct the jury to disregard said questions and answers.

43. The Trial Court erred, over defendants' objections and exceptions (Tr., pp. 808-812, both inclusive), in permitting the answers to Questions 125-131, both inclusive, 142, 143, 145, 146, 147, 148, 149, 151, 152, 153, 154, 156, 157, 163-168, both inclusive, of the depositions of Henry Starr to be read to the jury (Tr., pp. 807-816), both inclusive), and the answers to Questions 1 and 2 appearing on pages 818 and 821 and Questions 2 through 8, both inclusive, appearing on pages 822-824, both inclusive, of the Transcript of Proceedings, to be read to the jury.

44. The Trial Court erred in permitting to be read to the jury, over defendants' objections and exceptions, the answers in the deposition of Bert Preston, Sr., concerning reports which had come to him that the Carpenters of Local 646 had been run off the job in Breathitt County, Kentucky (Tr., pp. 871, 872).

45. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 873) plaintiff's counsel to read to the jury from the deposition of Bert Preston, Sr., the hearsay testimony that "they told me they were ganging up" (Tr., p. 872), and in failing and refusing to strike such answer from the evidence and to instruct the jury to disregard it, and in permitting said counsel to read to the jury also the answer to question 29 of said deposition (Tr., p. 873).

page 335 } 46. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's counsel to read to the jury the testimony of Bert Preston, Sr., given in a deposition concerning conversations at the meeting at Salyersville on August 2, 1949, and the meeting of the Paints-ville Local on July 26, 1949 (Tr., pp. 881-883, both inclusive).

47. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 887), plaintiff's counsel to read to the jury from the deposition of Bert Preston, Sr., the hearsay and immaterial statements between Preston and Hart concerning William Hutchinson (Tr., pp. 887-889, both inclusive).

48. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 925, 926), plaintiff's wit-

ness, Norman Hackworth, to relate a conversation between him and Bryan (Tr., pp. 925-926), and in permitting the witness to testify that he told Bryan that he wasn't going to work because "I thought a lot more of my life than I did of that job of work; that I feared I would be killed if I went back to work" (Tr., p. 926).

49. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Norman Hackworth, to testify (Tr., p. 922) that "the rumor had been around that they were coming to run us off the job, United Construction".

50. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 932, 933), plaintiff's witness, Norman Hackworth, to relate conversations between himself and employees to whom he went for the purpose of getting them to sign application blanks to join the A. F. of L. (Tr., pp. 932-933).

page 336 } 51. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witnesses to testify concerning conversations between Bryan and plaintiff's employees and concerning acts and transactions at plaintiff's work site on July 27, 1949 (Tr., pp. 910-911, 925-926, 970, 988, 989, 1016-1018, both inclusive, 1008-1009).

52. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Otto Preston, to testify concerning remarks made by Estle Robinson (Tr., p. 1038).

53. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Mayo, to relate a conversation between himself and some laborers (Tr., pp. 1044, 1945).

54. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 1110-1111, 1123), plaintiff's witness, Delinger, to testify concerning conversations between himself and Bryan (Tr., pp. 1111-1114, both inclusive, 1124), and between Delinger and other employees of plaintiff (Tr., p. 1121).

55. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1123), in permitting plaintiff's witness, Delinger, to testify concerning a conversation between himself and one Adams, and between himself and Weaver Freeman (Tr., pp. 1122-1126, both inclusive).

56. The Trial Court erred, over defendants' objections and exceptions, in permitting plaintiff's witness, Ragan, to testify that plaintiff's laborers had signed applications with the A. F. of L. Carpenter's Local in Salyersville, Kentucky, to

become carpenters' helpers (Tr., p. 1142), and to  
page 337 } testify concerning such applications (Tr., p. 1142),  
and to relate conversations between himself and  
other employees of the plaintiff (Tr., p. 114).

57. The Trial Court erred, over defendants' objections and exceptions, in permitting plaintiff's witnesses, Bert Preston, Sr. (Tr., pp. 833-835, both inclusive), John Hackworth, Jr. (Tr., pp. 909-910), Norman Hackworth (Tr., pp. 926-928, both inclusive), and Robert Hackworth (Tr., pp. 945-946), to testify concerning conversations and transactions at the meeting of the Paintsville Local No. 646 on July 26, 1950.

58. The Trial Court erred, over defendants' objections and exceptions, in permitting plaintiff's witnesses, Bryan (Tr., pp. 351-352) and Preston, Sr. (Tr., pp. 836-837), to testify concerning conversations and transactions at the Salyersville meeting on August 2, 1950.

59. The Trial Court erred, over defendants' objections and exceptions (Tr., pp. 901-902, 952-953, 1058), in permitting plaintiff's witnesses, John Hackworth, Jr. (Tr., pp. 901-902), Norman Hackworth (Tr., p. 922), Jack Patrick (Tr., pp. 952-953), C. H. Patrick (Tr., p. 967), Chester Trimble (Tr., p. 983), LeGrand Mayo (Tr., pp. 1040, 1057-1058), and Maynard C. Ragan (Tr., p. 1140), to testify, or in permitting answers to be read to the jury from depositions (Tr., pp. 1057-1058), concerning rumors or reports regarding United Construction Workers coming to plaintiff's job in Breathitt County.

60. The Trial Court erred, over defendants' objections and exceptions, in failing and refusing to strike the following question and answer (Tr., p. 952) from the evidence and to instruct the jury to disregard the same:

"Q. Before that time did you receive any report that the United Construction Workers were going to run you off the job?"

"A. I did."

page 338 } 61. The Trial Court erred, over defendants' ob-  
jections and exceptions, in failing and refusing to  
strike the following question and answer (Tr., p. 901) from  
the evidence and to instruct the jury to disregard the same:

"Q. Before that Monday morning had you as a member of the union been told that there would be any difficulty there that week?"

"A. Yes, sir."

62. The Trial Court erred, over defendants' objections and exceptions, in permitting plaintiff's witness, Trimble, to relate conversations between himself and unidentified persons (Tr., pp. 1010-1011), and permitting answers to questions 102, 103 and 104 on page 804 of the Transcript of the Proceedings to be read to the jury.

63. The Trial Court erred, over defendants' objections and exceptions, in failing and refusing to strike the question 16 in the deposition of LeGrand Mayo and the answer thereto (Tr., p. 1057) from the evidence and to instruct the jury to disregard said question and answer.

64. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 1970), plaintiff's counsel to read to the jury from Interrogatory (4), question 38, and the answer thereto (Tr., pp. 1970-1972, both inclusive).

65. The Trial Court erred in permitting (Tr., pp. 103, 145, 147), over defendants' objections and exceptions (Tr., pp. 103, 107, 145, 146, 148), plaintiff's counsel to ask and plaintiff's witness, Bryan, to answer questions concerning the relationship of each of Kathryn Lewis (Tr., pp. 103, 148) and A. D. (Denny) Lewis (Tr., pp. 103, 147) to John L. Lewis.

66. The Trial Court erred in permitting (Tr., p. 145), over defendants' objections and exception (Tr., pp. 103, 107, 146, 148), plaintiff's witness, Bryan, to testify (Tr., page 339 } pp. 147-149, both inclusive) concerning the appointments of A. D. (Denny) Lewis, Kathryn Lewis and O. B. Allen and the alleged power of John L. Lewis to discharge or suspend each of them.

67. The Trial Court erred in permitting (Tr., p. 154), over defendants' objections and exceptions (Tr., pp. 150-152, both inclusive, 154, 156, 264), plaintiff's witness, Bryan, to testify by reading from a memorandum.

68. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 151, 152, 154, 156), plaintiff's witness, Bryan, to testify concerning the construction work which plaintiff had done for Island Creek Coal Company or any of its associated or subsidiary companies prior to October 24, 1948 (Tr., pp. 154-157, both inclusive).

69. The Trial Court erred in permitting (Tr., pp. 195, 198), over defendants' objections and exceptions (Tr., pp. 159, 197, 198), plaintiff's witness, Bryan, to testify that when plaintiff executed the October 28, 1948, contract with Pond Creek Pocahontas Company, it was agreed that plaintiff would perform additional work in Breathitt County amounting to \$600,000 and that the work would be performed on a basis of cost plus a fee of five per cent (Tr., pp. 198, 468).

70. The Trial Court erred in permitting (Tr., p. 199), over defendants' objections and exceptions (Tr., pp. 159, 195, 199), plaintiff's witness, Bryan, to testify that plaintiff's business connections with Island Creek Coal Company and Pond Creek Pocahontas Company "was a permanent connection" (Tr., p. 199), and to testify regarding the value of that connection (Tr., pp. 199-200).

page 340 } 71. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 211), plaintiff's witness, Bryan, to testify concerning the kind and value of equipment plaintiff had to take to the job site for the execution of the contract of October 28, 1948 (Tr., pp. 211-215).

72. The Trial Court erred in permitting (Tr., p. 226), over defendants' objections and exceptions (Tr., pp. 224, 226), plaintiff's witness, Bryan, to testify concerning the arrangements made by plaintiff to house and feed its employees in Kentucky (Tr., pp. 224-228, both inclusive).

73. The Trial Court erred in permitting (Tr., p. 228), over defendants' objections and exceptions (Tr., p. 228), plaintiff's witness, Bryan, to testify (Tr., p. 229) that wages paid by plaintiff to laborers were satisfactory to the A. F. of L. people (Tr., p. 229).

74. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 247), plaintiff's witness, Bryan, to testify (Tr., p. 247) how the rate of wages paid by plaintiff to its common laborers was determined.

75. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 258), plaintiff's witness, Bryan, to testify concerning passing a number of automobiles, filled with men, headed in the opposite direction from the way Bryan was going (Tr., pp. 258-259).

76. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 444), counsel for plaintiff to inquire of witness, Bryan, and for Bryan to answer inquiries concerning his willingness or unwillingness to furnish copies of income tax returns requested by defendants (Tr., pp. 444-446, both inclusive).

page 341 } 77. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Bryan, to testify concerning bids made by plaintiff for work after August, 1949 (Tr., pp. 476-492, both inclusive).

78. The Trial Court erred in rejecting and overruling Tr., p. 491 defendants' motions (Tr., pp. 486, 489) that the Court strike, and instruct the jury to disregard, all testimony in plaintiff's behalf relating to the business relationship "of the Plaintiff with the Coal Companies after the date the suit

was instituted" and that the Court thereafter exclude (Tr., pp. 486, 489) "any more testimony on that point", to which ruling defendants excepted (Tr., p. 491).

79. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 737, 738), plaintiff's witness, Frank Dixon, to answer the questions, (1) "In the discharge of your duties have you come to know about the contests and accords and differences between the American Federation of Labor and the United Mine Workers of America" and (2) whether that is also true between American Federation of Labor and District 50 of the United Mine Workers of America and (3) whether that is also true between said Federal and the United Construction Workers, affiliated with the United Mine Workers of America (Tr., p. 738).

80. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 742, 744), plaintiff's witness, Frank Dixon, to testify concerning the American Federation of Labor's policy about crossing a picket line (Tr., pp. 742, 745), and in failing to strike such evidence from the record and to instruct the jury to disregard it.

81. The Trial Court erred in permitting, over page 342 } defendants' objections and exceptions (Tr., pp.

860, 863, 864), plaintiff's witness, Bert Preston, Sr., to give the following answers to the questions propounded to him by plaintiff's counsel as follows:

"Q. Then when Hart asked you would honor a picket line, why did you tell him you would?

"Q. Why did you tell him you would honor a picket line?

"A. It was my only way out" (Tr., p. 860).

"Q. Based on what you heard, what you saw, and what you did, and what you know, there at the job site on the 26th day of July, 1949, did the AF of L men quit on account of the picket line, or because they were scared to work?

"A. It was through fear that we quit, instead of the picket line" (Tr., p. 864).

82. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 884), plaintiff's counsel to read to the jury the following question and answer from the deposition of Bert Preston, Sr.,

"Question 101. If you had been working over there and Hart had told you what went on there, would you have been willing to go back to work?

"Answer. No, sir.

and in failing and refusing to strike the question and answer from the evidence and to instruct the jury to disregard the same, and in permitting said counsel to read to the jury the following question and answer from said deposition:

"Question 102. Why?

"Answer. I wouldn't want to get hurt."  
page 343 } (Tr., pp. 884-885).

83. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 897-898), plaintiff's counsel to place Mr. Willard Owens on the stand as a witness for the plaintiff and asking him his name, his father's name, and his father's connection with the United Mine Workers of America, (Tr., pp. 889, 891-899) and requiring the witness to answer such questions.

84. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 925), plaintiff's witness, Norman Hackworth, to be asked "Why didn't you go on over there?" and in permitting the witness to answer that "The reason why I didn't go to the tippie was because I didn't want to go over there. They told me I wasn't going to work any more, and I didn't want to get around to where they were at, because I felt maybe some of them would stick a knife in my back or shoot me" (Tr., pp. 924-925).

85. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Norman Hackworth, to testify that "I wouldn't work over there, anyway, after this all came about, if they offered me a job" (Tr., p. 929) and to answer, to the question "Why?" propounded by plaintiff's counsel, "Because I would be afraid to go back over there" (Tr., p. 929).

86. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 930), the plaintiff's witness, Norman Hackworth, to be asked "Did you turn the heat on them to make them sign up?", and in permitting the witness to answer, "No, Sir." (Tr., pp. 929, 930) and in failing and refusing to strike such question and answer from the evidence and to instruct the jury to disregard the same.

87. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 944, 945), the plaintiff's witness, Robert Hackworth, to be asked why he  
page 344 } did not go to the tippie and in permitting the  
witness to be asked "Were you scared to go to the  
tippie?" (Tr., p. 945), and the witness to answer "Sure".  
(Tr., p. 945), and the witness to be asked "Why?" (Tr.,  
p. 945), and the witness to answer "I figured they would have  
trouble or something down there and I didn't want to get in-

volved enough to maybe get hurt or be killed or something" (Tr., p. 945).

88. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 947), plaintiff's witness, Robert Hackworth, to be asked the question "Why did you do that?", and for the witness to answer "I couldn't make up my mind to go back to work. I just dreaded to go in there and probably start work and maybe get killed or something. I didn't want to do that. I finally decided to go. I intended to work if they were working and had everything settled down. I wasn't sticking my neck out" (Tr., p. 947).

89. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 956), plaintiff's counsel to ask of plaintiff's witnesses the question "Why?", and in permitting the witnesses,

John Patrick (Tr., pp. 956, 957, 958)

C. H. Patrick (Tr., p. 981)

Chester Trimble (Tr., pp. 987, 988, 990)

Paris Trimble (Tr., pp. 1008, 1009)

Sublett (Tr., pp. 1016, 1018, 1019, 1022)

Loumie Dixon (Tr., pp. 1027, 1028)

Estle Robinson (Tr., p. 1030)

LeGrand Mayo (Tr., p. 1042),

to answer the questions so propounded.

90. The Trial Court erred in overruling defendants' motion (Tr., p. 977), to exclude the hearsay testimony of plaintiff's witness, C. H. Patrick, and to direct the jury to disregard it, to which ruling defendants noted their exception (Tr., p. 977).

91. The Trial Court erred in overruling (Tr., p. 993) defendants' motion (Tr., p. 992) to exclude from the evidence the statement of the witness, Chester Trimble, "but they would have been" and "I said they could have been, and "I said there could have been; it would have went far enough to call their hand and done what they ordered us not to." (Tr., p. 992), to which ruling defendants excepted (Tr., p. 993).

92. The Trial Court erred in overruling (Tr., p. 1003) defendants' motion to strike all of the testimony of witness, Chester Trimble, as to anyone being run off the job at Greenbrier for the reason that his testimony shows that all of his knowledge is hearsay (Tr., pp. 1002-1003).

93. The Trial Court erred in permitting, over defendants' objections and exceptions, the following questions and an-

swers to be read to the jury from the deposition of plaintiff's witness, Mayo:

"Question 27. Why didn't you work?

"Answer. I couldn't afford to. I was afraid to work there at that time." (Tr. p. 1060)

"Question 34. Did you work any there that Wednesday morning?

"Answer. No, sir. I was just like I was the day before, I thought it would be dangerous" (Tr., p. 1061).

"Question 38. Why didn't you work any more there while Laburnum Construction Corporation was there?

"Answer. I couldn't afford to. I felt there was danger there." (Tr. p. 1062)

94. The Trial Court erred in permitting, over page 346 } defendants' objections and exceptions (Tr., pp. 1077, 1079, 1081-1083), the questions and answers in the depositions of Raymond E. Salvati to be read to the jury concerning the comparison of production tonnage of Island Creek Coal Company and Pond Creek Pocahontas Company with other commercial coal companies within the United States (Tr., pp. 1077-1078), and concerning additional construction work which Pond Creek Pocahontas Company contemplated at the time it entered into the contract of October 28, 1948 with plaintiff (Tr., pp. 1079-1081), and in failing and refusing to strike the question (Tr., p. 1079);

"Question. When the contract that we have just introduced was executed did the Pond Creek Pocahontas Company contemplate construction work in Breathitt County, Kentucky, in addition to work on the coal preparation plant at the No. 1 mine?"

and the answer thereto "It did", and to instruct the jury to disregard said question and answer, and also in permitting to be read to the jury from said depositions the questions and answers concerning any understanding which said Coal Company had with plaintiff with reference to additional work (Tr., pp. 1081-1087, both inclusive).

95. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 1087-1088), the answer in the deposition of Raymond E. Salvati, to be read to the jury concerning "Why?" plaintiff did not proceed with the construction of the concrete foundation for the coal preparation plant (Tr., p. 1087) and in refusing and failing to strike said answer from the evidence and to instruct the jury to disregard it.

96. The Trial Court erred in permitting, over page 347 } defendants' objections and exceptions (Tr., pp. 1089, 1091, 1093), questions and answers in the deposition of Raymond E. Salvati to be read to the jury concerning additional work (Tr., pp. 1089, 1090-1091), and in failing and refusing to strike said questions and answers from the evidence and to instruct the jury to disregard the same, and in permitting questions and answers in said deposition to be read to the jury concerning the list of commitments for work prior to October 28, 1948, between plaintiff and Pond Creek Pocahontas Company or Island Creek Coal Company (Tr., pp. 1093, 1094), as well as the memorandum concerning such commitments (Tr., p. 1094).

97. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., p. 1098), the answer in the deposition of Raymond E. Salvati, that "we felt that it was inadvisable for Laburnum Construction Corporation to bid on these two particular buildings, that we felt that if they did it might cause us a lot of trouble around our mines" (Tr., pp. 1097-1098) to be read to the jury, and in permitting a letter dated May 18, 1950, offered as Exhibit 5, according to said deposition, to be received in evidence and read to the jury (Tr., p. 1098).

98. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 1100-1101), the answer in the deposition of Raymond E. Salvati, to be read to the jury concerning "Why?" plaintiff had not been invited to submit proposals for work since May 18, 1950 (Tr., pp. 1100, 1101), and concerning Salvati's expectation of plaintiff's continuation to do work for the Pond Creek Pocahontas Company and Island Creek Coal Company (Tr., pp. 1101, 1102).

99. The Trial Court erred in requiring, over page 348 } defendants' objections and exceptions (Tr., pp. 1585-1586), defendants' witness Hart to testify concerning the shooting and killing of the Sheriff of Pike County, Kentucky (Tr., pp. 1585-1588).

100. The Trial Court erred in permitting plaintiff's counsel, over defendants' objections and exceptions (Tr., p. 1609), to read to the jury the report of David Hunter to A. D. Lewis, Chairman of the Organizing Committee, District 50, UMW and UCW, United Mine Workers, Washington 5, D. C. on Saturday, March 18, 1950 (Exhibit 4-8) (Tr., pp. 1609-1610), and to require defendants' witness, Hart, to testify concerning the statement in the report about him (Tr., pp. 1609-1610).

101. The Trial Court erred in permitting, over defendant's objections and exceptions (Tr., p. 1634), Plaintiff's counsel on cross examination of plaintiff's witness, Robinson, to read

from the answer of United Construction Workers to plaintiff's interrogatories, the report of David Hunter for the week ended September 9, 1950, as it appears on page 1634 of the Transcript of Proceedings and to require the witness to answer the question "What have you got to say about that fear" (Tr., pp. 1633-1635, both inclusive).?

102. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1681), in permitting plaintiff's counsel, on cross-examination of witness Higgins, to inquire, "If I was working on the tippie and you were laying out in the woods do you think you could shoot me off?" and "If I was working on the tippie—of course I hope you wouldn't want to—but if I was working on the tippie and you were out in the woods, do you think you could shoot me off?", and for the witness to answer, "If I wasn't too far away and had a good rifle I probably could, yes. I have killed squirrels" (Tr., p. 1681).

page 349 } 103. The Trial Court erred, over defendants' objections and exceptions (Tr., pp. 1754, 1755), in permitting plaintiff's counsel, on re-cross-examination of defendants' witness Fohl, Jr., to ask the question, "I say if you had a majority of the laborers signed up at Hopewell why didn't you start a proceeding before the National Labor Relations Board for an election so that your people could be certified as the bargaining agent"?, and in requiring the witness to answer such question, as appears on pages 1755 and 1756 of the Transcript of Proceedings.

104. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1787), in permitting plaintiff's counsel to inquire of defendants' witness Bach, the question, "If you want to go to work in eastern Kentucky you pretty well have to jine up, don't you" (Tr., p. 1787)?

105. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1915), in permitting plaintiff's counsel to refer to and read to the jury from Exhibit 4-1, which is a weekly report for the three weeks ended January 7, 14 and 21, 1950, dated January 23, 1950, as appears on pages 1915 and 1916 of the Transcript of Proceedings; and to inquire of defendants' witness Raney concerning said report, and in requiring said witness to testify concerning said report (Tr., pp. 1915-1920, both inclusive).

106. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1920), in permitting plaintiff's counsel to refer to and read to the jury from Exhibit 4-22, with answer of District 50, which is David Hunter's report to Mr. A. D. Lewis, dated April 7, 1950, for two weeks ending

March 25 and April 1, 1950, and which portion of said Exhibit, as read to the jury, appears on page 1921 of the Transcript of Proceedings; and to inquire of defendants' witness

Raney, and to require said witness to testify, page 350 } about said report, as appears on pages 1921-1924, both inclusive, of the Transcript of Proceedings.

107. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1924), in permitting plaintiff's counsel to refer to and read to the jury from Exhibit 4-17, with the answer of United Mine Workers of America, which is the weekly report for the week ending June 24, 1950, and which portion of said Exhibit, as read to the jury, appears on pages 1924 and 1925 of the Transcript of Proceedings; and to inquire of defendants' witness Raney, and to require said witness to testify, about said report, as appears on pages 1925-1930 of the Transcript of Proceedings.

108. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 897-898), plaintiff's witness Baird to testify that "these estimates in here do not include any estimate of profit the company would have made by the use of its own equipment" and in failing and refusing to strike said testimony from the evidence and to instruct the jury to disregard such testimony (Tr., p. 2009).

109. The Trial Court erred in overruling (Tr., p. 2024), defendants' motion (Tr., p. 2022) to strike the testimony of plaintiff's witness Hugh H. Baird, Jr., to which ruling defendants excepted (Tr., p. 2024).

110. The Trial Court erred in overruling (Tr., p. 769) defendants' objections and permitting plaintiffs' witness, Dixon, to testify (Tr., pp. 770-771) concerning the general course or pattern of conduct of United Construction Workers in other parts of eastern Kentucky, to which ruling defendants excepted (Tr., pp. 769-770).

111. The Trial Court erred in permitting, over page 351 } defendants' objections and exceptions (Tr., pp. 958, 958-A, 973, 1021, 1045), plaintiff's witnesses Jack Patrick (Tr., pp. 958, 958-A, 958-B), C. H. Patrick (Tr., pp. 972-974, both inclusive), Chester Trimble (Tr., pp. 990-991), Sublett (Tr., pp. 1020-1021), and Mayo (Tr., pp. 1045-1046) to testify concerning the reputation of United Construction Workers in eastern Kentucky about allegedly running A. F. of L. members off of jobs.

112. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 956, 1095, 1096), the answer in the deposition of Raymond E. Salvati, to be read to the jury concerning the contract between Island Creek Coal Company "or one of its associated or subsidiary companies

with Hamill Construction Company" (Tr., pp. 1095, 1096), and that said Construction Company was not able to complete the work and the reason therefor (Tr., p. 1096).

113. The Trial Court erred in permitting plaintiff's counsel to ask questions, and in requiring, over defendants' objections and exceptions (Tr., pp. 1597-1600, both inclusive), defendants' witness, Hart, on cross examination, to testify to questions concerning conversations and transactions at the Beckett Construction Company job at Wheelwright, Kentucky (Tr., pp. 1597-1600, both inclusive).

114. The Trial Court erred in permitting plaintiff's counsel, over defendants' objections and exceptions (Tr., p. 1613), on re-cross examination, to inquire of defendants' witness, Hart, whether he had run anybody off any job in eastern Kentucky in 1949, and to require the witness to answer such questions (Tr., pp. 1613-1614).

page 352 } 115. The Trial Court erred, over defendants' objections and exceptions (Tr., pp. 1910-1911, 1913, 1937), in permitting plaintiff's counsel to inquire of defendants' witness Raney, on cross examination, and in requiring the witness to testify, concerning alleged trouble in Prestonsburg in September, 1949, which involved the Hughes Motor Company and Ranier's Garage (Tr., pp. 1910-1911, 1937-1939, both inclusive); and in inquiring of said witness, and in requiring said witness to answer, the question if he had "heard or knew of anyone being run off a job in eastern Kentucky" by the defendants (Tr., pp. 1912-1914, both inclusive).

116. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1930), in permitting plaintiff's counsel to inquire of defendants' witness Raney, and in requiring said witness to testify, concerning alleged labor trouble at the Link-Belt Company at Wheelwright, Kentucky (Tr., p. 1930) and about United Construction Workers allegedly running anybody off jobs at Wheelwright, Hughes Motor Company and Ranier's Garage (Tr., pp. 1930-1932, both inclusive).

117. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1933), in permitting plaintiff's counsel to refer to the report of David Hunter, Acting Director, Region 58, dated April 7, 1950, in the answer of District 50, United Mine Workers of America, to plaintiff's interrogatories, and to read from said report to the jury, as appears on page 1934 of the Transcript of Proceedings.

118. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1934), in permitting plaintiff's counsel to refer to a report by David Hunter to Mr. A. D. Lewis,

dated May 22, 1950, weekly report for the week  
 page 353 } ending May 20, 1950, and to read to the jury from  
 said report, as appears on pages 1934-1935 of the  
 Transcript of Proceedings.

119. The Trial Court erred, over defendants' objections the answer of District 50, United Mine Workers of America, which is a report by David Hunter to Mr. A. D. Lewis, dated August 5, 1950, and to read to the jury from said report, as appears on pages 1935 and 1936 of the Transcript of Proceedings.

120. The Trial Court erred, over defendants' objections and exceptions (Tr., p. 1936), in permitting plaintiff's counsel to refer to and read to the jury from Exhibit 4.28, with the answer of District 50, United Mine Workers of America, which is a report by David Hunter to Mr. A. D. Lewis, dated September 14, 1950, and to read to the jury from said report, as appears on pages 1936-1937 of the Transcript of Proceedings.

121. The Trial Court erred, over defendants' objections and exceptions (Tr., pp. 1947, 1949, 1950, 1951, 1952, 1958, 1959), in permitting plaintiff's counsel to read to the jury the deposition of Nelson Baldrige, as appears on pages 1948-1950, both inclusive, of the Transcript of Proceedings and the Trial Court erred in overruling defendants' motion to exclude (Tr., p. 1958) the deposition as read to the jury, to which ruling defendants excepted (Tr., p. 1958).

122. The Trial Court erred in permitting (Tr., p. 302), over defendants' objections (Tr., p. 301) and exceptions (Tr., p. 302), plaintiff's witness, Bryan, to detail the utterances of

Bert Preston concerning the reputation which the  
 page 354 } people in Breathitt and other counties of the  
 State of Kentucky had for shooting and that, in  
 Preston's opinion, they would shoot at the workers and it  
 was too dangerous to go back to work and advised against it  
 (Tr., p. 302).

123. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witness, Norman Hackworth, to testify that he knew the reputation of "those people in that country. It was very bad. I didn't want to get killed, and I felt if I worked on there, I would get killed (Tr., p. 923), and that he did not go back to work because "I was afraid to" (Tr., p. 924).

124. The Trial Court erred in permitting, over defendants' objections and exceptions, plaintiff's witnesses to testify concerning the reputation of Breathitt County for law abiding or law breaking (Tr., pp. 967, 968).

125. The Trial Court erred in refusing (Tr., p. 451), defendants' request that defendants be permitted to examine plaintiff's tax returns (Tr., pp. 434-435, 457-458), to which ruling defendants excepted (Tr., p. 458).

126. The Trial Court erred in refusing to permit defendants' counsel to inquire of plaintiff's witness Baird concerning income taxes and income tax returns of plaintiff for the State of Kentucky and in refusing to require plaintiff's witness to answer questions concerning said taxes and income tax returns (Tr., pp. 2033-2034), to which ruling defendants excepted (Tr., p. 2034).

127. The Trial Court erred in rejecting and refusing (Tr., pp. 556-557) the motion of counsel for defendants page 355 } (Tr., p. 85) to permit Mr. Fred Pollard to examine and cross-examine witnesses on behalf of District 50, and either Mr. James Mullen or Colonel Crampton Harris to examine and cross-examine witnesses on behalf of United Construction Workers and the United Mine Workers of America.

128. The Trial Court erred in overruling (Tr., p. 698) defendants' motion to discharge the jury and declare a mistrial (Tr., pp. 648, 661-671, inclusive), to which ruling defendants excepted (Tr., p. 698).

129. The Trial Court erred in overruling the objection of defendants to the introduction of 24 application blanks, to which ruling defendants excepted (Tr., pp. 300, 400, 510).

130. The Trial Court erred in failing and refusing to exclude from the consideration and hearing of the jury certain evidence of acts and transactions introduced through plaintiff's witnesses, which evidence was objected to and excepted to by the defendants.

131. The Trial Court erred in failing and refusing over the objections and exceptions of the defendants, to exclude evidence introduced by plaintiff's profits obtained by United Construction Corporation which were made by United Mechanical Corporation.

132. The Trial Court erred in failing and refusing to exclude evidence and testimony in which defendant's witnesses and excepted during the course of the trial.

133. The Trial Court erred in citing illustrations Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

134. The Trial Court erred in refusing to exclude defendants' testimony.

135. The Trial Court erred in refusing to exclude defendants' testimony.

136. The Trial Court erred in refusing to exclude defendants' testimony.

shown by Instruction "A", "J" and "O-2" given by the Court and in giving the same as so modified.

136. The Trial Court erred in refusing to sustain and in overruling defendants' Motion for a Mistrial made on January 29, 1951, on the grounds of prejudicial and inflammatory remarks made by Counsel for plaintiff, and similar remarks made by plaintiff's witness A. Hamilton Bryan.

137. The Trial Court erred in refusing to sustain and in overruling defendants' Motion for a Mistrial made on February 14, 1951, because of the appearance of a highly prejudicial and inflammatory editorial in the Newspaper "Richmond News Leader" on February 13, 1951, entitled "Enemies of the Miners?".

138. The Trial Court erred in refusing to sustain a renewal of said motions for a mistrial made by the defendants in their motion to set aside the jury verdict and grant a new trial because of said prejudicial and inflammatory remarks and editorial, as well as further prejudicial and inflammatory remarks made by Counsel for the plaintiff during the remainder of the trial.

139. The Trial Court erred in refusing to permit counsel for the defendants to poll the jury regarding the editorial in the "Richmond News Leader" of February 13, 1951, entitled "Enemies of the Miners?", after the jury had rendered their verdict.

140. The Court erred in refusing to sustain, and in overruling, defendants' Motion to Set Aside the Verdict of the Jury and to Grant a New Trial on the grounds that the jury's verdict for compensatory damages is excessive.

page 357 } 141. The Trial Court erred in refusing to sustain, and in overruling, the defendants Motion to Set Aside the Verdict of the Jury and to Grant a New Trial on the grounds that the jury's verdict for punitive damages is excessive.

142. The Trial Court erred in refusing to sustain, and in overruling, defendants' Motion to Set Aside the Verdict of the Jury and to Grant a New Trial on the ground that the jury's verdict that the defendants are jointly and severally liable to plaintiff is contrary to the law and the evidence and is without evidence to support it.

143. The Trial Court erred in permitting, over defendants' objections and exceptions (Tr., pp. 97-98) plaintiff's witness, Bryan, to testify concerning the dollar volume of construction work which plaintiff did during the past 10 years (Tr., pp. 98, 100).

144. The Trial Court erred in failing and refusing to sustain Motion of Defendants to strike the remarks of plaintiff's

counsel appearing on pages 225-226 of the Transcript of Proceedings.

145. The Trial Court erred in admitting evidence of other acts allegedly committed by the defendants introduced by plaintiff for the purpose of showing a course of conduct by the defendants, over the defendants' objections and exceptions.

146. The Trial Court erred in refusing to sustain, and in overruling, defendants' Motion to Set Aside the Verdict of the Jury and to Grant a New Trial, and in entering said judgment of July 5, 1951, on the grounds that the jury's verdict and said judgment (a) deprive the defendants, and each of them, of liberty and property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, (b) constitute a denial to the page 358 } defendants, and each of them, of the exercise of rights granted to them by the First Amendment to the Constitution of the United States, and (c) constitute a denial to the defendants, and each of them, of rights granted by the Constitution and laws of the United States, including the Norris-LaGuardia Act, 29 U. S. C. A. Sections 101-110, 113-115, the Clayton Act, 15 U. S. C. A. Sections 12-13, 14-21, 22-27, 44; 29 U. S. C. A. Section 52, and the Labor Management Relations Act of 1947, 29 U. S. C. A. Sections 141-197.

147. The Trial Court erred in refusing to sustain, and in overruling, defendants' Motion to Set Aside the Verdict of the Jury and to Grant a New Trial for each and every ground assigned therein to defendants' written motion to set aside the verdict and grant a new trial.

page 359 } 148. The Trial Court erred in entering judgment upon the verdict of the jury that the plaintiff recover of the defendants, jointly and severally, the sum of \$275,437.19, with interest and costs, which judgment was entered on July 5, 1951.

Note: For the convenience of the Court we have wherever possible given references to the stenographic reporters transcript where the incidents complained of have been reported. In many cases there were continuing objections to specific lines of examination of witnesses or other conduct and continuing exceptions to the Trial Court's rulings and complete references to the transcript are not practicable in all cases. The failure to give complete references is not intended as a waiver of any specific evidence or conduct during the trial which is covered by the substance of any assignment of error.

. . . . .

## Supreme Court of Appeals of Virginia.

## PRE-TRIAL CONFERENCE.

## VOLUME 1.

. . . . .

Received and filed Aug. 16, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

. . . . .

## ARGUMENT ON INTERROGATORIES.

City Hall,  
Richmond, Virginia,  
Thursday, October 12, 1950.

Met, pursuant to agreement, at 9 30 o'clock a. m.

Before: Hon. Harold F. Snead, Judge.

Appearances: Archibald G. Robertson, Francis V. Lowden, Jr., and T. Justin Moore, Jr., of Hunton, Williams, Anderson, Gay & Moore, Electric Building, Richmond, Virginia, appearing on behalf of the Complainant.

page 2 } James Mullen, and Fred G. Pollard, of Williams, Mullen, & Hazelgrove, Richmond, Virginia;

Colonel Crampton Harris, 1018-19 First National Building, Birmingham, Alabama; and

Yelverton Cowherd, 1435 K Street, N. W., Washington, D. C., appearing on behalf of the Defendants.

Also Present: A. Hamilton Bryan, President of the Laburnum Construction Company.

Willard Owens, 900--15 Street, N. W., Washington, D. C.

page 3 }

## PROCEEDINGS.

The Court: We will proceed, gentlemen.

Mr. Robertson: The appearances for the complainant are Archibald G. Robertson, Francis V. Lowden, Jr., and T. Justin Moore, Jr. Also present is Mr. A. Hamilton Bryan, President of the Laburnum Construction Corporation. As such, he is interested in these proceedings.

I now ask defendants to let the record show everybody present, who they are, that have already not been named. I ask that everybody in this room be shown as to who was here, what their capacity is.

The Court: The Court doesn't see any objection to that.

Mr. Pollard: The appearances for the Defendant are James Mullen, Fred G. Pollard.

Mr. Robertson: And—

Mr. Pollard: If you will wait until I finish—

Mr. Robertson: I don't know when you have finished, and when you are whispering to other people.

Mr. Pollard: Also appearing for the Defendants, Crampton Harris, Esq., counsel for the defendants. He has been admitted to practice before this Court. His address is on file with the Clerk.

Mr. Robertson: Have you any objection here to telling what his home address is? What his firm is? 1000  
page 4 } Mr. Pollard: None.

Col. Harris: It is 1018-19 First National Building, Birmingham, Alabama. I practice law.

Mr. Pollard: Also present is Yelverton Cowherd.

Mr. Cowherd: My address is 1435 K Street, N. W., Washington 5, D. C.

Mr. Robertson: I think you are also counsel for the United Construction Workers in this case?

Mr. Cowherd: Before I was so rudely interrupted, I will say that I have appeared in the case as counsel for United Construction Workers and District 50, United Mine Workers, each of which organization I am the General Counsel of. If that satisfies Mr. Robertson, I will cease, otherwise, I will talk until he gets tired.

The Court: Let's don't get in any controversy between counsel.

Mr. Pollard: Also present is Mr. Willard Owens, 900—15th Street, N. W. Washington, D. C.

Col. Harris: Mr. Owens doesn't appear as counsel. He is a mere spectator visiting in this Court.

Mr. Robertson: May we ask what function he has?

Col. Harris: No, we may not, it is immaterial. We decline to state why he is here.

Mr. Robertson: I ask the Court to ask him, so we will know.

The Court: Does the Court understand that Mr. 1000  
page 5 } Owens is just a visitor here?

Col. Harris: Yes.

The Court: I think that explains his presence here.

Mr. Robertson: I ask the Court if I might ask Mr. Owens

one question. I want the record to show everything that occurs.

The Court: Yes.

Mr. Robertson: Are you the son of Mr. John Owens, Secretary and Treasurer of the United Mine Workers of America?

Col. Harris: I object to that question. It is wholly immaterial. This hearing is a public hearing. As I understand it, any citizen is entitled to come here, and Mr. Owens does not appear as counsel. The time of this Court shouldn't be wasted in trying to get information as to who Mr. Owens is.

The Court: I sustain the objection.

All Right, Mr. Mullen.

Mr. Mullen: If your Honor, please—

Mr. Robertson: May I have that answer for the record? I except to the ruling of the Court. I would like to have it in the record.

The Court: I suppose you would be entitled to it for the record. All right.

Mr. Robertson: Mr. Owens, are you the son of Mr. John Owens, who is Secretary-Treasurer of United Mine  
page 6 } Workers of America?

Col. Harris: Don't answer. We repeat the objection.

The Court: The Court has sustained the objection. Counsel asked the privilege to ask the question for the benefit of the record, not for the benefit of the Court, in case this matter goes up.

Mr. Owens: Am I to become a witness, your Honor?

The Court: No, no witness at this point.

Mr. Mullen: The Judge has already ruled you don't have to answer the question. You can put it in the record.

The Court: In the record, but not for the purpose of this hearing. He has saved his point.

Mr. Robertson: The Court says that you answer the question.

The Court: Answer the question.

Mr. Owens: I am.

Mr. Mullen: If your Honor please, the defendant, United Mine Workers of America object as a whole to the interrogatories addressed by the complainant in this case.

The grounds of objection are as follows:

(1) The interrogatories as a whole and in special categories violate the Fourth Amendment to the Constitution of the United States, and the Statutes of Virginia, and are contrary to the decisions of the United States Supreme Court in that

they constitute a fishing expedition and impose an impossible task on the defendant.

(2) A large percentage of the questions asked are irrelevant and immaterial, and the periods for which information is asked is likewise irrelevant and immaterial.

(3) That the extensive duplication of questions imposes an undue burden on the defendant.

(4) That a large percentage of questions call for interpretation of written instruments and is an invasion of the functions of the Court.

(5) That the answers to certain categories of questions are known to, or information necessary to answer same is in the possession of, complainant.

(6) That certain categories are specifically intended to create prejudice and the interrogatories as a whole are directed to creating prejudice and to confuse the jury.

I have already stated the grounds for the objection.

The Court: Does counsel desire Mr. Mullen to repeat?

Mr. Lowden: There is a copy for us?

Mr. Mullen: I first objected that the interrogatories violate the Fourth Amendment to the Constitution of the United States.

The Court: Did you say Fourteenth?

Mr. Mullen: Fourth, in that it constitutes a fishing expedition and imposes an impossible task on the defendant.

The interrogatories are addressed to three distinct things: one, the production of documents; second, declarations by the defendants as to certain facts; and, third, declarations by defendants as to their interpretation of certain provisions of their respective constitution and rules.

Section 8-320 of the Code of 1950, Virginia, provides that a party may file interrogatories to any adverse party. Thereupon, the clerk shall issue a summons requiring the officer to summon the proper party to answer such interrogatories.

Section 8-321 of the Code of Virginia, 1950, provides:

"When the court \* \* \* is satisfied that the interrogatories are relevant and such as the person to whom they are propounded would be bound to answer upon a bill of discovery \* \* \* it may, if such person do not in a reasonable time file answers thereto, upon oath, or, if he file answers which are evasive, attach him and compel him to answer in open court, or to answer more explicitly. It may also, if it see fit, set aside a plea of his, and give judgment against him by de-

fault, or if he be plaintiff, order his suit to be dismissed with costs . . . .”

If he files answers which are evasive, the Court may attach him and compel him to answer in open court, under certain penalties.

Section 8-324 provides:

page 9 } “In any case at law a party may file an affidavit, setting forth that there is, he verily believes, a book of accounts or other writing in possession of an adverse party . . . containing material evidence for him, specifying with reasonable certainty such writing or the part of such book.”

It then provides the Clerk is to summons as provided in Section 8-320.

Section 8-325 provides:

“When the court is satisfied that the person filing such affidavit has no means of proving the contents of such writing, or of such part of the book, but by the person summoned producing what is required by the summons, and that the same is relevant and material . . . it may unless the person summoned shall, in a reasonable time, either produce what is so required, or answer in writing upon oath, that he has not under his control such book or writing.”

Then he may attach him and compel him to answer.  
The code section just quoted establish:

1. All facts demanded must be such as the applicant could obtain on a bill of discovery.

2. No document may be demanded unless the following requisites concur:

- page 10 } (a) The application is sworn to;  
(m) It states that the document is material;  
(c) It specifies the document “with reasonable certainty”;  
(d) The contents of the document are not otherwise provable by the applicant;  
(e) The person summoned to produce the document does not state under oath that it (or another of like import) is “not under his control”.

3. No fact or document may be demanded unless "relevant" or "material", under the terms of the statute.

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page 16 }

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I don't want to take the time of the Court, but I would like to refer to three little cases here, very briefly. There are innumerable cases on this subject, and all of them go to this same point, that it must show materiality. It must reasonably specify the document or book which contains the evidence and the mere suspicion isn't sufficient.

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page 19 } Mr. Mullen: I am going into certain questions that apply under the law I have just read. I am not undertaking at this time to go through all of the questions and ask a ruling on them. I desire to argue this question fully, citing the cases, the questions that come under it, and also arguing the other points, in order that the Court may pass on my request for an order to send these interrogatories and the interrogatories addressed to United Construction Workers and District 50 back to be reformed and revised by the complainant.

No. 1. is: "When and upon what authority was United Mine Workers of America first organized?"

"2. Furnish a copy of the Charter, Constitution, Rules, Laws, By-Laws and all other regulations and rulings of United Mine Workers of America in effect between the dates October 28, 1948, and August 4, 1949, together with a copy of all changes or revisions made in same since August 4, 1949."

Not only are the regulations and rulings not shown to be relevant, but United Mine Workers was organized in 1890, sixty years ago. It is entirely conceivable that a ruling made in the very first year is still in effect. That is the question, what rulings or regulations are in effect. That would mean a search over sixty years of records and looking up every letter, every ruling that they might make. The ruling might be what is the tonnage rate to be applied to mines  
page 20 } in the State of Missouri. It might be any one of thousands of questions. They are asking to bring

in all rulings and all regulations, regardless of whether relevant, and over a period of time that is simply impossible, an impossible burden on the defendant.

The difference is illustrated right in that very question, because a copy of the Charter, the Constitution, Rules, Laws and By-Laws, if there are any such papers, they are designated. They are designated by name.

There is a Constitution. They know that. They have had it already. So that is one of the examples of a fishing expedition.

Now, No. 6 calls for a charter or certificate of affiliation granted by U. M. W. to District 50. All right. That is a specific designation of a specific document that we can identify. If that is relevant, and it may be, they have a right to call for it.

The same thing applies to Question 7.

We now refer to Questions 13. It reads:

"13. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that, among other objects, it was an object of United Mine Workers of America to do the following:"

This is quoted from the Constitution:

page 21 } "Second. To increase the wages, and improve  
the conditions of employment of our members by  
legislation, conciliation, joint agreements or strikes."

Then dropping down to Subsection (d):

"(d) As used in the language quoted above, what is meant by the words 'joint agreements'? Were United Mine Workers of America, or District 50, or United Construction Workers parties to or bound by the provisions of any such joint agreement during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? If so, furnish a copy of all such joint agreements."

Those joint agreements are more than 1,500 in number. They are not joint agreements between United Mine Workers, District 50 and/or United Construction Workers. They are collective bargaining agreements entered into between the employer and the Union representing his employees. They have no possible bearing on this Question here. In addition to which, they will disclose the private business of the employer.

The United Mine Workers have thirty districts, 3,000 locals and 650,000 men, members. District 50 has 58 districts, 850 locals, 112,643 members. United Construction Workers has 58 districts, 655 locals and 45,000 members.

Those locals of United Construction Workers, District 50, have such agreements, but it has no bearing here.  
page 22 } It can't possibly have any. It is purely a fishing expedition to try to find some evidence to bolster up their case.

Take as another example, Question 34. They quote from the Constitution of United Mine Workers of America, this:

"He may appoint a member whose duty shall be to collect and compile statistics on the production, distribution and consumption of coal and coke, freight rates, market conditions, and any other matter that may be of benefit to the Organization. Said statistician shall make a report to the regular convention."

Now, coming to Subsection (c), they ask:

"(c) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did any person or member having been appointed for the purpose by the President of United Mine Workers of America, collect and compile or attempt to collect and compile statistics relating to District 50 and United Construction Workers or to the work and industries claimed by them, respectively? If so, what statistics were collected and compiled and what reports thereon were furnished to the President of United Mine Workers of America? Furnish a copy of all these reports."

We have another case there where they are simply fishing, hoping that something will develop in some of these reports, if there are any, which may help them get evidence  
page 23 } for their case. It is exactly the things that are condemned by the cases I have read your Honor, and by the Fourth Amendment to the Constitution.

Another example of fishing in violation of the Amendment, is Page 37, in which they quote from the Constitution of the United Mine Workers of America—that is Question 37:

"He shall interpret the meaning of the International Constitution but his interpretation shall be subject to repeal by the International Executive Board."

In Subsection (d) of Question 37, they say:

“(d) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did the President of United Mine Workers of America have the right to interpret or to cause to be interpreted the meaning of the Constitutions or Rules of District 50 and of United Construction Workers? If so, what interpretations of the meaning of said Constitutions or Rules made by the President of United Mine Workers of America were in effect between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all these interpretations.”

Now, we have got the same, in effect. I read from Subsection (d). There we have the same question in effect.

District 50 was organized in 1936. He is going back 14 years to find every interpretation that may have  
page 24 } been made. Those interpretations certainly had nothing to do with Laburnum Corporation. Laburnum Construction Corporation and its work down there was never heard of until after the suit was brought. It may be a big matter for Laburnum, but in proportion to the volume of business and the administration that has to be done, as shown your Honor by the figures that I gave you, as to those Districts and the Locals, the membership, why, of course, it is a matter that the head administrators wouldn't know anything about.

These interpretations couldn't possibly, all these prior years and all, be furnished. If they want to add, if there are any interpretations relevant to this matter, that conceivably would be within the purview of the decision by Mr. Justice Holmes, which suggests in that case that they should ask for any documents, correspondence that are relevant and then if, in the judgment of the other side, that given was not correct, then they could ask by a showing to have it supplemented.

I read (d). I offer the same objection as to Subsection (c) of Question 37, which also asks:

“(c) What interpretations of the meaning of said ‘International Constitution’ made by the President of United Mine Workers of America were in effect between the dates October 28, 1948, and August 4, 1949, and also after August  
page 25 } 4, 1949? Furnish a copy of all these interpretations.”

Now we go back sixty years. “What interpretations of the meaning of said ‘International Constitution’ made by the President of United Mine Workers were in effect”, not what

were made during this period involved in this matter: not even what interpretations were made generally during that period. But your Honor sees from the numerous Districts and numerous Locals and the membership, that there again they are asking for something that is impossible and is purely a fishing expedition, hoping to find something that will bolster their case.

To go through those records and answer that question and a similar one on No. 2, would take weeks and weeks. They had records stored away back. It would call for hunting up every letter the President may have written in reply to inquiry from any of those Locals, from any of those Districts, from any of the members, all upon rulings or interpretations, rather the right to inquire to do so and so under the Constitution. The mere correspondence—it is an impossible task.

In Question 85 they ask for the following:

“85. Furnish a copy of all credentials issued by United Mine Workers of America or its International Executive Board or its President or any other representative of United Mine Workers of America to each of the persons named below for his or her proper identification and use page 26 } between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, said persons being as follows:

John L. Lewis  
A. D. Lewis  
Kathryn Lewis  
Thomas Raney  
O. B. Allen

Thomas Davis  
David Hunter  
William O. Hart  
H. G. Robinson

We have no particular objection to giving the information. In fact, we have no objection to giving any information that is pertinent to this case. I have been instructed not to raise any captious objections, and even where cases are wrong in many cases, if they are properly framed, to answer them, even though we could object. But to the interrogatories as a whole, based on those objections which I stated, we are going to ask for that order, and I will cover the other points now. However, that calls for a good deal of work.

Question 86—I am giving you the principal now, on the question of what papers are called for, that part.

“86. Was John L. Lewis, as an employee or representative of United Mine Workers of America or District 50 or United

Construction Workers, required to provide automobile liability insurance or any other kind of insurance for the protection of United Mine Workers of America or District 50 or United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949? If so, who required such insurance? Furnish a copy of the policy or policies of insurance affording such protection."

That covers automobile liability insurance or any other kind of insurance. We don't know whether any one was required, but the part I am objecting to is the scope of that question. There might be innumerable policies, if there was such a requirement. Yet we are asked to furnish copies of all of them.

The same question is asked in Questions 87 to 95 for A. D. Lewis, Kathryn Lewis, O. B. Allen, Thomas Raney, also, Thomas Davis, David Hunter, William O. Hart, H. G. Robinson, the clearest possible evidence that they are fishing. Everyone they can think of, they are asking if they have got any insurance and want the papers, hoping that they might find something to bolster their case. They doubtless are asking that, hoping to find something to show agency or responsibility of this defendant for the acts alleged to have been wrongfully done by Employer, or representative of United Construction Workers.

Now we come to the most serious invasion of the rights of the defendants under the Fourth Amendment to the Constitution, Questions 95 through 103.

"95. What written reports on work performed, page 28 } on matters of policy or on organizational activities did John L. Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers submit to the International Executive Board of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

That same questions is asked for A. D. Lewis, for Kathryn Lewis, for O. B. Allen, Thomas Raney, Thomas Davis, for David Hunter, W. O. Hart, H. G. Robinson.

I am calling your Honor's attention to the form of that question, "What written reports, etc. were made"? What was meant? The question, itself, shows they cannot comply with the requirements of the law in regard to interrogatories. They can't merely surmise that something may be in exist-

ence. They have got to show what they are asking for specifically as existing documents or papers having some relevancy to the matter upon which the case is based. The very form of this question shows they do not have any such information. It shows that they are guessing, hoping that there are reports on work performed or matters of policy or organizational activity made by some of these people that may have in it some allusion to what happened down in Kentucky in July and August, 1949. That is what they are after. It is a gross perversion of a right given in asking for interrogatories.

page 29 } As I said, there are questions addressed to every one whose names they have heard of, asking about reports made backwards or forwards or between them, first about reports made to one man; second, what reports did he make, and asking for copies.

That again shows clearly the fishing expedition that they they are engaged in.

Then we come to another set of questions that is equally bad. Starting at Question 105.

"105. What written instructions, statements, reports, memoranda, letters and other papers were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer or Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers."

We have almost the identical language used in the Lorillard Case, that is what they asked for. It was condemned and the opinion written by Mr. Justice Holmes. The same thing we have here, the very form of the question shows they can't comply with the premises under which they can ask for interrogatories. They show it is simply a dragnet, hoping to find something somewhere, that somebody has said to this man down there, "You did right" or, "You did wrong", whatever you did—that is what you are hunting for. Nothing is relevant. They are not able to specify reasonably or identify reasonably the papers they ask for.

That same question goes on down through 106, 107, 108, 109, 110, 111, 112. Again I call attention to the territory that

those requests would cover. There are the numerous Districts, Locals that I have spoken of. These questions might apply to any one of them. But even if they apply only to District 50 or to Region 58, they still must meet the requirements of the Virginia Statute and the Fourth Amendment to the Constitution.

They show on their face the whole purpose and aim is a dragnet to try to bring out something, to hope there is in existence. They don't know whether there is in existence any such, or don't know whether they have ever been in existence, and they want to bring out—

Mr. Robertson: May I ask you one question? I am not as familiar with Constitutional law as you are. The Fourth Amendment relates to unlawful searches and seizures?

Mr. Mullen: Yes.

Then in Question 125 they ask:

“125. Furnish a copy of the minutes of all meetings of the International Executive Board of United Mine Workers of America held between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949.”

There again they are asking for production of papers and all which do not come within the purview of the requirements of law, which must be met, as a basis for propounding interrogatories calling for introduction of papers, documents and so forth.

The second objection that we made is to the duplication of questions.

Question 8 reads:

“8. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, that ‘This Organization shall be known as the United Mine Workers of America’, and that ‘It shall be International in scope’, and, if so, during what period or periods; and has said Constitution at any time since August 4, 1949, so provided and, if so, during what period or periods?”

Then follows 32 questions in which that identical question is asked, after quoting some phase of the Constitution, when one would cover the whole thing. It is just an imposition

upon the defendants; and in addition to that, they  
 page 32 } have the information in their possession. They  
           } have the Constitution of the International Union,  
 United Mine Workers of America, in which it is stated:  
 "Adopted at Cincinnati on October 11, 1948, effective No-  
 vember 1, 1948". And on Page 38, Article XII, Section 1:  
 "The next International Constitutional Convention shall be  
 held on the first Tuesday in October, 1952."

There is the answer to these 32 questions that they ask,  
 identical, without so much as a change of a comma. Not only  
 is it an imposition to ask that all of those questions be an-  
 swered, the same questions, but also they have the informa-  
 tion in their possession at this time. And it is only to get  
 information not in the possession of parties proposing inter-  
 rogatories. This is a fishing expedition.

Question 14 (b) is as follows:

"(b) As used in the language quoted above, do the words  
 'International Union' mean the United Mine Workers of  
 America and its Districts, Sub-Districts, branches and subor-  
 dinate branches, including District 50 and United Construc-  
 tion Workers; and, if not, what do they mean?"

That is the language referred to in the quotation from the  
 Constitution of the International Union, United Mine Work-  
 ers of America. This question is repeated eight times in the  
 identical form. They are bound to know they are  
 page 33 } quoting from the Constitution. They are bound to  
           } know that the references in it are to the Interna-  
 tional Union, United Mine Workers of America. It couldn't  
 be anything else. A large number of the 32 questions that  
 they ask, upon quotations from the Constitution, they have  
 the answer right in the Constitution. And anybody who un-  
 derstands elementary English, anybody who can understand  
 the by-laws of a corporation, or anybody who could under-  
 stand the organization of the Methodist Church, or the Epis-  
 copal Church, can understand the Constitution of the United  
 Mine Workers of America and the Rules of the United Con-  
 struction Workers and District 50. They are all perfectly  
 clear and consistent and are no different from the by-laws of  
 any corporation.

Question 16 (c) reads:

"(c) As used in the language quoted above, do the words  
 'Executive Board' mean the International Executive Board

of United Mine Workers of America, and, if not, what do they mean?"

That question is repeated nine times in the same identical words, no change of comma, even.

Question 13 (d) reads as follows:

"(d) As used in the language quoted above, what is meant by the words 'joint agreements'? Were United Mine Workers of America, or District 50, or United Construction Workers parties to or bound by the provisions of any page 34 } such joint agreement during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? If so, furnish a copy of all such joint agreements."

I have already explained what those joint agreements were, but that question is repeated four times. There are the instances of repetition which I haven't taken; however, taking those questions alone that I have referred to, there are 53 duplications which could be answered in four questions, four answers. The answers are bound to be the same. They are quoted in there.

Take another, for example, Take Question 23. I think that is a typical question.

"23. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'Charters of Districts, Sub-Districts and Local Unions may be revoked by the International President, who shall have authority to create a provisional government for the subordinate branch whose charter has been revoked. This action of the International President shall be subject to review by the International Executive Board upon appeal by any officers deposed or any members affected thereby. Until such review is had and unless said order of revocation is page 35 } set aside, all members, officers and branches within the territory affected by the order of revocation shall respect and conform to said order. An appeal may be had from the decision of the Executive Board upon such order of revocation, to the next International Convention'."

Then they ask questions (a) through (h), and in the first place, (a) is the usual question:

(a) During what period or periods did said Constitution so provide?"

That is one of the 32 times they ask that question.

"(b) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did said International President have the authority or right to revoke the charter or certificate of affiliation of District 50 in accordance with and subject to the provisions of the language quoted above?"

They have got the answer to the very thing they quote. It states they have got that specific power. They have got it in here, and they have got it in what they quoted, themselves.

"(c) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did said International President have the authority or right to revoke the charter or certificate of affiliation of United Construction Workers in accordance with and subject to the provisions of the language quoted above?"

Even the question shows that they know the answer. Then there is (d):

"(d) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did said International President have the authority or right to revoke or to cause to be revoked the charter of United Construction Local Union 778A or of Local Union No. 778A, District 50, in accordance with and subject to the provisions of the language quoted above?"

They go on with the whole series of questions, of which they have the answer right here (indicating), and the answer is in what they, themselves, have quoted specifically and clearly and imposes an undue burden upon the defendant to ask them to answer all of those things that they already have answered and they are contrary to the statement of the premises upon which interrogatories can be required to be answered.

In addition to those repetitions, and to other repetitions, there are more than sixty questions asked in the identical language in each one of the three sets of interrogatories that they have filed up to date, that is United Com-  
page 37 } struction Workers and the District 50, and United  
Mine Workers. So we have over 250 duplications,  
which imposes an unnecessary burden on the defendants in  
this case.

Then there are 35 questions in which the defendants are asked to interpret—I have read one or two of them—the Constitution. We have no particular objection to interpreting the Constitution. The counsel may not like our interpretation. I don't know whether they would really be bound by it or not, but we have no particular objections to interpreting it. But where there is duplication, we do have, and a lot of duplications occur therein. Of course, there is an usurpation of the province of the Court.

In a review in the Virginia Law Review summarizing Rule 30 in the Federal Procedure, which relates to interrogatories, it is said that the party cannot be required to summarize or interpret any paper to which it is a party, that that is within the province of the Court.

I assume the same thing applies, in fact it is established law, that where papers introduced in a suit to which a party in the suit is one of the signers, an objection asking him to interpret it, will be sustained. It must be by the Court.

Then, we believe that all through, that these lone 245 questions are addressed to the purpose of creating prejudice.

For example, we don't mind answering Questions  
page 38 } tion 45, as such, but it clearly states:

"45. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'The salary of the President shall be \$50,000 per annum; Vice President, \$40,000 per annum; Secretary-Treasurer, \$40,000 per annum; International Executive Board Members, \$1,000 per month; Tellers and Auditors, \$25.00 per day when employed. Each of the above mentioned officers shall receive, in addition to their salaries, such additional sums for additional service rendered as may be authorized and approved by the President; together with all legitimate expenses when employed by the Organization away from their places of residence.' "

The question based on that quotation is this: "During the periods inquired about, did United Mine Workers of America pay to Thomas Raney, member of the International Executive Board of United Mine Workers of America, in addition to his salary, an additional sum for additional services rendered. If so, what additional?" That question can be asked, with the last half of that quotation, namely, "Did they pay him for additional services". But it is clearly put in there for prejudicing you.

page 39 } As I say, we have no particular objection to it.

Those salaries, in the face of salaries paid to large corporations, paid to men who administer the affairs of an institution the size I have shown, are nothing to be ashamed of. But they are evidently put in there for prejudice.

There is another question specifically put in there for prejudice, Question 78:

"78. What is the relationship, by blood or marriage, between John L. Lewis and A. D. Lewis; and what is the relationship by blood or marriage, between John L. Lewis and Kathryn Lewis?"

That can have no other possible purpose except to create prejudice. Anybody who reads the newspapers can know perfectly well what the relationship is, but it is wrong in an interrogatory in this place, and serves to create prejudice.

Now, for those reasons, because it violates the right of these defendants under the Fourth Amendment of the Constitution and under the Virginia law and under the decisions, as clearly demonstrated by the questions, they are engaged in a fishing expedition and because of the undue burden, the date, placed on these defendants by the duplication of questions and because the questions clearly are intended to create prejudice, we are asking that order that I have referred to.

We see no reason why these defendants should be page 40 } punished by being required to answer interrogatories as slovenly as these interrogatories are. We don't object. We have no right to object to proper interrogatories, but we do have the right to object to being imposed upon under the guise of interrogatories. And we do have the right, we submit, your Honor, to require that they reform their interrogatories and bring them within the scope of what is permitted by the law and not to impose an unreasonable obligation upon the defendants and not to have them expect to go back sixty years or to make all kinds of copies which would take weeks and weeks.

That is the basis of our prayer to the Court to send back

all three of these interrogatories. We have indicated what the questions are that should be changed to avoid duplication. They can pick them out themselves. I don't see why we should pick them out for them.

As far as the other question of a fishing expedition, of course, they are for your Honor to pass on; if he does, he can correct those. That is the basis of our request for interrogatories to be sent back, upon our objection, to be reformed and revised by the complainant.

The Court: Let's take a recess of five minutes.

(Whereupon, a recess was taken.)

The Court: All right, are you ready?

Mr. Robertson: Yes.

page 41 } Your Honor will recall that this action was instituted in December, 1949, and set for trial beginning December 11 of this year.

Your Honor will recall also that the first interrogatories filed in this action were filed in behalf of all three defendants last summer. And the plaintiff was directed to answer those interrogatories on or before September 20, and counsel for all parties appeared here on September 20 and the plaintiff answered the vast majority of the interrogatories and the Court ruled upon certain of those interrogatories as to whether they should or should not be answered. And subsequently, on September 26, all parties came before the Court, by counsel, and the plaintiff answered the additional interrogatories that the Court ruled it must answer.

Now, I will not go back to reading those interrogatories at this moment, but I wish to call the attention of the Court to the fact that in those interrogatories, these three defendants here have done many other things which they now claim we have no right to do. In the form of the questions they asked and the insistence that they be answered and the benefit they have gotten through the answers and they cannot blow hot and cold, they are committed to the course of action they took there, so far as it applies to these interrogatories.

Prior to September 20, this plaintiff filed various interrogatories against the three defendants, returnable on page 42 } September 20. None of them have yet been answered. On September 13, this plaintiff filed these interrogatories that Mr. Mullen has just discussed this morning, and made them returnable to September 20, so that they would come before the Court on that date. So when these interrogatories under discussion here this morning were formulated and filed, counsel for the plaintiff had not had the

benefit of what transpired here before the Court on September 20, where I recall in some instances the Court now has disposed of the plaintiff's interrogatories.

Then we came back here on September 26 and discussed various matters, got these subsequent dates and the Court will recall that it asked Mr. Mullen and I to get together promptly and indicate what questions we could and what questions we could not agree upon.

I undertook to do that promptly with Mr. Mullen, and did it, I think prior to September 28, as will appear from my memorandum to him, which was written on September 28. My recollection is that I telephoned him before that date. I heard nothing from Mr. Mullen until October 10, and this letter from him to me was delivered by a messenger. Prior to that time, Mr. Mullen had told me he was so busy he would let me know whether he wanted to get together or not.

"With respect to the suggestion that we endeavor as far as possible to determine beforehand what questions in the interrogatories addressed to the United Mine page 43 } Workers of America we would not object to I beg to advise as follows:-

"We shall object to the interrogatories as a whole. If, however, the Judge should rule against us on this point we list below the questions to which we will specifically object. This does not necessarily mean that we may not criticize some of the questions in any argument against interrogatories as a whole. It simply means that if we are required to answer any part of the interrogatories the following questions will be specifically objected to:

"(2), (9-e), (13-d), (19), (24-f), (28-e), (34-e), (35-e), (37-e and d), (40-b), (43-b), (45), (61) to (64), both inclusive, (78), (96) to (103), both inclusive, (105) to (112), both inclusive, (118), (119), (120), (121a and b), (123-a and d), (124) and (125). In the supplemental interrogatories we will object to (1) and (2).

Those are the ones that are before the Court. When we come to those I am going to show they are exactly the ones they asked up there, just in reverse.

This is the case where the plaintiff seeks to recover \$500,000. It is an important case in this Court. It is a case where there are three defendants, and all the witnesses, page 44 } and many of the key witnesses are out of the state. We conceded here this morning that the Court had

no inherent power to compel their attendance. And Mr. Mullen has stated prior to this time that they will make no commitment for any witness whatsoever to attend here.

These interrogatories have been framed and submitted in good faith after the most painstaking study and preparation. In view of the hour and a half that Mr. Mullen has taken here this morning, and the scope of his argument, it is perfectly obvious that we are going to have to take these depositions up one by one seriatim. I am going to ask the Court to do it. If Mr. Mullen was too busy before we got here today, I ask the Court to do it today. I say the seriousness and importance of the case merits whatever time is necessary.

It seems to me that the necessary time will be minimized if I reply generally to his argument against the interrogatories *in toto*. And then we take them up one at a time and dispose of them, rather than try to group them in any such way as Mr. Mullen attempted to do, to which, of course, I do not agree.

So if the Court will permit me, I will make a general reply to Mr. Mullen's argument, then come to the specific question. I call the Court's attention to one fact at the very outset. When Mr. Mullen charges us with having the Constitution of the International Union, which I think we page 45 } have, and in one of the other times when we were here, he stated specifically and categorically that there was no Constitution of it, and the reason that we need this Constitution, we have had these things, these questions are based on these various Constitutions, Rules and Regulations; but if all of their witnesses are out of the State and if we have no assurance that they be here, does your Honor think for one minute if we had offered this to the Court at the trial of this case, out of a blue sky, that it would have been received?

Mr. Mullen: May I interrupt?

Mr. Robertson: You may once. I interrupted you.

Mr. Mullen: We offered to furnish you the Constitution, which you could produce in Court.

Mr. Robertson: I don't remember any such offer. The record will show it now. Do you still hold that offer?

Mr. Mullen: We never said there wasn't any constitution of the United Mine Workers. We did say there was no Constitution of United Construction Workers or District 50.

Mr. Robertson: That is one reason we have asked for what we have asked for. We don't want to quibble about what you call it. We want what actually is that governs these three different defendants.

Now, if your Honor please, I ask you to let me read you the names of these three defendants. United Construction Workers Affiliated with United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, the three defendants.

Now, if you go to the notice of motions of judgment filed in this case, you will see that our theory of the case is that these three different defendants are either component parts of one whole, to-wit, United Mine Workers of America, or they are instrumentalities or agents of the United Mine Workers of America, and that the three defendants are so inter-related and interwoven that they act through their members and component parts, or through their agencies, or through both.

I repeat what I said when we were here before. I make this statement based on the most exhaustive study that I, Mr. Lowden, Mr. Moore and Mr. Bryan are capable of making, that these things cannot be intelligently understood and co-related to each other, and that they are not intended to be, but they are intended not to be. That is a fair statement based on anybody, on a study of them by anybody, including the Court.

Mr. Mullen: I object to him imputing improper motives.

Mr. Robertson: I am not imputing the motives. I think it is very skillfully and artfully done. I don't think you did it. I certainly didn't do it.

If your Honor, please, I think much of what Mr. Mullen says here today comes with poor grace and too late, because

I understand, I think the working notes I made, page 48 } and my associates made when we were there, showed that he agreed without any strings to it, to answer certain interrogatories; that he challenged the right to be required to answer certain other interrogatories and the Court ruled that some of them he didn't have to answer, some of them he did have to answer. Some of them he need not answer as tendered, but must be tendered in modified form and a modified form was worked out. Then on those occasions, that what he says now as to any interrogatories, except those before the Court today, come too late. He did reserve the right to urge any and all objections he chose to urge against these interrogatories here today against the United Mine Workers of America.

If your Honor, please, at the outset of Mr. Mullen's argument, he said that these instruments, documents, records that we have called for could only, as I understood his argument, could only be acquired under *subpoena duces tecum*. Now,

if your Honor please, I am not naive enough to come here and ask this Court for irrelevant and immaterial information, inadmissible information. I do ask, I submit I am entitled to have every bit of information in answer to these interrogatories which tend to show the inter-relationship as component parts or as agents each of the other of these three defendants.

I can speak with some authority and with some feeling about the question of whether this Court right now, at this moment can ask any, demand that any of these page 49 } parties bring anything here that this Court says bring here, without any *subpoena duces tecum* or anything else, and the Court has that authority. That fact is set forth in the decision of *Robertson v. Commonwealth*, and it is discussed in the briefs and it is discussed in oral arguments and it appears in the record. And I think it appears in the opinion and the reason it runs through the whole thing, if the Court didn't have that power, the Court could not function. And we are not going to stop with any tweedle-dee-tweedle-dum thing, to have a *subpoena duces tecum* issued when the parties are right there before the Court, within the jurisdiction of the Court. I cite that case as my authority for that statement.

I have not come here unprepared on what questions are proper in the form of interrogatories. There is a discussion of it in Burke's Pleading and Practice, the last edition. You can get it there largely in one paragraph. There are some decisions in Virginia. I do not recall them at the moment. I have it at my file in the office. I can get it within fifteen minutes.

The rule as to what is admissible is the rule which applies in a pure bill of discovery, and you can make the distinction between a pure bill of discovery in equity and a bill for discovery and relief.

A pure bill of discovery means exactly what it says. You are trying to discover something, but you are not page 50 } asking for relief and in that instance, the things do not, the interrogatories do not have to be sworn to.

If it is a bill for discovery and relief, it must be sworn to to show the Court that they are acting in good faith. The rule which determines the propriety of interrogatories in a civil action is the rule which applies where a pure bill of discovery is sought. And you will find that in Burke's Pleading and Practice, with cases cited.

Then in Lyles' Notes on Equity Pleadings where he discusses the difference between the pure bill of discovery and a bill of discovery and relief, he says that in a pure bill of

discovery, which is the rule that applies here, you can get any information which is helpful to aid you in the proof of the case, where it is relevant, necessary and material, but it need not be vital to the proof of your case.

I can get those authorities, it is just a question of going to the office and getting them.

This case here, so far as the procedure is concerned, is governed by the law of Virginia, and not by any Federal rules of procedure and not by any Federal decisions in matters of interstate commerce. I submit it is a far cry from anything we have asked here, to a violation of the Fourth Amendment against illegal searches and seizures. The law your Honor applies here is the procedure law of Virginia, and the substantive law which your Honor will apply here will be the

substantive law of Kentucky, where this cause of page 51 } action arose. They have made the point. It was stated here repeatedly; when we were here on September 20 and September 26, they made no point of the correctness and incorrectness of the service. They expressed this desire to cooperate in giving information and then we can't even get them to give the names and addresses except under compulsion of the people who are in this courtroom this morning.

As I have said, these interrogatories have been prepared as result of the greatest study, the most painstaking preparation and in good faith. And we have got these three copies, which one of them is the Constitution of the International Union, United Mine Workers of America, the one to which Mr. Mullen referred. We got it from one of our labor services in Washington, D. C. It is not certified. If I were to offer it in Court as it is, Mr. Mullen, I think, would be the first one to object. Whether he did or not, I would be a fool to offer any such thing as that, because it certainly could be ruled out upon objection.

He said, and before I leave that, it was said here that John L. Lewis is the Czar of the United Mine Workers. Before a matter gets to the International Executive Board, which represents the membership of the Union, John L. Lewis'

word is the word of God, subject to be overruled page 52 } by the International Executive Board. And the word of the International Executive Board, except when you are going to expel a man from the Union, I believe is final, subject to review by the General Convention, and John L. Lewis, according to the wording of that thing, has the right to interpret that Constitution and apply it as he sees fit, in his uncontrolled judgment. And when we submit this thing to the Court or Mr. Mullen gives us a copy of it,

unless in some of these interrogatories that we have asked here, we don't know who is coming here to say that is the written constitution, but John L. Lewis has changed it. Mr. Mullen says now that there is no such thing as a Constitution of District 50, of the United Construction Workers. We have got this thing, here, that we got from a labor service, "Rules of United Construction Workers, Affiliated with United Mine Workers of America, March 15, 1949, 900—15th Street, N. W., Washington, D. C." If that is what they operate under, that is what we want. We want them to produce it here so we will have it in a form admissible in evidence, the Constitution of the United Mine Workers, these Rules and Regulations of the United Construction Workers, and these Rules of District 50, United Mine Workers of America, March 15, 1949.

So, to say that those things upon which our interrogatories are based, are irrelevant in this proceeding, is like trying to discuss the Constitution of the United States without having a copy of the Constitution available to you. And page 53 } it is an argument that doesn't merit the thought of a man of Mr. Mullen's ability to come here and say we have got this information in our own possession, when he ought to know we have got it in a form that is not admissible in evidence and that this Court has got the power to require them to make it available to us in a form that will be admissible in evidence. That is what we are asking this Court to do.

Mr. Mullen made the point that most of these questions are irrelevant and immaterial and inadmissible. I didn't think they were going to like them. I have intimated here before that I thought of obstacles that could be put in our way, would be put in our way to keep us from getting information.

He says that he wants through testimony under oath to show the relevancy of what we ask for and the materiality of it and whether or not it is an unjustified fishing proposition. I say that we have Hamilton Bryan, the President of the plaintiff company here prepared, if the Court wants him, to testify under oath and he has lived with this thing from its inception down to this minute.

I don't think it is any use going into the different questions now, like Mr. Mullen did, because it is perfectly obvious from what he said that we have got to go over them all anyway. I will stop and come back to that. I do say this, your Honor, when we come to that, it is going to be page 54 } tedious. It is going to be irritating. It is going to get boring. But I submit that those questions

are framed and submitted in good faith. I think some of them are probably too broad and should be narrowed in their scope here and now today, and I ask the Court to bear with all the parties and get these things thrashed out here now, today.

One purpose of our question is that we want to show the interrelationship, the interwoven scheme of things between these three defendants, in support of our allegation that they are acting through their component members who are or are not also their agents. You can't say that that is not relevant in this case, that that is not material in this case, that that is not admissible in this case, nor in the form of interrogatories, when they have put us on notice that they may not have anybody here for this hearing if they deem it unnecessary.

Of course, if they thought they could make our case collapse without having them here, there wouldn't be anybody here but us. Then Mr. Mullen, having argued this morning, you have got all this here in your testimony all right, put it in evidence—how far do you think I would get? How far do you think he would have a right to let me get away with any such stuff as that?

Mr. Mullen charges that we have been guilty of inexcusable and persecutory repetition in these three sets of interrogatories of these three different defendants. What page 55 } we have a right to do and are doing is to show the interrelationship between them so far as it applies to these events between October 28, 1948, when Laburnum had his first contract to go to work out there, and August 4, 1949, when the thing came to an utter collapse through the illegal acts of all three defendants acting as agents and component parts of each other.

Just to end this first phase of what I have to say, we have three further short sets of interrogatories here which we are going to submit this morning and ask the Court to either rule on them or rule on them here in time for it to be answered before the trial date of this case. I want to anticipate them to say this, those interrogatories demonstrate—perhaps they don't demonstrate it—but those authorities ask for specified copies of their official newspapers of one of these defendants and the file has been available to us through the courtesy of someone else and we have copies of them now, and those copies are in our possession. We think they contain information which is necessary to the proper presentation of our case. And we are going to ask for them in our interrogatories. That is what they won't admit, that these papers are correct copies. We still want other copies of them so we can return these to where we got them.

If your Honor, please, I think I have covered the ground generally. I suggest that we go—I think as long as I am presenting the interrogatories and they are challenged, that I should present them and if they are challenged seriatim, then I will say what I have got to say, then Mr. Mullen say what he has got to say. Then I have the right to close the argument. There is no use of Mr. Mullen shaking his head and saying it is too tedious or takes too long. That is the way to proceed. I will cooperate in making it short. There is plenty of time in a court of justice to assert a \$500,000 claim for damages, which has worked any such results as we claim have been represented and we claim it in good faith, on this plaintiff.

Mr. Mullen: I am not objecting to time. I hate to take the time. I am objecting to Mr. Robertson trying to assume our position on these interrogatories. We are here by agreement to meet, to state my objections. I don't think it should be turned over to him to start them and for me simply to come in the middle to answer them.

Mr. Robertson: I have said. I want to hear what the Court thinks.

Mr. Mullen: I want to say a few things.

Mr. Robertson: He doesn't like me to do that. He is assuming this pontifical air here—

The Court: I think everybody is getting along all right this morning.

Mr. Robertson: He is asserting to himself the right to open and close, when I am offering the proof.

The Court: Wouldn't it be proper first for the page 57 } Court to pass on Mr. Mullen's position?

Mr. Mullen: May I say one or two words?

The Court: Yes, you may reply to Mr. Robertson.

Mr. Mullen: Your Honor, please, you will recall that Mr. Robertson has said he has not been able to get these introduced. In reading Question No. 2, I stated:

"2. Furnish a copy of the Charter, Constitution, Rules, Laws, By-laws and all other regulations and rulings of United Mine Workers of America in effect between the dates October 28, 1948, and August 4, 1949, together with a copy of all changes or revisions made in same since August 4, 1949."

What we objected to were the words, "All regulations and rules in effect" from that time.

Mr. Robertson: I told you I wouldn't interrupt you. I want

to be heard on each separate interrogatory and not have Mr. Mullen "pooh-pooh" them in the way he is doing.

The Court: As I understand, your remarks are being addressed to your motion?

Mr. Mullen: The motion as a whole, so that what he has stated about not being able to prove those, I stated this morning with the proper question, it would show the difference between a proper question and a fishing expedition and that we would be glad to answer it. I have already stated that we had no objection if these were revised, to in-  
page 58 } terpreting as they have asked in some 32 questions the Constitution. We are not going to fight against that. We are fighting against simply the dragnet in those questions I took up, and on the burden imposed by duplication.

We have no quarrel at all with what Professor Lyles says. The very statement of it by Mr. Robertson that they must be relevant, material, that is all we contend, that these are not relevant and material.

He states he can't possibly understand what it is, he wants to find out. It is perfectly clear. The Union is the International Union, United Mine Workers of America. It has 30 Districts. One of those Districts is District 50, an autonomous District. The other Districts include minors, District 50 does not. And it has its own Conventions, its own administrations, its own functions. It is an autonomous district of United Mine Workers.

United Construction Workers is a division of District 50. It and District 50 are as specifically stated in this and in both of those, bound by and operating under the Constitution of the International Union, United Mine Workers of America. Where there is anything obstruse about that, I can't see. It is perfectly clear. As I say, we are perfectly willing to interpret, we don't want to in doing that answer one question 32 times.

Mr. Robertson addressed himself largely to the  
page 59 } question of time. We take no blame for that whatsoever. They started this suit in December, 1948.

Mr. Pollard: They started this suit in December, 1949.

Mr. Mullen: They started this suit in December, 1949. They never filed these interrogatories until September. We filled interrogatories away back in June. They took three months to answer them. Then they commenced filing these lengthy interrogatories to us, didn't want us to have any time to do it. Now, if there is any delay in this matter, it lies with them, not with us.

The Court: The Court will say this: The Court has no fault to find with either side, up to the present, for the co-operation it has received in this matter.

Mr. Mullen: That is just the situation. I do not see that Mr. Robertson has at all answered the objections made to these, either on the ground that they are fishing expeditions or that they were unduly burdensome in their tremendous duplications, 200 duplications in them.

Mr. Robertson: If the Court please, I submit that is not a proper argument. That is in argument of his motion to return everything, because the whole thing is improper and if that argument is to be addressed to each specific question, we are consuming time for nothing on any such page 60 } argument as that.

Mr. Mullen: That is your opinion. I ask the Court if I may proceed.

The Court: Well, go ahead.

Mr. Mullen: As I was saying, I do not see that he has answered the question at all, the question of undue burden and duplication. He speaks of the hearings heretofore on the interrogatories addressed to the United Construction Workers and District 50. We objected to a great many things in those. We did not then know what was in here to throw a very different light on the matters. We now renew our objections to those because of what I have said, because of the duplication, because all of them put together constitute a gross fishing expedition.

All we are asking is that they reform, after your Honor has passed on certain questions.

. . . . .

The Court: I suspect I had better rule on your page 61 } motion to require the plaintiff to reform these several interrogatories to the defendants. The Court overrules that motion.

In regard to the interrogatories addressed to the United Mine Workers of America, then we may proceed and you may take up any question that you like, object to any of them and the Court will pass on them as we go along.

Mr. Mullen: As I understand, your Honor overruled the motion to send them back for reformation.

The Court: Yes.

Mr. Mullen: Then, of course, we except.

The Court: You except, of course, to the ruling.

Mr. Mullen: Then, your Honor, as we have written in that

case, we only object to certain questions, why is there any use to read all of these questions?

Mr. Robertson: That is the only way I can get them answered. I have been trying to get them answered since the 13th of September. I want the Court to rule on them now.

The Court: Of course, he has made a general exception to all of them. Then he comes and says he wants to make specific objections to a certain number.

Mr. Robertson: Does he mean except those, he is going to answer the others?

The Court: The Court will require him to answer the others. I don't see any need—

Mr. Robertson: I don't either, if the Court is page 62 } going to do that.

Mr. Mullen: The whole purpose is to simplify the matter, as your Honor has requested.

Mr. Robertson: I offer the letter and ask the Court to mark it filed, and I offer it in evidence.

The Court: Plaintiff's Exhibit No. 1.

Mr. Pollard: The defendant, of course, will object to that.

The Court: The defendants object to the introduction of this letter, Plaintiff's Exhibit 1.

(The letter referred to was marked Plaintiff's 1, and filed with the Court.)

Mr. Robertson: When we come to these specified questions, you want to hear from Mr. Mullen first, or from me?

The Court: I think Mr. Mullen said he would prefer to do that, then you can answer him.

Mr. Mullen: (The first objection is to Question 2, to that part of Question 2 which calls for any Rules and Regulations that were in effect between the dates of October 28, 1948 and the present time. I think I made a paraphrase of that.

Mr. Robertson: Have you finished?

Mr. Mullen: No. That question is objected to, page 63 } that part of it, on the ground that that part of the question is in contravention to the Fourth Amendment of the Constitution of the United States and imposes undue burden on the defendants. The question is unlimited as to the time and the rules or regulations pertinent to the issue in this cause and calls for immaterial testimony.

As I have already stated, they were organized sixty years ago. It would take a month to make the examination that they ask for.

That is all on that.

Mr. Robertson: If your Honor pleases, you will notice it does no such thing. It says: "Furnish a copy of the Charter, Constitution, Rules, Laws, By-Laws and all other regulations and rulings of United Mine Workers of America."

That is what I am driving at, is to get these things which I think control them. I tried to make it broad enough to cover the whole thing, it says, "In effect between the dates October 28, 1948 and August 4, 1949", less than one year, "together with a copy of all changes or revisions made in same since August 4, 1949."

The reason I want that—there is no use of reading it here—John L. Lewis has a right to change it if he wants to.

Mr. Mullen: Nothing of the kind.

Mr. Robertson: Don't interrupt me. I can read page 64 } it here. He has a right to interpret it as he sees fit. We want to know. It is not for any long period of time. We want to know from October 28, 1948, when we first went out there, when we first got our contract out there, down through the time they ran us off of the work, that the work was taken away from us, down to the present time, are these things complete. Are there any changes to them. If so what are they? If so, gives us copies of them. I ask for you to admit these three to go in testimony, or give us copies of them.

Mr. Mullen: I told you three or four times we would admit it. We thought it a proper question to call for those. We admit it.

Mr. Robertson: Because we are not sure they are complete. We want to know whether this Czar's right to change them has been exercised or not. We want these things and we want them brought down to date.

Mr. Mullen: He has no more power than the President of a corporation. It is so stated in there, everything he does is subject to—

The Court: Is it stipulated that they may be introduced in evidence?

Mr. Mullen: Certainly we will stipulate that. We have offered it every time I have been up here.

The Court: Then, if it is stipulated that they page 65 } may be introduced in evidence, what you would like to know is whether or not those constitutions and by-laws have been amended since their enactment.

Mr. Mullen: We will answer that.

The Court: That will answer that question?

Mr. Robertson: That will answer it.

Mr. Pollard: May I interrupt a minute?

Mr. Mullen: Yes.

Mr. Pollard: This was adopted on October 11, 1948, became effective November 1, 1948.

Mr. Robertson: Which one are you talking about?

Mr. Pollard: The Constitution of the United Mine Workers.

I don't see where the date they request, October 28, 1948, is material to the facts which are alleged to have happened in Kentucky. Do you think if we put in this one, it ought to be enough and ought not to put in one in effect prior to that?

Mr. Robertson: We have already stipulated and agreed upon it now, Mr. Pollard tries to kick over the traces. We are entitled to know whether these things are down to date, whether this is in effect now or whether it is not. They might have changed them to try to cover up the tracks of the agents.

Mr. Mullen: Mr. Pollard isn't talking about page 66 } that. He is talking about you asked between October 28, 1948, this Constitution became effective three days later, November 1, 1948. That is what he is talking about.

Mr. Robertson: I want the other Constitution, too. I have seen them. There are very little changes in them, I think.

Mr. Mullen: There are no changes practically.

Mr. Robertson: All right, if you say there are no changes, I will accept that, if you will be bound by these.

Mr. Mullen: Let me finish. There are no changes involving anything here. There are such changes as this—

Mr. Robertson: I can help you, if you will say there are no changes in this Constitution in comparison with any prior Constitution, which changed the application of that Constitution to this situation, on the date of its adoption, I will accept that statement, without going any further.

Mr. Mullen: No, I won't make that statement.

Mr. Robertson: You see, I am entitled to it.

Mr. Mullen: Here is the thing, "to demand not more than six hours from bank to bank in each 24 hours, not more than five days a week shall be worked by each member of the organization." Before that it was 7 days, 8 days. That has been changed by the Constitution, nothing in the basic covenants of it.

page 67 } Mr. Robertson: I told you—

Mr. Pollard: I don't think Mr. Mullen heard you question.

Mr. Robertson: The Court heard it. I think I am speaking loud enough. I asked him would he agree that this Constitution which was adopted on October 11, 1948, and became

effective November 1, 1948, so far as it applies to this case, was identical with whatever was in effect beginning October 28, 1948. He said he would.

Mr. Pollard: He said he would not.

Mr. Robertson: He said if—

Mr. Cowherd: He said he would not.

Mr. Robertson: I say, if he won't make that stipulation, I am entitled to the one in effect on October 28, 1948, everything in effect from that down to this time.

Mr. Mullen: I submit this occurrence they claim happened in July.

Mr. Robertson: If I don't get that, and I come into Court with that, they are free to pull something else out of the hat and say, "You are all wrong. This other thing applied all the time you are talking about." I have a right to be safeguarded against any such thing as that.

Mr. Mullen: Your Honor please, the date alleged is July, 1949. Now, all they could be concerned with us what constitutes the rules that were in effect, what Constitution and Rules were in effect at that time and since then, and I think they are entitled to that. Prior to that, they have nothing to do with it. As far as any of this is concerned, they were only affected by what was in effect in July, 1949.

Mr. Robertson: Your Honor please, there were threats against us there almost from the beginning. We have got a right to show from our observation how they tie up, who is responsible for them.

The Court: That wouldn't be a tremendous task to furnish those.

Mr. Mullen: We will give them copies of those. We can say there is no changes in these from the date they were in effect, down.

Mr. Robertson: If you will tell me that these are the same provisions that were in effect, so far as this case were concerned, on October 28, 1948, and subsequent to that, I will accept your statement and won't ask for anything else.

The Court: Can you agree to that?

Mr. Harris: Judge, the point we want to make clear, and we want to avoid any waiver of that point in any form is that the critical times in this case begin with the dates alleged in his complaint, that we did a wrong. And he claims that we did wrongs in July, 1949, in his complaint. We have given and it is stated here this morning that the Constitution in effect in July, 1949, up to the present time, we have handed him, and it can be introduced in evidence.

But at no point in this case do we think we should

start going and bringing in things that have nothing to do with the case. It is the integrity of our position that the time that is material to this Court begins with the time mentioned in his complaint, when he said we did things to him and to go back of it is to bring in wholly irrelevant and immaterial bits of evidence. And he has that date specified in question after question hereafter. Do I make myself clear?

The Court: I see what you are talking about. What is your answer to that, Mr. Robertson?

Mr. Robertson: We have got a right to know what was the setup when we first went out there in Kentucky and show the background of this thing. That is going to be the testimony in this case. They have asked in their questions, what we did in that whole time, from the time we first went in there, October 28, on down to date. They want to know what we made, what we didn't make. We want to show from the time we got our contract, what we were up against, as result of their threats, what they were doing, which culminated in these things, which were done on July—I think it shows there they made one threat against us—

Mr. Bryan: On July 14, 1949. There had been threats, all sorts of stuff before that.

Mr. Robertson: There had been threats before page 70 } that. Why, if they say it is all right, Mr. Mullen was willing personally to agree to it, they called him off, what is the bug under the chair?

Mr. Cowherd: I would like to speak to that. We want to narrow it down to those dates. We have those other copies. We have no objection to letting them in as such, those particular ones. When it runs to the whole case, we must be consistent. We think the dates are the dates upon which they allege we first came on the job, to do anything wrong. If it were two or three weeks before the actual date complained of, we wouldn't object to that. We wouldn't object to anything they claim prior to the date upon which they claim we did a wrong.

Mr. Robertson: That argument boils down to this, we can't show any relationship of principal and agent or principal and component members and parts an hour before they came on the job and threatened us with physical force to run us off, or an hour before they called Bryan and told them to get off there.

Mr. Cowherd: This is a nine-month interval he is talking about. This Constitution was adopted prior to the date he stipulated, the giving effect date three days later, all of which was nine months before he claims any wrong was done.

Mr. Robertson: If any counsel of record for page 71 } these defendants will make a statement of record so far as the issues involved in this case is concerned, that these three sets of provisions were in effect on October 28, 1948, I don't ask for anything else.

Col. Harris: If the Court pleases, I feel that I should make it clear to the Court that the form of questions, "bug under the chip", we object to. We have come into this Court, as stated by Mr. Mullen. We are not making objections to a lot of questions that we thought we had the right to object to. We do want the issue which we understand will be tried before a jury, we do want the issue kept clear. We do not want in any reference to any question to appear to waive our basic contention that anything prior to July, 1949, is wholly irrelevant. We are trying to come into this Court and make a fair and honorable answer to interrogatories, which the consensus of opinion of these lawyers in Washington is that they are relevant and call for relevant and material evidence. Such questions, we are not objecting to. Every objection we we put in is, we think, a sound objection and not a hyper-technical objection. We are not here to engage in intellectual gymnastics with the gentlemen on the other side, but we do think that a jury trial must be in accordance with the statutes of the State of Virginia.

Mr. Robertson: Your Honor, please, the gentleman, of course, hasn't had the benefit of being here either page 72 } on September 20 or on September 26. It is my understanding of the Court's former ruling that whatever questions the Court directs to be answered here, the Court reserves its right here to rule all out, if the Court thinks they are not admissible.

Col. Harris: I appear under a misapprehension, if the statement just made by counsel is correct. I understood, I represent in my ordinary business the International Union of the United Mine Workers of America. I understood the interrogatories to the International Union, United Mine Workers of America, we were to have our objections in today and that they have not been ruled on by your Honor heretofore. Your Honor may have made rulings—

Mr. Robertson: I think you misunderstood me. My understanding is that when we get into the jury trial, and as we go forward with the introduction of evidence, and that as the pattern of the case appears, and then if any of these interrogatory answers are offered by anybody, the Court will then rule whether they come into evidence.

The Court: That was my understanding. Is that yours, Mr. Mullen?

Mr. Mullen: Will you read that?

The Court: In other words, you can object to the introduction of any part of these interrogatories at the page 73  $\frac{1}{2}$  trial of the case.

Col. Harris: But you were not dealing with United Mine Workers of America at that time, were you?

Mr. Robertson: Yes.

Mr. Mullen: He meant this, now if he requires them to be answered, that still doesn't bar us from objecting at the time of the trial.

Col. Harris: I understand that, but we are still arguing upon matters that are material and important here.

The Court: Exactly.

Col. Harris: The right to make objections at the trial does not forfeit our right to interpose objections that are carefully considered today?

The Court: That is true.

Mr. Pollard: May I say something?

The Court: Yes.

Mr. Pollard: This Constitution, as has been stated, went into effect November 1. They asked for the Constitution in effect beginning October 28. I don't think that the plaintiff's have shown how it is in any way material what was in effect between October 28 and November 1, certainly on those three days—

The Court: Was October 28 the date of the contract?

Mr. Pollard: That is the date of their contract.

Mr. Cowherd: No.

page 74  $\frac{1}{2}$  The Court: Were those the people you were doing the work for?

Mr. Robertson: Yes.

The Court: Gentlemen, I will allow this question to be answered.

Col. Harris: We reserve an exception.

Mr. Pollard: Exception.

The Court: For reasons stated.

Mr. Mullen: That relates to the Rules and Regulations portion of the question, that we are required to go back sixty years?

The Court: I don't understand you have to go back sixty years on that, Mr. Mullen. These Rules and By-laws are in pamphlet form. I assume that those before the amendments were made were in pamphlet form. Won't you just furnish copies of those that were immediately prior to the ones?

Mr. Pollard: As to any rules that were made in 1890, it has been overruled? It is still in effect, I would assume.

Mr. Cowherd: If your Honor please, we have carefully

considered this because the duty falls largely on me personally to try to correlate and corral all of this voluminous material. I was concerned as a practicing lawyer, if perchance they could find some little document that we didn't know anything about that might have been passed page 75 } on thirty years ago, or 20 weeks ago, that had no remote connection in this case, produce it in Court and say then we should forget our defense, we should have our testimony moved out of Court because we were toying with the Court, as I understand has been said heretofore with reference to us, have some kind of adverse ruling under Virginia procedure thrown at us, because we failed to turn up with some insignificant ruling.

If this Court now rules we have to produce the Constitution, I see no objection; but if we are required to produce anything that might conceivably be charged to be by the eminent counsel for the opposition, a regulation or a ruling in effect, and that would include anything that hadn't been revoked since 1890—

Mr. Robertson: No, it doesn't.

Mr. Cowherd: We would like to have that clarified in the record. What are we being asked to produce?

Mr. Robertson: You are asked for the rulings from October 28, 1949, down to date. I think it is a reflection on the Court to say to make an effort in good faith, and some little trivial thing found here, that the Court would strike it out, of course the Court wouldn't do it.

Mr. Cowherd: That is not my understanding of the word "effect".

The Court: Don't you gentlemen have all your rulings combined?

page 76 } Mr. Cowherd: No, sir, we do not. It would be an immaterial ruling where one man would write in and ask a question under so and so of the Constitution, am I required to pay dues for the month of April, and May and June, 1899.

Mr. Robertson: We only want the rulings from October 28—

The Court: Why can't we simplify the matter? We don't want you to go back sixty years.

Mr. Robertson: Will you state your ruling in the record? All I am asking for is from October 28, 1948, down to date. I am not asking him to go back behind that date. That is not such a terrible thing, from that time.

The Court: You want the rulings that were put into effect between those dates.

Mr. Cowherd: Just a moment. I have an objection to

that. Suppose the District President of the State of Washington writes in and says XYZ Coal Company has asked me for an interpretation, does the present national contract affect our tonnage rate under the article of the Constitution as affecting diggers of coal in the State of Washington.

Mr. Robertson: We are entitled to show the interrelationship between these different people. That is the only way we know to get at it.

Mr. Cowherd: The question should be stated as to form, as to what rulings—

page 77 } Mr. Robertson: I am stating what I have asked the Court to do.

The Court: What do you say?

Mr. Cowherd: I suggest he narrow it down to any rulings in anywise connected with the case at bar, or in anywise connected with relationship, if he wants, between the components of the organization, if she desires to call it that, dealing with the subject matter under litigation, not some man who wants—

Mr. Robertson: I don't want to put myself at their mercy that way. I want them all. The Court can rule which ones apply. I am not willing to accept their statement. They have already said everything I asked for is irrelevant. I don't want any such ruling as that.

Mr. Mullen: The Supreme Court of the United States said that was the way to call, on those relevant; then you objected they were not relevant—

Mr. Robertson: I think they are relevant, though, here from the date of our contract down to the present time.

Mr. Mullen: It will take months.

Col. Harris: May I give your Honor an additional bit of information? The United Mine Workers of America mine coal in 26 different states. The total membership of the mine workers of District 50 and the Construction Workers runs to 600,000 men.

page 78 } Mr. Robertson: I am willing to leave out "all other regulations and rulings."

The Court: All right.

Mr. Robertson: If they try to introduce any of them, I am. Of course, they can't blow hot and cold on that.

The Court: We are scratching out, "and all other regulations and rulings". It will read, "Charter, Constitution, Laws and By-Laws". That ought to be simple enough.

Mr. Cowherd: No objection.

The Court: No objection, now that we have taken out "all other regulations and rulings".

Mr. Cowherd: Yes.

Mr. Pollard: We still object as to the scope of the time.

Mr. Cowherd: As to the date.

The Court: All right.

Mr. Robertson: The next one.

Mr. Mullen: That is 9-e.

Mr. Robertson: I am asking that you read the whole question and subsection, so you can get the content of what we are driving at. If you don't, I will.

The Court: I think that is fair.

Mr. Mullen: Question 9.

"9. Did the Constitution of United Mine Workers of America at any time between the dates October 28, page 79 } 1948, and August 4, 1949, and also after August 4, 1949, provide that, among other objects, it was an object of United Mine Workers of America to do the following:

" 'First. To unite in one organization, regardless of creed, color or nationality, all workers eligible for membership, employed in and around coal mines, coal washeries, coal processing plants, coke ovens, and in such other industries as may be designated and approved by the International Executive Board, on the American continent',

"and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) With respect to the 'one organization' mentioned in the language quoted above, were the members of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, a part of this 'one organization', and, if so, during what period or periods?"

We are not objecting to that. We will get the whole answer as to proposed organization, right there.

The Court: Let me read the whole thing.

(Pause, while the Court examines said document.)

The Court: All right.

Mr. Mullen: Subsection (c) is next.

page 80 } "(c) With respect to the 'one organization' mentioned in the language quoted above, were the members of United Construction Workers at any time between

the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, a part of this 'one organization', and, if so, during what period or periods?

"(d) With respect to the 'one organization' mentioned in the language quoted above, were the members of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, a part of this 'one organization', and, if so, during what period or periods?

"(e) With respect to the 'such other industries as may be designated and approved by the International Executive Board; mentioned in the language quoted above, what were the designated and approved 'other industries' between the dates October 28, 1948, and August 4, 1949; and what have been the designated and approved 'other industries' since August 4, 1949?"

. . . . .

page 81 } Col. Harris: What is meant, this man was in the construction business. That is, Mr. Bryan is operating the Laburnum Construction Company. Then District 50 isn't limited to Construction Workers. It takes in multitudinous types of workers. What difference does it make in this case if there were chemical workers, if there were men working on other jobs, all of the varied industry of America? What has that got to do with the simple question that deals with the Laburnum Construction Company?

Mr. Robertson: It shows they are one component part of the parent company.

Col. Harris: It has no tendency logically or factually to prove the component part, to show the size of District 50.

Mr. Robertson: I am not asking the size. I am asking what other industries it included.

The Court: What relevancy do you say that has to this matter, Mr. Robertson?

Mr. Robertson: I think it shows the course of interrelationship between the parent organization and its component part of it, or this agency.

Mr. Cowherd: It would be simple enough to answer—

Mr. Robertson: Was the International Executive Board reaching down, approving things all down through this District 50?

Mr. Cowherd: It would be very simple to ask whether the industry complained of, the industry complaining, page 82 } had been accepted into the group.

The Court: Why not ask the question about this

particular industry you are concerned with? That would seem to me to be relevant.

Mr. Robertson: Except I think this, your Honor, I think the whole course of dealing, as I understand the law of agency, the whole course of dealing between United Mine Workers and District 50—how far, of course, District 50 is a creature of the United Mine Workers, that is what we are trying to show. And in the course of dealing with this parent, with this creature, it is very relevant showing the agency. If they did it in just one instance, that is one thing. If they did it nationwide, as we believe it did, we would like to have the jury know that, and say if the United Mine Workers is sitting up there, they are pulling the strings for District 50 all over the United States, taking this industry, letting that one out, expel this one. That course of dealing in itself could be conclusive proof in the eyes of the jury that District 50 was the Agent of the United Mine Workers, that United Mine Workers was acting through that instrumentality.

Mr. Mullen: You would have to go much farther than that to show agency. That has been decided in the case of United Mine Workers. They are not responsible for that Local Union.

Mr. Robertson: I don't know about the relevance of these things. That will be proved at the trial. They ask me why I claim it is relevant. I say that we say under the law of Kentucky, I am prepared to argue at any time, under the substantive law of Kentucky, it is relevant.

Col. Harris: Of course, the questions of procedure, as the gentleman stated during this hearing, are governed by the laws of Virginia, and the questions of admissibility of evidence as such are questions of procedure.

Now, then, we have 26 states. They bear no relation whatsoever to the construction industry. This question is framed and the argument is directed to getting before the jury, again for purposes of prejudice, the tremendous size of District 50. It isn't framed to show agency. You can find out by asking questions limited to construction workers or to Laburnum Construction Company.

So we say that this question is subject to all objections that Mr. Mullen read this morning. Why do we have to go back and dig up a list and see every industry in every one of the 26 states? That isn't going to throw any light on what happened over in Kentucky. It has nothing to do with what happened over in Kentucky.

Mr. Robertson: If your Honor please, I never heard such argument. You mean suppose this defendant operates na-

tionwide. It is a defendant. Haven't we got a right to show it, in addition to everything else I have said, and if the United

Mine Workers has this dummy subordinate page 84 } through whom it acts nationwide, including out here in Kentucky, haven't I got a right to show it? If in addition to Breathitt County, Kentucky, they are using this instrumentality throughout the United States, do you mean it is irrelevant to show that?

Mr. Mullen: I can't see how these industries that come under District 50 can possibly throw any light on the question of liability down there. This particular industry, Construction Workers, is what they are concerned with, and what they can ask, if Construction Workers has been designated as an industry in which the District 50 could have local unions. That is all they are concerned with. If it tends to show agency, which I think it does not, to use that instance where they are concerned is just as potent as to use a hundred other industries that has no bearing on it whatsoever.

Mr. Robertson: I just can't follow that argument. If I could show United Mine Workers acting through this instrumentality is furthering its purposes all through America, and that it was acting through this instrumentality on our job—the fact that it is not only on our job, but in all of these other industries is not evidence tending to prove our case that they did here just what they did in other instances? It is what the case is on.

Mr. Mullen: What more are you concerned with in this particular in reference to this defendant than is page 85 } stated in the Constitution of these defendants, namely that District 50 is created as a District of this defendant and subject to the international laws? What more do you want?

Mr. Robertson: You have asked the question, I will answer it. I think it is additional proof. Suppose somebody claims I am general attorney for Virginia Transit Company, and say, "Well, how do you prove that?" I say, "I tried that one case for them", and they would say, "Well, that doesn't make you general attorney." During that same 12 months, I tried cases all over Virginia and North Carolina. What about that? Do you think that is not an element? It is the same proposition here.

Mr. Pollard: Excuses me, applying Mr. Robertson's argument to this case, he said he tried that one case. Does that make him general attorney? Well, if we are agent in this one case out in Kentucky, the rest of it is material anyway. That is the only thing you are concerned with.

Mr. Robertson: We are to get in the running with all of

them here, I see. I say when you assert that I am general agent and I don't know but one case, that I have ever tried, that doesn't make me a general attorney necessarily. If it is up before a jury, I am certainly entitled to show whoever tried to prove me general attorney, that during the same time involved in this thing, I tried things for the same page 86 } company all over Virginia and North Carolina.

We say here you were agent of United Mine Workers. You were acting as their agents, furthering their business. You not only did this, but as further proof of that, that is what you do as practice and course of action all through the United States.

Col. Harris: We are not being tried for anything that happened with reference to other people in the United States. It is a question of whether we did any legal wrong to this plaintiff for which this plaintiff is entitled to recover. If we would list 1,500 different industries, there couldn't be any possible effect except to lead somebody on the jury to say, "Well, this Union is too big".

Mr. Robertson: We have got the right to say that, if we want to.

The Court: Let him finish.

Mr. Robertson: I have got the right sometime to make the closing argument.

The Court: We will let you close after we hear from this gentleman. Go ahead and finish.

Col. Harris: That is all. I think it is purely a question for prejudice and would be an unreasonable burden on us.

Mr. Robertson: Of course, he is arguing what I am asking is substantive law. I am not. I am asking for page 87 } method of proof, circumstantial evidence.

The Court: Well, as presently advised, I will allow the question to be answered.

Col. Harris: We reserve an exception.

The Court: Very well.

Mr. Robertson: 13 (d). I am going to ask that you read all of that.

Mr. Mullen: 13 (d).

Mr. Robertson: I want to read all of that.

Mr. Mullen: "13. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that, among other objects, it was an object of United Mine Workers of America to do the following:

"Second. To increase the wages, and improve the con-

ditions of employment of our members by legislation, conciliation, joint agreements or strikes,'

"and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?"

That is the question they have repeated fifty-two times.

Mr. Robertson: You didn't object to it.

Mr. Mullen: I objected to it as a whole.

The Court: Let's move along.

page 88 } Mr. Mullen: "(b) Was the above quoted object of United Mine Workers of America also an object of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and if so, during what period or periods?"

"(c) Was the above quoted object of United Mine Workers of America also an object of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and, if so, during what period or periods?"

"(d) As used in the language quoted above, what is meant by the words 'joint agreements'? Were United Mine Workers of America, or District 50, or United Construction Workers parties to or bound by the provisions of any such joint agreement during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? If so, furnish a copy of all such joint agreements."

Now, your Honor, please, I have already explained what those joint agreements are. There are over 1,500 of them. They are not joint agreements between District 50 and United Construction Workers, between the Mine Workers of America and United Construction Workers, or Mine Workers of America and District 50. They are the collective bargaining agreements entered into with a party employing  
page 89 } labor, by that party and the Union representing those laborers. It is put into this Constitution to emphasize what the administration of the United Mine Workers stands for, namely, a contract made shall not be violated. So in all truth they have provided that the local unions cannot make any rules and regulations in violation of joint agreements. That has nothing to do with this case. It will disclose the private business of employers in more than 1,500 cases and would not show anything as to the joint connections of any of these three defendants.

Mr. Robertson: Judge, let me tell you what we are driving at there. First, because you can work for hours on here, you can't find what you are talking about. Any such interpretation as Mr. Mullen says, I have not been able to find it. Suppose you are trying to work out a collective bargaining agreement. Suppose the United Construction Workers was dealing with the employer, District 50 sits in on that thing and aids and abets and advances the purpose in conjunction with them, and United Mine Workers sends its representative there and they all agree on a joint agreement for these three defendants to work together. They all aid each other in accomplishing a collective bargaining agreement. Then we are entitled to know it and we are entitled to those agreements. And it is no excuse, it is either relevant or it is not relevant.

Of course, you don't want to make anybody do un-  
page 90 } necessary work, but if it is relevant and necessary  
and proper for the proof of this case, because it  
entails work they don't like to do is no reason to rule it out.

Mr. Cowherd: May I understand? Does the Court understand just exactly what we mean by 'joint agreements'?

The Court: No, I don't.

Mr. Cowherd: It is nothing in the world but what is meant by a union contract. It isn't good practice for gentlemen to reveal their contracts with one employer and another.

The Court: I want to ask, that is a contract between the Union and employer?

Mr. Cowherd: There are over 3,000, rather than 1,500, because you have got two years inquired about here. We don't object, if we have any joint agreements between this plaintiff and either of the defendants. We haven't heard of one, but we don't think this plaintiff has any right whatever to view a joint agreement which might be from his competitor, or that this Court should require us to put in the record here joint agreements which may reveal agreements between their competitors as employers. That is what joint agreements are.

Mr. Robertson: It takes all of this talk to find out—I am saying this: He is willing to give us anything except what we want that throws a light on it. We haven't  
page 91 } asked what the joint agreements are between these  
three defendants. We say here if any one of these  
three defendants made joint agreements with an employer,  
the other two were parties to that agreement in the sense of  
helping put it through, we are entitled to know what the inter-  
relationship is.

The Court: I fail to see the relevance there. I refuse that question.

Mr. Robertson: Does the Court require them to answer what a joint agreement is?

Col. Harris: We do that later.

Mr. Robertson: I am asking about this question now.

The Court: I will allow them to answer what a joint agreement is. Mr. Cowherd has just made the statement.

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page 93 }

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Mr. Mullen: We are at Question 19.

"19. Who were the members of the International Executive Board of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and who have been the members of said International Executive Board since August 4, 1949; when and by whom was each of these persons appointed or elected a member of said International Executive Board; during what period or periods between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949, did each serve as a member of said International Executive Board; what Districts or Sub-Districts or branches or subordinate branches of United Mine Workers of America did they respectively represent on said International Executive Board; and what were the locations of their respective offices?"

We object to that question because it is immaterial to the issue in this cause. Any inquiry should be limited to Region 58 of United Construction Workers or District 50. Coal is mined in 26 states. Members of the Board exceed 26 in number. This question would require information to be gotten from all Districts where they are elected. In addition, this is just a general fishing expedition. We cannot

page 94 } see what the members of the International Executive Board, other than any representing this Region 58, which is the region within which this is said to occur, in which the men they are inquiring about particularly were working, were employed by whomever they were employed by—and we think that should be limited. We think that is in line with the ruling which your Honor made when we discussed the interrogatories addressed to United Construction Workers.

Mr. Robertson: Your Honor, please, our position on that is this: That we are entitled to know who was on that Committee. For instance, Tom Raney, the International Committeeman from Breathitt County, Kentucky; we think we can pin things on him, but I think I am justified in the statement, also some of the members of the Executive Committee were also members of the organizing committee of District 50, I believe members of the organizing committee of the United Construction Workers.

There is no burden on them to take this publication which appears every two weeks. It has got the names on there. It has been run down in one column. These committeemen, you know, they draw \$1,000 a month through their very stable jobs. They don't change very often. We are entitled to know what the interrelationship is between that Executive Committee, this International Executive Board, and these organizing committees of District 50 and United Construction Workers. It is perfectly relevant to show who put them there, whether

they were elected or whether they were put in  
 page 95 } there by this Lewis authority, how long they stayed,  
 who they were, so when we get an orderly development of our proof, we think we are going to show they were just all mixed up together, interwoven together, just the same old crowd.

Mr. Mullen: With regard to Thomas Raney, they ask further on specifically if he was a member of the International Executive Board, which question we did not object to. But the other members of the Board, in other Districts—there is one for each District, elected by the District, and as to the facts of their election, being a member on the Board, what that has to do with this matter we cannot see.

Mr. Robertson: Even in corporate law, suppose they are one, two, three, four, five members of the International Executive Board, who were also on the organizing committee of District 50 and held various jobs in District 50, or in United Construction Workers? That is all evidence and proof of agency and interrelationship, component parts. That is our whole case.

Mr. Cowherd: If the Court please, on Interrogatory No. 20, immediately following—

Mr. Robertson: I am talking about No. 19.

Mr. Cowherd: I was about to say in Interrogatory No. 20, the exact question is asked and we are raising no objection. It says, "Who represented District 50 on the International Executive Board of United Mine Workers of America between", and it is those same dates.  
 page 95a } You can get that information in No. 20.

Mr. Robertson: All right. I have got the thing here to show you didn't have any on the specific date. I am entitled to show the whole picture, to establish the interrelationship.

Mr. Cowherd: Question 29 doesn't ask that at all.

Mr. Mullen: It also asks later on in here who were the members of the organizing committee, District 50 and of United Construction Workers. Thomas Raney was then on the Executive Board. It will be shown.

Mr. Robertson: I think I have the right to close, if we are going to close. I will say that is the very reason why I am entitled to know. If I come along later, they are going to try to knock it out, and anyway I can smoke it out, to show what the hook up is between all three of the defendants, I am entitled to know.

The Court: If these questions relate to others, as they come along—it may have some bearing.

Mr. Cowherd: This asks for the Executive Board member and has nothing to do with Region 58, and the area of Breathitt County, Kentucky, no connection whatever.

Mr. Robertson: If I am going to exercise my right—

The Court: Let him finish.

Mr. Cowherd: They have 30 regions scattered page 96 } geographically all over the United States, Canada, to the Gulf, and in Canada. That many.

Mr. Robertson: We are entitled to know how they are hooked up among each other.

The Court: As I understand it, the International Executive Board is the top Board.

Mr. Mullen: Composed of a Board of Directors and the corporation, and are elected by the Districts of the United Mine Workers.

The Court: The Court will allow that question to be answered.

Mr. Mullen: We note an exception.

The Court: An exception will be noted.

. . . . .

page 97 } Mr. Mullen: The next one is No. 24 (f).

Mr. Robertson: Read the whole thing.

Mr. Mullen: "24. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things as follows:

"In all questions of dispute, appeals and grievances (unless restricted by joint agreement) the right of appeal of an

individual member shall end with the District Executive Board, and the right of appeal of any branch of the Organization shall end with the International Executive Board. This shall not prevent individuals whose membership is at stake from appealing to the International Executive Board, which body's decision shall be final and binding until reversed by the International Convention,' and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) As used in the language quoted above, do the words 'any branch of the Organization' mean any branch of United Mine Workers of America, including District 50 and United Construction Workers, and, if not, what do they mean?

"(c) Did the members of District 50, whose membership might be at stake, have the right, at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, to appeal to the International Executive Board, all as provided in the language quoted above, and, if so, during what period or periods?

"(d) Did the members of United Construction Workers, whose membership might be at stake, have the right, at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, to appeal to the International Executive Board, all as provided in the language quoted above, and, if so, during what period or periods?

"(e) As used in the language quoted above, do the words 'International Executive Board' mean International Executive Board of United Mine Workers of America, and, if not, what do they mean?

"(f) As used in the language quoted above, what is meant by the words 'joint agreement'? Were United Mine Workers of America or District 50, or United Construction Workers parties to or bound by the provisions of any such joint agreement during the period between the dated October 28, 1948, and August 4, 1949, and also after August 4, 1949? If so, furnish a copy of all such joint agreements."

That is repetition of a question gone before, in which Your Honor has ruled we do not have to furnish those agreements.

Mr. Robertson: Are you through?

page 99 } Mr. Mullen: Yes.

Mr. Robertson: Your Honor, please, it just shows the context of that language quoted up there out of the Constitution, shows you how impossible it is to nail down the meaning of the language used.

Now, Mr. Mullen has stated here with reference to a prior question, that they referred to a joint agreement between an employer and an individual union. And, therefore, we had no right to pry into the business of that.

This thing is bound to be joint agreements between different unions. That is what we are trying to smoke out; between the United Construction Workers, United Mine Workers, District 50, and the United Mine Workers of America.

"As using the language quoted above, what is meant by the words 'joint agreement'?" If it means what we think it means, from a study of these papers, of these Constitutions and Rules, which we can't understand, it is used in a different sense here than the sense it was used in, in that other question, "Were United Mine Workers of America, or District 50, or United Construction Workers parties to or bound by the provisions of any such joint agreement" between each other during that period?

In other words, if they were all hooked up, they are interwoven and inter-related, and we have got a right to know about it. We have got a right to know how many times it was—

page 100 } Mr. Mullen: Not so much as a comma has been changed in that from the question in 13 (d), which Your Honor rules, we understand, against.

The Court: Do the words "joint agreement" mean the same thing as where I ruled a few moments ago?

Mr. Robertson: We say not.

Mr. Mullen: It means the same everywhere it is used in the Constitution.

Mr. Robertson: If they will say that, if they will make that statement, that is all right, all through there, then it is perfectly easy for them to answer it, and say there were no such joint agreements between us.

Col. Harris: We can't let him frame our answers.

Mr. Robertson: You can't frame your answers except under the ruling of the Court either.

Mr. Mullen: Your Honor, please, we agreed to state what the joint agreements were at the former time you ruled.

The Court: The Court refuses to require (f) to be answered, 24 (f).

Mr. Robertson: The Plaintiff will except to refusal of the Court to require the Defendants to answer Interrogatory 24 (f) as tendered, upon the grounds advanced in argument in support of this Interrogatory (f).

Mr. Mullen: Next is No. 27 (f).

Is it necessary to read all that? It is identical page 101 } the same question you just passed on.

Mr. Robertson: I think I have the right to have the thing gone into conscientiously.

The Court: Well, I expect you had better read it then, if it is requested by either party.

Mr. Mullen: "27. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'Sub-Districts may be formed and assigned such numbers and territory as may be designated by the District of which they are a part, subject to the approval of the International Executive Board; and such Sub-Districts may, after being duly chartered, adopt such laws for their government as do not conflict with the laws and rulings of the International or District Unions or joint agreements',

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) Was United Construction Workers formed as a Sub-District of a District of United Mine Workers of America, and, if so, by what District was it formed and of what District did it become a part? What territory was assigned to United Construction Workers?

"(c) When was the formation of United Construction Workers approved by said International Executive Board? Furnish a copy of such approval.

"(d) As used in the language quoted above, do the words 'International Executive Board' mean the International Executive Board of United Mine Workers of America, and, if not, what do they mean?

"(e) As used in the language quoted above, do the words 'laws and rulings of the International or District Unions' mean the laws and rulings of the United Mine Workers of America or of the District Unions of United Mine Workers of America, and, if not, what do they mean?"

Here is the question we object to.

"(f) As used in the language quoted above, what is meant by the words 'joint agreements'? Were United Mine Workers of America, or District 50, or United Construction Work-

ers parties to or bound by the provisions of any such joint agreements during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? If so, furnish a copy of all such joint agreements."

Same question without a change of a coma.

Mr. Robertson: Here is what I am trying to drive at. I think the context indicates that the term "joint agreements" was being used in one sense back in the question you ruled on before lunch, and being used in a different sense page 103 } now. I think what they mean here is joint agreements between these component unions or parts of unions or different defendants. You remember before lunch I said, I argued, but the Court rejected my argument, if you were the employer, I come along as the United Construction Workers, try to negotiate a contract and couldn't put it over. I then pull in District 50 to help me, they participate in it, we still can't put it over. Then I pull the United Mine Workers in it to help me, and there you have us all together succeeding in putting it over. I think I would be justified in showing that.

I understood, my recollection is, Mr. Mullen said before lunch there was no such instances of that sort existing. It would be a union making a contract with an employer. No other union or defendant involved in it. If that is correct, I don't think I had a right to ask for it.

Now here, if instead of being a contract between a union and an employer, it is a contract, for instance, between United Construction Workers and District 50, and United Mine Workers or any two of them, I think I am entitled to it.

Col. Harris: We state again that joint agreements do not refer to the agreements that he has in mind. They are employee or employer agreements.

The Court: All right. The Court will refuse to require that question to be answered.

Mr. Robertson: He can answer the first part page 104 } of it, nail that down, Your Honor, that is what you ruled this morning. Go back there to No. 24 (f), ask him to answer the first part of that, that will avoid misunderstanding hereafter.

The Court: In other words, "As used in the language quoted above, what is meant by the words 'joint agreement'?"

Mr. Robertson: Yes.

The Court: The Court will allow that to be answered.

Col. Harris: We can just refer to the previous answer we have made.

The Court: And in 27 (f), answering the first question, that would be the same.

Mr. Mullen: Our next objection is No. 28(e), which brings up the same question.

Mr. Robertson: If you make the same objection, answer it the same way, I think the Court will make the same ruling.

The Court: Same ruling. That was 28(e)?

Mr. Mullen: 28 (e).

The next one is No. 34 (c). Do you want all that read?

Col. Harris: If you are tired and want me to read it, I will?

Mr Mullen: I am going to ask one of you all to read it right now.

Col. Harris: I will be glad to read it.

Mr. Mullen: Go ahead.

page 105 } Col. Harris: "34. With respect to the privileges, powers and duties of the President of United Mine Workers of America, did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and October 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'He may appoint a member whose duty shall be to collect and compile statistics on the production, distribution and consumption of coal and coke, freight rates, market conditions, and any other matter that may be of benefit to the Organization. Said statistician shall make a report to the regular convention',

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) As used in the language quoted above, do the words 'the Organization' mean United Mine Workers of America and its Districts, Sub-Districts, branches and subordinate branches, including District 50 and United Construction Workers? If not, what do those words mean?

"(c) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did any person or member, having been appointed for the purpose by the President of United Mine Workers of America, collect and compile or attempt to collect and compile statistics relating to District 50 and United Construction Workers or to the work and industries claimed by them, respectively? If so, what statistics were collected and compiled and what reports thereon were fur-

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nished to the President of United Mine Workers of America? Furnish a copy of all these reports." You have an objection there?

Mr. Mullen: Yes.

Mr. Robertson: I can simplify that somewhat.

The Court: All right.

Mr. Robertson: I think that is too broad, Your Honor. What we are driving at there is—come back here to the language of the Constitution on page 17.

" 'He may appoint a member whose duty shall be to collect and compile statistics on the production, distribution and consumption of coal and coke, freight rates, market conditions, and any other matter that may be of benefit to the Organization.' "

That just throws it all wide open. We want to know what the scope of his duties were there? What he did? Otherwise, these statistics, we want to show the inter-relationship between them and statistics so far as they apply there would show the inter-relationship. We don't care about those statistics all over the United States.

Col. Harris: Judge, hasn't he misread the question? Don't the words "and any other matter" relate to statistics?

Mr. Robertson: Not necessarily.

page 107 } Col. Harris: They do to me.

Mr. Robertson: If you will make that statement in the record, that is entirely satisfactory to me.

The Court: Let's see! "He may appoint a member whose duty shall be to collect and compile statistics on the production, distribution and consumption of coal and coke, freight rates, market conditions, and any other matter that may be of benefit to the Organization."

Mr. Mullen: Statistics on them.

Mr. Robertson: What we are trying to get there, if they had had anybody compiling statistics on District 50 of United Construction Workers, or Region 58, we are entitled to know it.

Mr. Mullen: United Construction Workers have 675 locals, 45,000 members, 58 regions. District 50 has 850 locals, 112,643 members, and 58 regions. We think that question of information should be confined to Region 58, which is the region involved in this matter. We don't think that to go all the way in hundreds of locals—

The Court: What is the objection to confining it to Region 58?

Mr. Robertson: I think that would give us substantially what we want.

The Court: All right. Confine it to Region 58.

Mr. Pollard: District 58, United Construction Workers.

The Court: Region 58 of District 50 of United page 108 } Construction Workers.

Mr. Mullen: Region 58, of District 50 and of United Construction Workers.

The Court: What is the next?

Mr. Mullen: The next one is 35 (c).

Col. Harris: I will read it. Would you like to have me read it all?

Mr. Robertson: Yes.

Col. Harris: "35. With respect to the privileges, powers and duties of the President of United Mine Workers of America, did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'He may appoint such organizers field and office workers as may in his judgment be necessary to conduct the affairs of the International Union',

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) As used in the language quoted above, do the words 'International Union' mean United Mine Workers of America and its Districts, Sub-Districts, branches and subordinate branches, including District 50 and United Construction Workers. If not, what do those words mean?

"(c) What organizers, field and office workers did the President of United Mine Workers of America appoint or cause to be appointed to conduct or to assist in conducting the affairs of District 50 and United Construction Workers, or either of them, during the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949?"

Mr. Mullen: We object to that on the grounds it is not material to the issues in this cause, and covers too much ground.

We do not object to giving this information for Region 58, or District 50, United Construction Workers, but United Construction Workers has 675 Locals, 58 Regions, District 50 has 850 Locals, 58 Regions. This question would cause to deter-

mine every stenographer, office boy, or anybody else appointed in any of those Regions all over the United States and Canada.

If they want the information that they appointed anybody in the Region 58, and thereby that shows agency, all right. We will furnish that information. We don't think we are called on to go all over the United States and Canada.

Mr. Robertson: Judge, here is why we think that question is correct as propounded.

Suppose that they did at times appoint anybody within Region 58, but suppose they were employing them page 110 } everywhere else in America, then it was their general agent even though they didn't specially appoint one in this territorial subdivision, if Tom Raney was their man acting there, he was their agent there, and they would still be liable for his acts.

So, even though they may not have appointed anybody within Region 58, if they had been appointing them all over the country, it would show that the United Mine Workers was dominating and controlling District 50, had the right to do it. It would be a question of whether or not they exercised that right.

The Court: Why don't you confine it to Region 58, and any others appointed outside who performed any duties in Region 58 during that period?

Mr. Robertson: I don't think that would meet it. Suppose that the United Mine Workers appointed everywhere in America except in Region 58, they would still be their general agent. We would still show the inter-relationship between the United Mine Workers and District 50, which dominated and controlled them, if our theory of the law is right. Therefore, United Mine Workers would be liable for its illegal acts.

Mr. Mullen: That remains to be seen. Does Your Honor realize the immense amount of work in an organization of this size that this would call for, the whole United States and Canada?

Of course, in carrying on the work, there are page 111 } changes in employees from time to time. This goes down to as low as office boys. I don't think that it has any material bearing. If they want to show an agency, claims that that shows an agency, if it could so be said, they have the answer right there when it states in the Constitution: "He may appoint such organizers, field and office workers as may in his judgment be necessary to conduct the affairs of the International Union."

Mr. Robertson: Of course, here is what they are driving at. If the independent organizations, if District 50 is not dominated by United Mine Workers, there wouldn't be any-

thing there. It would be just a little trival thing. If they are reaching down in their appointing of office boys, scullery maids, everybody else, that is proof-positive of what we are saying, that they are dominating the whole concern. And we are entitled to know it.

Col. Harris: Is it permitted for me to say something? I don't want to violate your rules.

The Court: I have an open mind on this. The Court wants all the enlightenment it can get.

Col. Harris: Well, I—

Mr. Robertson: I hadn't finished.

Col. Harris: Pardon me.

Mr. Robertson: I had another thought to add, it just came to me.

The Court: If it comes to your mind, all right.

Col. Harris: I was struck with the fact, Your page 112 } Honor used exactly the words that were running through my mind, that was this: If any men were appointed in Region 58, or if they were appointed for some other region and went down and worked in Region 58, that would not impose an unreasonable burden on us. It would give him the information that is relevant and pertinent.

Now, then, he keeps talking about showing the connection between the unions. There isn't any doubt from the Constitution that the parent organization is the International Union of United Mine Workers of America. That appears from the Constitution. Nobody could keep it from being the parent organization. So any question of trying to show a relationship seems to me beside the point.

Mr. Robertson: Judge, here is my point: That had escaped my mind. As has been said, there is the parent organization. There is the authority, if you choose to exercise it.

Now, this Coronada Case in the Supreme Court of the United States, which has been cited in this case, goes a long way in saying, which of course is correct, you have not only got to show the existence of authority, you have got to show it was exercised. Which, of course, is just a garden variety of the law of agency. We don't think the Coronada case applies here, or has got anything to do with this case at all.

This is not under Federal Statute, not under Federal laws. It is under the law of Kentucky. The Law of Kentucky is not the law of the Coronada case, which is surely page 113 } a Federal Statute. We are going to apply the garden variety of laws of agency of Kentucky, which I think is about the same as Virginia in this phase of it.

After you show the existence of an agency, you have got to

show action. That is what we are trying to show. That is exactly what we don't want to show, because it takes us off on the Coronada Case, and that is exactly what we want, if they are putting in here office boys, stenographers, every Tom, Dick and Harry, we are entitled to know it.

Mr. Mullen: It won't help you under the Coronada Case.

Mr. Robertson: We don't think that case applies here. We say, in other words, to prove our case, we have got to show the existence of the relationship of an agency. We have got to show the act of the agency was actually performed. Here it is. It goes right to the heart of the case.

The Court: In assuming, if none of these employees were in Region 50, how would that tie in in this particular case?

Mr. Robertson: It would show the general agency. It would, I suppose, show a general control of District 50 by the United Mine Workers. Then, suppose I can show that somebody connected with District 50 did these unlawful acts within the scope of his authority, which would render them liable under the law of Kentucky, then I have got them.

page 114 } I have got a right to show the existence of the relationship of an agency and the exercise of the act of agency generally as supporting my claim that Tom Raney was acting as an agent in the acts that are attributed to him in this action.

The Court: May I ask this question?

Reference has been made to Mr. Raney. Did he come down into Region 50?

Mr. Robertson: Yes.

The Court: Wouldn't that be covered in the question I suggested? Those employees in Region 50 appointed in Region 50, those employees appointed outside of Region 50, who have been in Region 50.

Col. Harris: Region 58.

The Court: Region 58.

Mr. Cowherd: Mr. Tom Raney is the International Executive Board member for an area larger than Region 58, but part of Region 58, that part in which Breathitt County is situated, is in that same geographical area. He is there all the time. That is his station.

Mr. Robertson: We are not suing on Region 58, we are suing District 50, whatever Region 50 is. I don't know how important Region 58 is, I have some idea how important District 50 is.

Mr. Mullen: I think Mr. Robertson's argument contradicts itself. He says after showing agency there, they must show specific acts done under that agency. Now, showing general agency in other districts

isn't necessary, if he shows an agency in this District. He still hasn't gotten anywhere, unless he shows that under that agency wrongful acts were committed by employees of one or more of these organizations.

Mr. Robertson: Suppose he is a general agent of District 50, and I show that—I am using him as an illustration—he and us are agents of District 50, generally elsewhere in the United States. Then they come within Region 58, within the general scope of that authority, and in furtherance of the objectives of District 50, and of the United Mine Workers, do unlawful acts, then under the laws of Kentucky, they are liable without any prior authorization, or subsequent ratification.

The Court: What does District 50 comprise?

Mr. Robertson: That is what we are trying to find out.

Mr. Mullen: United States and Canada.

Mr. Cowherd: There are 58 different regions geographically located.

The Court: District 50 is comprised of the United States and Canada.

Mr. Cowherd: Whatever occurred in this case occurred wholly within Region 58 or District 50, one of the page 116 } 58 regions.

Mr. Robertson: We started out this morning, as I understood the claim, it was an independent union. Now it turns out they have already gotten far enough in here that it runs right square back to John L. Lewis. He runs the whole thing, the Executive Board, the top people. They object now, because we say he comes down and dictates to the office boys and the stenographers. If that is the fact, we are entitled to know it.

Mr. Mullen: We said this morning that District 50 is a district of the United Mine Workers. It runs its own affairs.

The Court: As presently advised, the Court will restrict this question to Region 58, and all employees appointed outside of Region 58, who have been doing business in the confines of Region 58, regardless of where they were appointed.

All right. 37 (c) and (d).

Col. Harris: All employees appointed outside of 58—

Mr. Cowherd: This might seem foolish. It really isn't. Would it apply to the lawyers they have sent down there who have made investigations on this case?

The Court: The Court wouldn't be interested in attorneys.

Mr. Robertson: I don't care anything about the lawyers.

The Court: The attorneys are excluded.

Mr. Robertson: I don't know. Suppose John page 117 } L. Lewis appointed them. I think—Suppose John L. Lewis employed Mr. Cowherd—I think that would be the most flagrant interference, most flagrant control.

Suppose John L. Lewis appointed Mr. Mullen or Mr. Pollard, is that evidence?

Mr. Pollard: I suggest it is not evidence. We are employed to defend this case, regardless of any agency.

Mr. Robertson: That is all right. I want to show the control. I ask they show that. If they didn't employ him, they don't have to state it. If they did, we are entitled to know it.

Mr. Mullen: We object to that. I don't think they have the right to bring lawyers into this matter.

The Court: Well, lawyers will be excluded in this.

Col. Harris: What is the next one?

Mr. Mullen: No. 37 (c) and (d).

Col. Harris: "37. With respect to the privileges, powers, and duties of the President of United Mine Workers of America, did the Constitution of United Mine Workers of America, at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things, as follows:

" 'He shall interpret the meaning of the International Constitution but his interpretation shall be subject to page 118 } repeal by the International Executive Board',

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) As used in the language quoted above, do the words 'International Constitution' mean the International Constitution of United Mine Workers of America, and, if not, what do those words mean?

"(c) What interpretations of the meaning of said 'International Constitution' made by the President of United Mine Workers of America were in effect between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all these interpretations,"

Is it "C" you are objecting to?

Mr. Mullen: "C" and "D".

Col. Harris: "(d) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did the President of United Mine Workers of America

have the right to interpret or to cause to be interpreted the meaning of the Constitutions or Rules of District 50 and of United Construction Workers? If so, what interpretations of the meaning of said Constitutions or Rules made by the President of United Mine Workers of America were in effect between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all page 119 } these interpretations."

Will you state the objections, Mr. Mullen?

Mr. Robertson: One minute! I think we can simplify that in line with the prior ruling of the Court, the interpretations made on and after October 28, 1948, down to date.

Mr. Mullen: If that is so, then with reference to this matter or in reference to Region 58, yes. But during these two years, the United Mine Workers have been doing business all over the United States and Canada. There were undoubtedly letters written by the President for various mining regions, asking, "Under the Constitution, can we do so and so?" or, "Under the Constitution, what is to be done about the rates, tonnage of this district?" That has no bearing on this case. It simply is almost an impossible task. It means taking the entire office practically of United Mine Workers for those two years and bringing it down to Richmond.

Mr. Cowherd: If the Court please, in trying to arrive at some means of answering these, before objections were even contemplated, we began to make our "road map." We found out to get that particular information, we would have to search the independent file of each of the thousands of local unions to get those things, because it isn't kept in a compiled form, and there isn't that much formality in connection with one out of a hundred inquiries.

Mr. Robertson: Now, if Your Honor please, to page 120 } come back to these basic things, which you can see, is the heart of our case all the way through here, to show the inter-relationship between these different defendants and the relationship either as component parts of one organization, or as principal and agent. Now, they don't have to count them all. Suppose they say they have done that generally all through the United States. That would cover the answer.

Another thing we are up against. I have read enough of these cases to know it. What we have a right to be protected against is when we go to the trial and come out and rely on one of these things (indicating the Constitution), then you see Mr. John L. Lewis has the right to interpret any way he wants, and nullify the whole thing, subject to veto by the In-

ternational Executive Board. We want to be protected against that.

So, it has gone a double objective; one, is to protect us against what I have just stated; two, they have been doing it all over the United States. I am not interested in this local, that local, and the other. If it has been their practice and custom throughout the United States, this Plaintiff is entitled to know it.

Mr. Cowherd: If the Court please, that isn't what I said.

Mr. Robertson: I hadn't finished. I come to (d).

The Court: Suppose we stick on (c) first, and page 121 } confine our remarks to "C".

Mr. Cowherd: We don't know whether there has been an interpretation or not, and to find out if there has been, irrespective of the subject to which it refers, we would have to go through and search the files, thousands in number, and it can't be done under six months, to find out whether or not there has been an interpretation.

When we use the words, "were in effect", we would have to recheck and double-check, if there has been a contra inquiry, to see whether that was changed, to be sure the Constitution does not grant to the President, a reading of it will show any right to change the Constitution, or to amend it. That is granted only to the Convention, which doesn't happen until 1952. And there is no such thing as anybody having a right to change the wording of the Constitution; only to interpret its application to a particular incident that may occur somewhere.

Mr. Robertson: Let me just tell you that does not make sense. I haven't said anything about rewriting the Constitution. I have said, "Does this gentleman mean to say that the top man of this organization, whether it is John L. Lewis or Tom Jones, don't care who it is, doesn't know whether he has been interpreting these things as constant practice around throughout the United States without searching the files?"

I might as well ask Your Honor if you had tried page 122 } cases, the general character of the business of

Your Court is such, you don't have to run back to the files to tell what's what.

The Court: Let me read this again.

Col. Harris: He asks for copies.

The Court: It asks to furnish a copy of all these interpretations, to do so, you would have to go to the files to get those.

Mr. Robertson: I am willing to waive that. I want to know what the general practice is. I am willing to eliminate that.

The Court: In other words, you want to know whether

general practice is for the President to interpret these—The International Constitution.

Mr. Robertson: Yes.

Mr. Mullen: Is it the general practice of the President to interpret the International Constitution?

Mr. Robertson: What, in general, is done?

The Court: The general answer whether he interprets the International Constitution.

Mr. Cowherd: The Constitution so states, yes.

Mr. Robertson: It gives him the power. You want to know whether he has been doing it?

The Court: That is what he has been doing.

Col. Harris: I think he is entitled to ask  
page 123 } whether he has performed a function under that.

I think as limited that way, my own personal opinion, these other lawyers may disagree with me, as limited that way, has he made interpretations, yes. But, to go through all our files—

The Court: That is what you want to know.

Mr. Robertson: As I have understood it, what is the interpretation, if he can state it, in general. If he gives a general, honest, forthright answer, I am satisfied. I don't want to ask him to dig out each letter.

The Court: Answer that question to the best of your ability along those lines. All right? No copies are to be furnished.

Now we go to "D".

Col. Harris: "(d)—

Mr. Mullen: That is the same thing.

Col. Harris: No, that is slightly different.

"(d) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did the President of United Mine Workers of America have the right to interpret or to cause to be interpreted the meaning of the Constitutions or Rules of District 50 and of United Construction Workers? If so, what interpretations of the meaning of said Constitutions or Rules made by the President of United Mine Workers of America were in effect between the dates

October 28, 1948, and August 4, 1949, and also  
page 124 } after August 4, 1949? Furnish a copy of all these interpretations."

The same argument that we have made—

Mr. Robertson: I think that if furnishing copies were to come out, then you would answer it like you did the other one.

The Court: I think the same would apply to "D".

Col. Harris: Will Your Honor indulge us just a second, so I can catch up here on that?

The Court: Certainly.

Col. Harris: 37 (d), the same ruling?

The Court: Yes.

Col. Harris: As in 37 (c)?

The Court: Yes.

Mr. Mullen: The next is 40 (b).

Col. Harris: "40. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

" 'All appointments, suspensions and removals from office done by the President shall be subject to the approval of the International Executive Board',

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

page 125 } "(b) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, what appointments, suspensions and removals done by the President of United Mine Workers of America were approved by the International Executive Board, and what appointments, suspensions and removals done by the President of United Mine Workers of America were disapproved by the International Executive Board?"

You have an objection.

Mr. Mullen: The question is objected to on the grounds—

Mr. Robertson: I may be able to save some time. If you say you approve 95, and disapprove 5, that is all I want. I am not asking to say, approve them all, or disapprove them all. There couldn't have been a terrific volume.

The Court: Does that satisfy you? In other words, if 95 were approved, and 5 were disapproved, without giving names. It seems to me you could do that without any trouble.

Col. Harris: All right. That is, giving percentages, giving numbers.

The Court: The number approved, the number disapproved.

Mr. Cowherd: No names.

The Court: Now go to 43.

Mr. Mullen: 43 (b).

Col. Harris: "43. With respect to the Inter-  
page 126 } national Executive Board of United Mine Work-  
ers of America, did the Constitution of United  
Mine Workers of America at any time between the dates Oc-  
tober 28, 1948, and August 4, 1949, and also after August 4,  
1949, provide, among other things, as follows:

" 'The Board shall be convened upon the order of the Presi-  
dent, or by the Secretary-Treasurer at the request of a ma-  
jority of the members thereof',

and, if so, state the following:

" (a) During what period or periods did said Constitution  
so provide?

" (b) During the period between the dates October 28, 1948,  
and August 4, 1949, and also after August 4, 1949, what meet-  
ings of the International Executive Board of United Mine  
Workers of America were held? When and by whose order  
was each meeting convened and when did each meeting ad-  
journ?"

Mr. Mullen: Your Honor, we object to that on the grounds  
that it is clearly immaterial. It does not come under Mr.  
Robertson's stock answer that it shows agency.

Of course the International Executive Board, which is the  
Board of Directors, from time to time called a meeting. But  
that fact, when they held meetings, when they adjourned,  
certainly cannot have any bearing on this case.

Mr. Robertson: Now, if Your Honor please,  
page 127 } Mr. Mullen here has referred to what everybody  
reads in the newspapers and knows; well, if I may  
fall back on that, it is certainly common newspaper reading  
that John L. Lewis dominates the whole show, and the Inter-  
national Executive Board is a dummy board he completely  
controls, that he hires and fires, and exercises the powers  
of an industrial czar.

Now, we are claiming that this thing starts at, and the  
United Construction Workers goes up through District 50,  
goes on up, on through to the top. We are showing all that.  
We think before we get through with this case, we are going  
to show he reaches all the way down; whatever he wants to  
do, he does it. That being so, throwing light on that situa-  
tion, we think we are entitled to have those questions.

The Court: Let me read this again.

Col. Harris: I might state for the record we don't deny

that Mr. Lewis is President of the union and we think he is a good one. But he is no such superman, as that, that he can reach on down and touch every transaction of 600,000 members. That would require omnipotence, rather than enlarged human powers.

Mr. Robertson: That is what we are going to find out. I think he is, and we shall be enlightened about the deity. From what we read about him, that committee rarely functions without him. I didn't mean to use an offensive term.

The Court: I don't know that the Court is interested in that line of argument.

page 128 } Col. Harris: I am not offended or anything else. I am trying to arrive—

Mr. Robertson: We realize you are trying to help us get the information.

Col. Harris: I am trying to help you get that information. You are legally entitled to that. I am trying to help you get the information which you are legally entitled to, and we do not object.

Mr. Robertson: I am wary of Greeks bearing gifts.

\* \* \* \* \*

The Court: Gentlemen, I will allow that question to be answered. I don't think it will work a hardship on you.

Col. Harris: 43 (b)?

The Court: Yes.

The next is 45.

Mr. Mullen: Do you want to read that?

The Court: What is your objection to 45?

Mr. Mullen: Our objection was that the salaries of the officers—

Mr. Robertson: Read the whole thing.

Col. Harris: I will read it.

“45. Did the Constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide, among other things, as follows:

page 129 } “ ‘The salary of the President shall be \$50,000 per annum; Vice President, \$40,000 per annum, Secretary-Treasurer, \$40,000 per annum; International Executive Board Members, \$1,000 per month; Tellers and Auditors, \$25.00 per day when employed. Each of the above mentioned officers shall receive, in addition to their salaries, such additional sums for additional service rendered as may be

authorized and approved by the President; together with all legitimate expenses when employed by the Organization away from their places of residence,'

and, if so, state the following:

"(a) During what period or periods did said Constitution so provide?

"(b) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did United Mine Workers of America pay to Thomas Raney, as a member of the International Executive Board of United Mine Workers of America, in addition to his salary, 'additional sums for additional service rendered'? If so, what 'additional sums' were paid to Thomas Raney; for what 'additional service rendered' were such payments made; and when were such payments authorized and approved by the President of United Mine Workers of America?

"(c) As used in the language quoted above, does the word 'Organization' mean the United Mine Workers of America and its Districts, Sub-Districts, branches and subordinate branches, including District 50 and United Construction Workers? If not, what does that word mean?"

There has been some confusion as between Mr. Mullen's memorandum and my memorandum as to whether or not all of that question was to be objected to, or only a part of it, or none of it.

Mr. Mullen: The objection, I used it this morning in arguing against interrogatories as a whole, is on the ground of showing prejudice by the fact that, quoting, in regard to the salaries of the President and so forth, was not a necessary part of the question, which was whether Thomas Raney had been paid anything extra and that the very fact that no other question was based on that, except as to Tom Raney, shows it was used for prejudice.

Col. Harris: Am I correct in this? We see no objection to answering, if he leaves off reading to the jury the salaries of these officers?

Mr. Mullen: That is right.

Col. Harris: And confines his question to the last sentence as applied to Thomas Raney. It may be that Thomas Raney was at work down there. He thinks he did something, he got some additional pay for. He is entitled to find out. We won't object to it.

The Court: You object to the salaries being read out?

Col. Harris: Read out and paraded before the page 131 } jury.

Mr. Pollard: That has nothing to do with approving agency, Judge.

Mr. Robertson: The whole Constitution, as I understand it, is going to be put in. Evidently nothing is going to be deleted. They are going to put it in, as I understand that. Now it is not for prejudice we tried to get in here the net worth of these different unions. The Court ruled we couldn't do it. The salaries of these people have got nothing to do with their net worth. We are not claiming they were over paid, not claiming anything else. What we are principally interested in— it never occurred to me it would prejudice—I don't see why it should prejudice them. Mr. Mullen says everybody that reads the papers knows what these salaries are.

Mr. Mullen: I didn't say that.

Mr. Robertson: We are principally interested in this, whether on account of what Thomas Raney did or anybody else, whether in United Construction Workers, District 50, or United Mine Workers, if they went down there and participated in what took place, if he got extra pay for it, we want to know about it.

Col. Harris: I only asked about Tom Raney.

The Court: I think the objection is about setting forth the salaries of the officers and the question is now without the salaries, without quoting the salaries as provided in the Constitution.

Mr. Robertson: Exception.

page 132 } Col. Harris: What is the next one?

Mr. Mullen: The next is Category 61 to 64, both inclusive.

Mr. Robertson: We are getting down to the heart of it now.

Col. Harris: Shall I read it?

The Court: Yes.

Col. Harris: "61. Who are the persons who served as Regional Directors of District 50 between the dates October 28, 1948, and August 4, 1949; when and by whom was each of these persons appointed a Regional Director; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as a Regional Director; what were the numbers of their respective Regions, and what were the locations of their respective Regional Offices?"

The Court: Suppose we take them one at a time and discuss them as we go down.

Mr. Mullen: We object to that on the grounds that this

question is not material to the issue in this cause, as applied to United Construction Workers in District 50. It should be limited to Region 58 of District 50, and United Construction Workers, being the district in which the wrongs complained of are alleged to have occurred. The territory page 133 } had a number of people and locals in Region 58, United Construction Workers. I have heretofore set forth a large number of those. This question is merely a fishing expedition.

As I said, District 50 has 58 Regions, The United Construction Workers. There are districts under the Regions. Persons who have served as Regional Director in each district have nothing to do with what happens in District 50. That is merely a part of an organization, just like a corporation with its directors, with its managers under those directors. It compares very well to Universal Leaf Tobacco Company, with its separate districts, a man on each market, in each town, and a man in charge of those districts. What one does in Oxford, North Carolina, doesn't concern what the one in Danville does. We have a similar situation here exactly.

I don't think that question is proper under those circumstances.

Mr. Robertson: If The Court please, we can't of course, ask but one question at a time. We are entitled to smoke it out here, to what extent, if any. If we don't smoke it out, it is a point in their favor. The same individuals serve in different capacities and are all bound up together in a common cause being advanced together by these three defendants, either through their component parts, or agents. We are entitled to ask that about the officers of each one of the three defendants. These Regional Directors, I think, page 134 } are well paid positions. Therefore, they are responsible people; they have responsible people in those positions. They have got stability. The same person occupies the same position for a number of years. They are put out, I believe, on one page of the United Mine Workers paper, every time it comes out, every two weeks. That is all they have got to go back to, it is already tabulated for them. I believe that the changes during this period of time we are asking about are almost negligible. All they have to do is to go back to their efficient publication, to find out the changes in them, if any. I think they will find practically none. We are entitled to that, to know it, to know the inter-relationship between these three defendants.

Mr. Mullen: That is one of the duplications of the specific questions I referred to.

Mr. Robertson: We think each person who is a Regional Director is also an official of the United Construction Workers. We think the same crowd occupies them, the same man occupies two or three positions, some of them in one thing, some in the other.

Col. Harris: Judge, I think in fairness to my client, which is the International Union of the United Mine Workers, that I should object to the constant repetition of the phrase, "smoke them out," as if we were some animal that was being chased, or as if we were deliberately trying to  
page 135 } conceal information. I have stated heretofore that we are trying to give every bit of information that we thought they were legally entitled to and we were not instructed to make every technical objection we could.

I don't think that Counsel is entitled under what Your Honor has seen today to use the phrase, "Smoke them out." "Smoke them out." There is no evidence that we have been hiding anything.

The Court: The Court will ask Counsel not to use that expression, "Smoke them out" again.

Mr. Cowherd: I would like to ask the Court, I don't believe Counsel for the Plaintiff would deliberately make an incorrect statement. That paper to which he referred, which he extended to the Court, is not put out by United Mine Workers. It is put out by District 50, NUCW. There is a paper put out by the Mine Workers.

Mr. Robertson: We are going to get that—NUCW. That is what we are trying to smoke out.

The Court: They objected to the words "smoke out".

Mr. Robertson: I didn't say it then, did I?

The Court: Yes.

Mr. Robertson: I apologize. What I say is each person who is a director of Region 50 is also an officer of United Construction Workers. This thing is going to show it, when we  
page 136 } get through, we are entitled to get that information.

Mr. Mullen: Exactly the same question.

"Who are the persons who served as Regional Directors of District 50 between the dates October 28, 1948, and August 4, 1949; when and by whom was each of these persons appointed a Regional Director; during what period or periods between the dates October 28, 1948 and August 4, 1949, did each serve as a Regional Director; what were the numbers of their respective Regions; and what were the locations of their respective Regional Offices?"

I have marked on it that you have ruled it will be limited to Region 58.

Mr. Cowherd: The Court will observe all of that, 61, 62, 63, and 64 are just rephrases of the same question.

The Court: It is my recollection, it was the Court's recollection it did restrict that to Region 58 in the interrogatories. I will restrict that to Region 58.

Mr. Mullen: Then No. 62 is the next one that asks the identical same question.

Mr. Robertson: I ask you read it, and pass on it.

Col. Harris: All right.

Mr. Mullen: Go on, read it, if you insist on it.

Col. Harris: I will now read question 62.

"62. Who are the persons who served as Regional Directors of United Construction Workers between the dates October 28, 1948, and August 4, 1949; when and by page 137 } whom was each of these persons appointed a Regional Director; during what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as a Regional Director; what were the numbers of their respective Regions; and what were the locations of their respective Regional Offices?"

I suppose the same ruling on that—

Mr. Mullen: Identical question was asked of the United Construction Workers, Your Honor ruled on it.

Mr. Robertson: What we are driving at here, Judge, I don't want to keep repeating the same thing, if Your Honor doesn't mind, I insist on it. Suppose they are the same individuals in Region 58 and also a whole lot of the same individuals everywhere else, or in other geographical areas. That is an element or factor in our proof as we see it.

The Court: Well, could you correct the question to the effect that any of the Regional Directors of 58, do they serve in any other regions. If you want to ask that question—

Mr. Robertson: I don't mean the Directors in 58. I mean out of these two concerns, the same man is a Regional Director in 58. Then you go over in some other Region, and the same man occupies both positions, then go into a third geographical territory. The same man occupies the two positions there. The sum total, every bit of it is cumulative proof of this inter-relationship and control. That is page 138 } all we are trying to show.

Col. Harris: We think if you limit it as you did before, to 58, that he may be entitled to that information, and as modified by Your Honor—

Mr. Robertson: Suppose that the same person occupies a dual position in ten different geographical areas and you limit us to showing it in Region 58. To our way of thinking, you have eliminated nine-tenths of our proof on that phase of the case.

Mr. Pollard: May I point this out? That the question deals with United Construction Workers, and in the interrogatories directed to them you have ruled that it should be limited to Region 58. Now this is a question directed to the United Mine Workers concerning United Construction Workers, and it is not information which the United Mine Workers should properly answer, because it concerns the United Construction Workers and that question has been put to them and limited as to them, so it certainly should be limited as to the United Mine Workers. The question still remains whether they can properly answer it.

Mr. Robertson: I understand I have the final say on this thing. Section 20—I believe Section 20 or Section 22 of United Mine Workers Constitution says that District 50 is a part of United Mine Workers. We claim it is the whole thing, all the way down through. If they don't know page 139 } this answer, of course, they don't have to answer it. As I said a moment ago, if the same persons occupy a dual capacity, like in ten different geographical areas, you confine us to Region 58, say we can't show it on the others, you cut out nine-tenths of our proof on that question.

The Court: I will restrict it to Region 58. The Court reserves the right to change its mind on that subject at a later date.

Col. Harris: The next one will be 63, won't it?

The Court: Yes.

Col. Harris: "63. Who are the persons who have served as Regional Directors of District 50 since August 4, 1949, and when and by whom was each of these persons appointed a Regional Director; during what period or periods since August 4, 1949, has each served as a Regional Director; what were the numbers of their respective Regions; and what were the locations of their respective Regional Offices?"

Mr. Mullen: That is the same question as in No. 61.

The Court: Is that the same question?

Mr. Robertson: It is the same thing after August 4.

Col. Harris: The date is different, that is all.

The Court: I see. We will let that be restricted to Region 58. The Court reserves the right to change its ruling on that at a later date; as presently advised, that is re-  
page 140 } stricted to 58.

Mr. Pollard: "No. 64. Who are the persons

who have served as Regional Directors of United Construction Workers since August 4, 1949, and when and by whom was each of these persons appointed a Regional Director; during what period or periods since August 4, 1949, has each served as a Regional Director; what were the numbers of their respective Regions; and what were the locations of their respective Regional Offices?"

Mr. Mullen: It is the same thing.

The Court: That would be the same ruling.

Col. Harris: The same reservation?

The Court: The same reservation.

. . . . .

Mr. Mullen: The next is the categories from page 141 } 96 to 103.

Mr. Pollard: "96. What written reports on work performed, on matters of policy or on organizational activities did A. D. Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America, or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August, 1949. Furnish a copy of all such reports."

Col. Harris: I think if it were limited—

Mr. Robertson: I think you might well eliminate furnishing a copy of the reports.

Col. Harris: I think if it were limited to Laburnum Construction, it would be less burdensome on us.

Mr. Robertson: We don't care anything about whether they were acting. We want to know what they were doing in that territory.

Mr. Mullen: We say in that territory—

Mr. Robertson: We ask that they furnish the reports. The reason we do that, Your Honor, Mr. Bryan has seen some of those reports. Those reports are kept in a very orderly way and very correct way and they are not particularly voluminous. We ask that you restrict it to 58, and furnish copies of the records, bring the original of the reports, have them here during the trial, and if they go in evidence, page 142 } we will undertake to have photostats made if necessary, and they can be withdrawn and copies substituted.

Col. Harris: We just make a copy and attach it to our answer, under the laws of Virginia.

The Court: That will be all right.

Mr. Mullen: You said you had seen copies of reports made by A. D. Lewis?

Mr. Robertson: No, I didn't say that. I said I had seen some of the reports. I haven't seen them, but Mr. Bryan has seen some of the reports, or copies of the reports made from people in Region 58.

Mr. Cowherd: That is not what the question asks for.

The Court: This 96 will be restricted to Region 58.

Mr. Robertson: And furnish copies of the reports?

The Court: Furnish copies of the reports.

The next is 97.

Mr. Pollard: "97. What written reports on work performed, on matters of policy or on organizational activities did Kathryn Lewis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United  
page 143 } Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

Mr. Mullen: The same restriction will be put on that?

Mr. Robertson: If you restrict that to 58, it would conform to the ruling.

The Court: Furnish copies. Restrict it to 58.

Mr. Robertson: As I understand it, the Court is reserving the right to change these rulings. It all comes down to the same thing.

The Court: Of course, the Court can change the rulings at any ytime in regard to these interrogatories, as I understand.

Col. Harris: You are merely serving notice on us as to the uncertainty of your feeling on 61, 63 and 64. You have not said you were reserving rulings on these others.

The Court: I have not said so. I take it the Court can reserve rulings in any point in these interrogatories.

Col. Harris: I think so.

Mr. Pollard: No. 98.

"98. What written reports on work performed, on matters of policy or on organizational activities did O. B. Allen, as an employee or representative of United Mine Workers of America or District 50 or United Construction  
page 144 } Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United

Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

No. 99.

Mr. Mullen: No. 98 and 99 are similar.

Mr. Robertson: I want you to read it. There is no use getting irritated about it, Mr. Mullen. We tried to get through that way up here the other day. I wrote a memorandum, waited ten days, and you said I had it wrong.

Mr. Mullen: All right. Read them.

Mr. Robertson: I take it you will restrict No. 98 to 58?

Mr. Pollard: Furnish copies of such reports?

The Court: All right. Restrict that to Region 58.

Mr. Pollard: No. 99.

"99. What written reports on work performed, on matters of policy or on organizational activities did Thomas Raney, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the page 145 } International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

Mr. Robertson: Restrict that to 58.

Mr. Pollard: No. 100.

"100. What written reports on work performed, on matters of policy or on organizational activities did Thomas Davis, as an employee or representative of United Mine Workers of America or District 50 or United Construction Workers, submit to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

Mr. Robertson: Restrict that to 58.

Mr. Pollard: The next is the same except—

Col. Harris: That was No. 100 that you just read?

Mr. Pollard: Yes.

Mr. Robertson: Restrict 101 to 58.

The Court: No. 101 is restricted to Region 58.

Mr. Robertson: Restrict No. 102 to 58.

Mr. Pollard: No. 101 refers to David Hunter. No. 102 refers to William O. Hart.

Mr. Robertson: Restrict that to 58.

page 146 } The Court: All right.

Mr. Robertson: Restrict 103 to Region 58.

Mr. Pollard: Question 103 refers to H. G. Robinson.

The Court: All right.

Now, we go to 105.

Mr. Pollard: "105. What written instructions, statements, reports, memoranda, letters and other papers were submitted by District 50 or by its Administrative Officer or Secretary-Treasurer or Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers."

Mr. Mullen: That is the question I argued in part this morning and argued against the whole. Those questions are so plainly a fishing expedition, that they certainly, your Honor, violate in themselves the Fourth Amendment of the Constitution and they impose an unreasonable burden on the defendant.

Mr. Roberts: I think I can shorten that. I think under the ruling of the Court, that would have to be restricted to Region 58.

page 147 } The Court: I think I restricted it to Region 58 in these other interrogatories.

Mr. Mullen: I think you did in all of those.

The Court: Let's restrict 105 to Region 58.

Mr. Pollard: "106. What written instructions, statements, reports, memoranda, letters and other papers were submitted by United Mine Workers of America or by the International Executive Board or the President or any other International Officer of United Mine Workers of America to District 50 or to the Administrative Officer or Secretary-Treasurer or Comptroller of District 50 between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers."

Mr. Robertson: Restrict that to 58.

The Court: Restricted to 58.

All right, 107.

Mr. Pollard: "107. What written instructions, statements, reports, memoranda, letters and other papers were submitted by United Construction Workers or by its National Director

or National Comptroller to United Mine Workers of America or to the International Executive Board or the President or any other International Officer of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949? Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers."

Mr. Robertson: My client makes this suggestion, I think it was the understanding, it was my understanding, suppose that something applied in part to Region 58 and applied also to something else. Of course, that would be called for in that answer.

The Court: I take it that would come under that answer.

Mr. Mullen: Of course, we are not splitting the questions.

The Court: How about 107, would that be restricted to Region 58, in accordance with the other rulings?

Mr. Robertson: Yes, that is restricted to Region 58.

The Court: Very well.

No. 108, would the same apply?

Mr. Robertson: Yes.

The Court: Restricted to Region 58.

Mr. Mullen: What about 109?

The Court: The same ruling, wouldn't it, 109?

Mr. Robertson: Yes, I think so.

The Court: No. 109 is restricted to 58.

No. 110 is restricted to 58.

Mr. Robertson: All right.

page 149 } The Court: No. 111?

Mr. Robertson: I think 111 would be restricted to Region 58.

The Court: All right. 111 will be restricted to Region 58. What about 112?

Mr. Robertson: I would like the gentlemen to read into the record now, if they have no objection, what geographical territory Region 58 includes. I think I know. We are restricting it here now.

The Court: Do you gentlemen have any objection?

Col. Harris: I don't know.

Mr. Cowherd: We have no objection to making it. I can't accurately give it at this time. There are ten or twelve counties in all, some in Kentucky, some in West Virginia, and Breathitt was one.

Mr. Robertson: Will you give it to us before the trial?

Mr. Cowherd: I think we will under one of your questions. We are going to furnish that complete geographical area. I have got that already prepared.

The Court: Fine.

Mr. Robertson: 112 will be the same?

The Court: 112 will be the same, restricted to Region 58.

Now, we jump to 118.

page 150 } Mr. Mullen: That is the same question, 118 and 119, that you directed in the other interrogatories to be changed so as to have the "yes" and "no" answer. In other words, instead of reading, "What charter fees, initiation fees and dues were paid to United Mine Workers of America by its District Unions, Sub-District Unions, Local Unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949?" it would change the word "what" to "were".

No. 119 is the same thing, only you put "what" down in next to the last line.

Mr. Robertson: Read that.

Mr. Mullen: "119. With respect to charter fees, initiation fees and dues paid to District 50 by its Sub-District Unions, Local Unions, and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, what portion or portions of such fees and dues were paid by District 50 to United Mine Workers of America?"

Mr. Robertson: There is the addition of the word "were". My recollection were they need not put it in dollars, but put it in percentage.

Mr. Mullen: Here is the word you submitted to me in your letter of September 28: "Were charter fees, initiation fees and dues paid to United—" page 151 }

Mr. Robertson: What question are you on? That doesn't correspond here with 119.

Mr. Mullen: I think it will. "Were charter fees, initiation fees and dues paid to United Construction Workers and Local Unions and Members between the dates October 28, 1948, and August 4, 1949, also after August 4, 1949, and was any portion of such fees and dues paid by United Construction Workers to District 50 or United Mine Workers of America." That is what I was speaking of, that language in 119 that now reads, "What portion or portions", and the Court directed it should read, "Was any portion of such fees paid".

The Court: Does that answer it?

Mr. Robertson: I don't see any objection made to any percentage. They were loath to state it in dollars.

The Court: As I recall it, the reason they objected to that was they would have to get all of these figures together. What

you were interested in was in knowing whether any portion went—

Mr. Robertson: Change that "what portion" to, "was any portion". I have got that all right.

The Court: I think that answers the question you want.

Mr. Mullen: The same thing in 120, "What page 152 } portion" should read, "Were any portions".

The Court: 121.

Mr. Mullen: We have 120 here that we have already fixed.

The Court: 121 (a) is next.

Mr. Robertson: I think we reframed that before. "Were funds advanced".

Mr. Mullen: Yes. That read, "Were funds advanced or paid by United Mine Workers of America to or for the account of District 50 or United Construction Workers, and why were such advances or payments made?"

Col. Harris: May I interrupt a minute?

The Court: Yes.

Col. Harris: I am not clear as to the wording on 120.

The Court: In other words, on the end of the fourth line of Question 120, it reads: "What portion or portions". That would be changed to read: "Were any portion or portions".

Col. Harris: O. K. I have it.

Mr. Cowherd: The next word "were", would naturally come out to make it grammatical.

The Court: Yes.

Mr. Pollard: No. 121, part (a), reads:

page 153 } "(a) What funds were advanced or paid by  
United Mine Workers of America to or for the  
account of District 50 or United Construction Workers, and  
why were such advances or payments made?"

It is my recollection on the other interrogatories and our notes so show, that you ruled we did not have to answer the part which reads, "And why were such advances or payments made."

Mr. Mullen: My notes show the same thing.

Mr. Robertson: I have no recollection, but I don't see why they shouldn't say "why". Suppose they were putting up the money for the agent, why shouldn't they show it?

Mr. Pollard: May I say something?

The Court: Certainly.

Mr. Pollard: I believe you will recall the argument. I was sitting where Mr. Mullen is, and Mr. Mullen where Mr. Robertson is. They held a conference there and I couldn't help overhearing, "It makes no difference whether an agent

was paid one dollar or ten; the reason why one was paid is immaterial, if the money was paid."

Mr. Robertson: I think it may be highly material, the reason for it being paid. I tried to convince Mr. Bryan on the principle that applied. I think you may give me some money as a gift, or you may give it to me to buy a piece  
page 154 } of real estate, or you may give it to me for running Laburnum off the job, which would be very important.

The Court: In other words, maybe a loan or something of that sort, or maybe something is due.

Mr. Robertson: Maybe Raney did such a good job at the top—we are going to see.

The Court: I think it is fair to answer that question, to see why the answers were made. So "a" will be amended.

Col. Harris: May we reserve an exception on that?

The Court: Let me state again: 121 (a) will now read: "Were funds advanced or paid", and so forth, instead of "what funds were advanced".

You go ahead and make your exception.

Col. Harris: I wasn't taking any exception to that. It is the last end, I think is improper.

Mr. Mullen: We take an exception to the inclusion of the words, "Why were such advances or payments made".

The Court: Go ahead and except to the last part of the question.

Mr. Mullen: I think he has already got it in. He stated the exception.

Col. Harris: We reserve an exception to your Honor's ruling to the effect that we must answer this clause: "Why were such advances or payments made?"

page 155 } Mr. Mullen: That is (a) and (b).

Mr. Pollard: An exception to both.

The Court: The amendment will apply to (b), as well as (a), and the same exceptions will apply.

Mr. Pollard: That is right.

Mr. Robertson: That is evidently worded wrong. There is no (a) and (d) to 123. I have got 121 (a) and (b), and you go to 123 (a) and (d). There is no 123 (a) and (d). Your Honor ruled on 121 (a) and (b).

Mr. Mullen: Your Honor has already ruled that we did not have to furnish balance sheet, did not have to furnish statement called for in Question 124.

Mr. Robertson: Let's take up 123.

Col. Harris: May I interrupt a second? We are almost through.

Mr. Robertson: I have got a lot more stuff.

Col. Harris: We haven't received any notice to appear on any motion.

The Court: Go ahead and make the statement.

Col. Harris: Mr. Pollard raised the question, if I got it correctly, as to your Honor's ruling on 121. I want to be sure I have that down, if your Honor doesn't mind.

The Court: All right, go ahead.

Col. Harris: I have here that 121 (a) is changed now to read: "Were funds", instead of "what funds".  
page 156 } The Court: That is right.

Col. Harris: Then, as so changed, we must answer. As to 121 (b), the same change, "What funds", to "were funds", but you also ruled we had to say "why" on 121 (b), and to that we reserve an exception.

The Court: Exactly.

Mr. Mullen: That is all in the record.

Mr. Robertson: Coming down to 123.

Col. Harris: Have you read 123?

Mr. Pollard: No.

Mr. Robertson: I have no recollection on that. If somebody will say what happened, it will come to my mind, I think.

The Court: "Furnish a balance sheet of United Mine Workers of America showing its assets and liabilities and net worth as of December 31, 1949."

Mr. Robertson: Have you your file copy of that letter?

The Court: Mr. Mullen's copy to me stated an exception to 123 (a) and (d) on that one.

Mr. Robertson: That may be a typographical error.

The Court: This is under Mr. Mullen's signature. There is no 123 (a) and (d).

Mr. Robertson: I will ask somebody to give their recollection as to what we did in the other instance about page 157 } the balance sheet. I don't remember.

The Court: As the Court recalls, it ruled out the balance sheet on both sides.

Mr. Robertson: All right. It would come out here. 123 will not have to be answered.

The Court: What about 124?

Col. Harris: "Furnish a statement showing the following with respect to United Mine Workers of America: (a) Cash balance on hand as of January 1, 1949, (b) Receipts during the year 1949, (c) Disbursements during the year 1949, and, (d) Cash balance on hand as of December 31, 1949."

Mr. Robertson: That was ruled out last time, the same ruling here?

The Court: The same ruling.

page 158 } The Court: No. 125.

Mr. Mullen: "Furnish a copy of the minutes of all meetings of the International Executive Board of United Mine Workers of America held between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949."

Mr. Robertson: You have ruled that had to be answered, your Honor.

Mr. Mullen: No, ruled the minutes of the Local 178A had to be answered.

Col. Harris: There are many matters, we would be revealing confidential information of coal operators that had nothing in the world to do with the entire state of Kentucky, much less Breathitt County, sir. The Executive Board, as the Constitution shows, is the "Supreme Court" between conventions and they handle multitudinous matters and to take and copy all the minutes of everything they had, would be just opening up all private and confidential business of United Mine Workers for publication.

Mr. Robertson: Your Honor, please, I don't think this makes sense. "Furnish a copy of the minutes of all meetings of the International Executive Board of United Mine Workers of America held between the dates October, 1948", down to date. If it is confidential and should not be revealed, the Court will not have it divulged.

Mr. Mullen: Necessarily, the decision of that page 159 } Executive Board are confidential.

The Court: Here was a similar question, wasn't it?

Mr. Mullen: I have got the question right here.

"Minutes of the organizing committee of District 50. Minutes of all meetings of Local 178A." As I say, they are very different things, and of the "International Executive Board of United Mine Workers".

Col. Harris: I think anything relative to Laburnum Construction Company, they would be entitled to it.

Mr. Cowherd: Region 58.

The Court: What I was thinking about, Region 58, how about that?

Col. Harris: That would make us disclose the private affairs of other operators in that region.

Mr. Robertson: The Court could determine that when it comes up. We want to see what their minutes show here about these interrelationships. We think we are entitled to see it.

Mr. Cowherd: That isn't the question. He doesn't limit his question to any minutes dealing with interrelationships. Every important matter that the United Mine Workers had during that period that went before the Executive Board could be brought into this case. International affairs between Canada and the United States might conceivably be defense matters, and might conceivably have no connection or anything else.

page 160 } The Court: I think that question is rather broad, Mr. Robertson.

Mr. Robertson: Well, what are you going to restrict it to, your Honor?

The Court: Let's see if we can arrive at some logical conclusion on that one.

(Discussion off the record.)

The Court: On the record.

Col. Harris: The other questions he asked, and where you applied them to Region 58, did not require, as we saw it, that we disclose any confidential information of other operators and other businesses. The financial dealings with other people, say. Now, any financial dealings that affect the Laburnum Construction Company, he would be entitled to. But suppose they have had extensive dealings with corporation "X", Corporation "Y", and Corporation "Z", and don't even know Laburnum Construction Company is in existence, never heard of them. As a matter of fact, there has been a lot of talk here about Mr. John L. Lewis. I venture the assertion Mr. John L. Lewis never heard of Laburnum Construction Company in his life until litigation developed.

It would just be going where we have this past mechanism covering many states, hundreds of thousands of men and the private business of individuals and corporations and associations engaged in production of goods for commerce, and producing the necessities of American life which seems to me that a proper regard for the rights of bystanders requires that we do not have to come in and tell him their business.

page 161 } Mr. Robertson: Your Honor, please, of course we won't get anything out of—the whole talk all day is Laburnum Construction Company is small potatoes compared to these Unions, John L. Lewis never heard of them. I think it would be a miracle if you would find anything—I won't go that strong, but it may very probably be that you won't find any specific reference by name to Laburnum Construction Company in those minutes. That is not the purpose of the ques-

tion. The purpose of the question is during those periods there, what were they telling their people down the line.

Even under the Coronada case, out of the Federal decisions, you have got to have specific authorization or specific ratification. And they claim that case applies here, as I understand it. We claim it doesn't. How else are you going to show it except through their minutes? We want the minutes of that Executive Board to show, yes, restricted maybe to Region 58, but what did you tell them to do within that District? What did you tell them? What did they tell you? What did you do about it? That goes to the very heart of our case.

Mr. Mullen: Minutes of the Executive Committee have to do with—

page 162 } Mr. Robertson: I haven't finished.

Mr. Mullen: All right.

Mr. Robertson: I don't understand, the Court comes along on my *ipse dixit* says that would show the private business of the coal company. I don't understand that the Court sticks its head in the sand and refuses to get enough information to act intelligently, just because somebody say that is interpretation of the thing.

As I said, the Court will require that to be answered here. Then if the Court thinks any part of it is improper, then I think it is highly probable some parts of it will be improper to go to the jury, the Court will rule out the part that ought not to go to the jury, delete it from the record, have it destroyed on the record, if the Court thinks that is going to violate any great business secret.

Mr. Mullen: If your Honor please, like the Board of Directors of a corporation are not dealing with the actual administrative affairs, they are dealing with larger matters, matters of policy. These minutes in those two years will, I assume, show matters in regard to negotiations of the last contract with the coal operators and John L. Lewis.

Col. Harris: That is right.

Mr. Mullen: They will show the discussions in that Board, that private matter.

Mr. Pollard: And the pending negotiations.

page 163 } Col. Harris: I will call it to your Honor's attention, if we have to give those minutes, and we will assume that many of them involve financial matters, then your Honor's ruling on 123, 124 would be nullified.

Your Honor ruled we didn't have to make financial statements. That had no concern with the case. Our instructions, if I may state to the Court, our instructions were not to put in any unnecessary technical objections. We were asked to protect the private financial matters of the Union and with

people that it dealt with that had nothing to do with this case.

The Court: I am wondering whether or not this would be feasible? Would you gentlemen object to one counsel for the plaintiff to kind of thumb through the minutes and see if there was anything in there?

Col. Harris: I have no authority to open the minutes to anybody on earth, Judge. I, myself, have never read a copy of the minutes of the International Executive Board. I have never had any occasion to read them. But Mr. Mullen didn't go up—I went up to Washington for the sole purpose of checking up on the objections that Mr. Mullen and I had figured out with Fred. And some of those we had figured out that we put in, Mr. Lewis said, "No, don't put them in. Go ahead. Make the answers."

Mr. Robertson: Following out the thought your Honor had there, I would be perfectly willing for them page 164 } to submit the minutes to the Court and the Court rule on what it thought was proper and improper. I have got no desire to get in anything improper here. I don't want to just read somebody's *ipse dixit*. He said he never read them. I don't know what is in them. I have not read them. I am not ready to accept anybody's judgment except the Courts as to what I am entitled to see out of it.

Col. Harris: I don't ask anybody to accept my statement. He doesn't know me.

Mr. Robertson: I say you haven't read them. It is no reflection on you. If you haven't read them, you can't know what is in them.

Col. Harris: I have no authority but I would recommend that they make no objection to your Honor reading them. I don't feel in view of instructions that I received, that I should deviate from them this afternoon.

The Court: I understand your position.

Mr. Robertson: I understand. I don't think it is proper for John L. Lewis or anybody else to be putting this Court on terms.

The Court: No, I don't think so, either, but there is a question in my mind whether I should require this question as framed to be answered. There is bound to be voluminous minutes there that haven't a thing in the world to do with this case.

page 165 } Mr. Robertson: I don't know whether there is or not. I don't know how often they met. This is supposed to be one man's Union. Nobody here has ever seen them. It might be one separate minute, a page, or it might be a book. If it is kept in any orderly way, it ought to

be in a book to be presented here to the Court and to be determined very easily if they really wanted to give us the information we are entitled to.

Col. Harris: As I say, Judge, I know your Honor reserves the ruling, the right to change the ruling a while ago. I don't think personally that he has any right to it at all, but of course we are willing to rely on the interpretation of the Court. If the Court looks at them, says even though it has nothing to do with it, even though you learn secrets that don't concern you, business matters you are not interested in, if your Honor thinks that is what we ought to do, I will recommend it to them. You see, what I am doing is in a way trying to let the rulings of your Honor today be the end of it.

The Court: Would there be any objection if the minutes were brought here and in the presence of counsel for both sides and the Court, just thumb through them to see if there was anything in there?

Col. Harris: The Court will thumb through them, not counsel on both sides.

Mr. Robertson: That is all right.

page 166 } The Court: You wouldn't want counsel on both sides?

Col. Harris: No, sir.

Mr. Cowherd: I have seen those minutes. I am confident that this firm of lawyers representing the other side of this case has clients whose business might appear in there, and does appear in there. And there might be exchange of information there that they are not entitled to. It is just confidential stuff. I don't think any Court would require, and I don't think any lawyer on the other side should look at those minutes. But I, too, would recommend that your Honor be allowed to deal with that part. I can assure you that you wouldn't want to deal with the entire volume, regardless of what Mr. Robertson says about a one-man Union, no minutes, no meetings. I am quite sure you wouldn't want to take the time to go through all of them.

Mr. Robertson: You don't want the Court to go through it conscientiously? I think I have the right to close this discussion on this phase of it.

The Court: Let him get through before you close. Are you through?

Mr. Cowherd: That is all right.

Mr. Robertson: I say, even under the Coronado Case, they say in order to hold either District 50 or United Construction Workers in here, we have got to show prior  
page 167 } authorization directly or subsequent ratification directly. Now, where is a better place to find out

whether it was or was not done than in these minutes? What is the equivalent of a Board of Directors in their organization?

The Court: Could the question be framed to furnish copies of minutes of the meetings which deal with the very things that you are talking about rather than just furnish copies of all the meetings? Then you are asking specifically for certain copies of the minutes.

Mr. Mullen: In those cases I read your Honor this morning, that is all they can ask for.

The Court: That might work.

Mr. Robertson: Restricted to Region 58, District 50 is the whole United States. He has been holding it down here to Region 58.

Col. Harris: Region 58 is 43 states.

Mr. Cowherd: It is 42 states.

Col. Harris: Coal producing states, coal producing districts.

Mr. Cowherd: Coal producing districts, and districts of United Mine Workers, as listed in the roster that Mr. Robertson has in his possession.

Mr. Robertson: You don't admit that is in the form that I can introduce it in evidence? I am getting my evidence in shape.

page 168 } Mr. Cowherd: Region 58 in this case, as I see it, is in Breathitt County, that is where it happened.

Mr. Robertson: You know, as I do, that no more embraces all of Region 58 than Henrico County, Virginia, does. I have never heard of such argument.

Mr. Cowherd: I didn't say it did.

The Court: We are getting off the subject here.

Mr. Pollard: Judge, your suggestion about looking at them in the presence of counsel, you meant in the presence of counsel and not have the counsel look at them, did you?

The Court: Well, I would prefer that both counsel look at it with me.

Mr. Robertson: I am perfectly willing to pass up looking at it.

The Court: Just let the Court look at it?

Mr. Robertson: Yes, but I want the books here, and let the Court make such examination as the Court deems proper, make such ruling as the Court deems proper. That is satisfactory to me.

The Court: After having seen the minutes?

Mr. Robertson: That is satisfactory to me, yes.

The Court: Is that satisfactory to you, gentlemen?

Mr. Cowherd: We couldn't stipulate that.

The Court: I understand you have got to recommend.

Col. Harris: That means by no device and  
page 169 } maneuvering or change of position or anything  
else, does anybody get to see it, if your Honor  
has it.

The Court: It will be private property. The agreement  
will be strictly complied with, as far as the Court is con-  
cerned.

Col. Harris: If you don't object, and if you, Mr. Mullen  
and Mr. Cowherd, don't object, we will recommend that that  
be done, Judge.

Mr. Robertson: By when, your Honor, is that going to  
be done? When the answer is on these things the 15th of No-  
vember, or is it going to be done before that? If they put it  
off, we won't have time to act.

The Court: Why not do this, you gentlemen contact the  
officers or the proper persons of the Union and see whether  
or not they are willing to voluntarily comply with your re-  
quest, and you notify the Court. It may be that they will re-  
fuse to do that. Then if they do, the Court will be in position  
to know what step to take next. In the meantime, I think the  
Court will withhold any decision on this Question 125.

Mr. Robertson: Will you put a time limit there, if your  
Honor please?

Col. Harris: That is what I am going to talk about. I am  
somewhat crowded. I had to fly up here and I have to fly back  
Sunday morning, because I must before the United States

Court of Appeals for the Fifth Circuit in Mont-  
page 170 } gomery, Alabama, 101 miles from Birmingham  
where I live, Tuesday morning. So I am having  
to fly right back Sunday morning and get home and then leave  
next morning for Montgomery, Alabama. I won't get a chance  
to see any United Mine Workers officials.

The Court: How about you, Mr. Cowherd? Are you going  
back to Washington?

Mr. Cowherd: No, I am not. My work is taking me in the  
opposite direction.

Col. Harris: Mr. Cowherd couldn't come yesterday. He  
had to be in Hartford.

I don't devote all of my time to United Mine Workers'  
business. I am engaged in the general practice of law. I had  
this case set down in the Court of Appeals. I don't work  
for anybody.

Mr. Cowherd: I am afraid it is not going to be a simple  
question to get answered. I don't believe any one of the  
officials will take the responsibility for doing it. After listen-

ing to the discussion of why we should not disclose the general minutes to anybody outside the organization, I don't know how they will feel about it. I won't be back until Monday morning.

The Court: You will be back to work Monday?

Col. Harris: You go ahead and state the problem. If they want to call me in Birmingham, or if you want to call me, all right.

page 171 } Mr. Robertson: The only point I make, Judge, I, of course, realize we ought to give a fair time to do the thing. There ought to be a time limit it, to bring this question to a decision.

The Court: You could let me know by the end of next week, couldn't you?

Mr. Cowherd: Sure.

Col. Harris: Yes.

The Court: That is a reasonable length of time.

Col. Harris: We have no disposition to delay. We understand the case is going to be tried the second week in December.

Mr. Robertson: I have some more interrogatories, which you have copies of, I think, Mr. Mullen.

Col. Harris: Judge, I don't know what his interrogatories are. When we came here this morning, counsel handed one after the other to Mr. Mullen.

Mr. Robertson: I haven't gotten to those.

Col. Harris: I don't know what your Virginia rules are, but we have got to get our defenses in by Monday morning. It seems to me, to take any other interrogatories up now, shortens our time and is unduly burdensome. I submit no adequate notice has been given to us.

Mr. Robertson: Mr. Harris, you weren't here before. What I am talking about now is about interrogatories filed in here on October 2, 1950, because they were inad-  
page 172 } vertently not left with the Court on September 26, and Mr. Wickham, who was here then, refused to come up here with me to get the things in order. If the Court will look at them, I made a certificate on them, three sets of interrogatories.

The Court: Are these the ones?

Mr. Robertson: These are the ones this morning. I have the ones before this.

The Court: You have one before this?

Mr. Robertson: Yes.

Mr. Mullen: I told Mr. Wickham to tell you we had no objection to you filing them, by reason of the fact you failed

to do it the day we were up here. I said I had no objection to you correcting that.

Mr. Robertson: Those are the ones they say there is no ruling on. They have had them. I understood you accepted them.

The Court: Here they are.

Mr. Mullen: In the supplemental interrogatories, we will object to 1 and 2.

Col. Harris: You want to get a ruling on 1 and 2, don't you?

Mr. Robertson: They are here, Judge.

The Court: "Was application ever made by United Mine Workers of America, to the National Labor Relations Board requesting that United Mine Workers of America be certified as the bargaining agent for the employees of the plaintiff."

Mr. Robertson: The reason I asked that, they asked that question of us in their own interrogatories. We answered it. If they had the right to ask us that question, we had the right to ask that.

Mr. Mullen: It is a very different situation.

The question is objected to on the ground it is not relevant to the issue in this cause, in that the right to organize workers is not dependent on any ruling or order of the National Labor Relations Board, that there are other methods of determining whether a given set of employees are represented by a Union and the right to strike is not dependent on application to or action by said Board.

In addition to that, before any application or anything could be made, they discharged the workers and were no longer in their employ.

Mr. Robertson: Now, your Honor, I agree that the Labor Relations Act has nothing on earth to do with this case, and the question of whether we ever applied for anything with the National Labor Relations Board, has got nothing to do with it. It was not in a Federal Court, not under the Labor Relations Act, not under any Federal Statute. They did ask us the opposite of this question, and we voluntarily answered it. We then want the other interrogatory and answer stricken out.

Mr. Pollard: May it please the Court, are you through?

Mr. Robertson: Yes.

Mr. Pollard: There is a provision in the National Labor Relations Act which might have created liability on the part of the defendants, had the Paintsville carpenters been certified by the National Labor Relations Board as the bargaining

agent; therefore, it became on us to know whether or not it had been created. Whether or not we had applied for certification, is entirely immaterial.

Mr. Robertson: I can't follow that line of reasoning, your Honor. Mr. Lowden here, I think, knows as much about the Labor Relations Act as Mr. Pollard. I just don't follow that line of argument.

Mr. Pollard: If the Paintsville carpenters had been certified as the bargaining agent, then under the Taft-Hartley Act there is a possibility that we would have been liable for calling the strike; otherwise, not.

Mr. Lowden: Since we didn't sue you under the provisions of the Taft-Hartley Act, then your interrogatory wasn't relevant.

Mr. Cowherd: Yes, it was, because it gives you the right to sue in either Court, State or Federal.

Mr. Pollard: The way the notice of motion for page 175 } judgment is drawn, you could have very well taken that position. So it is relevant as to us, but it is not as to them.

Mr. Robertson: I don't think it is relevant to either. If it comes in for them, it ought to come in here.

The Court: The Court will refuse to require the defendant to answer interrogatory No. 1, and will take under advisement the motion of counsel for the plaintiff to strike the like question in the interrogatory addressed to the plaintiff.

Mr. Robertson: I suppose you have the same ruling on No. 2?

Mr. Mullen: The second question.

The Court: There is no objection?

Mr. Mullen: No.

Mr. Robertson: We put in three additional sets of interrogatories here this morning, I did.

Mr. Pollard: Before you start, may I straighten one thing out. There were three sets of interrogatories on those questions. I take it your ruling applies to Questions 1 and 2, addressed to all three defendants?

The Court: All three defendants, yes.

Mr. Robertson: Now, if your Honor please, I have given you gentlemen copies of them. This first set goes to—

Mr. Pollard: We were just handed this paper page 176 } at the week end. I think it is unfair to ask us to make up our minds on it at this time.

Mr. Robertson: I will be frank, I am trying to get these things answered by the 15th of November, which is the time the Court said, and I am presenting them here to the Court now. So if you don't want to answer them today, if we can

agree upon a date when they will come here and let the Court rule on them, they are short.

Col. Harris: It is a novel experience to me, that a man hand you interrogatories and says, "Now, let's take up whether you want to answer or not."

The Court: The Court is not going to require you to answer them.

Mr. Robertson: I am not asking that. I am talking about wanting to cooperate in helping get information and move along. I haven't seen any evidence today of it.

Mr. Mullen: I haven't seen any on your part.

Mr. Robertson: I haven't offered any, I have put them out here today so we can determine today when you will come back and get the Court to rule on them.

The Court: How many questions are there in the interrogatories addressed to all three defendants? Are they the same questions addressed to each defendant?

Mr. Robertson: Practically. They are a little different.

I mean in one of them there we call for copies of page 177 } those publications. I thought that we would save time by doing it today.

The Court: The Court is prepared to go ahead. Of course, it is unreasonable to require the defendants to.

Mr. Robertson: I agree to that.

Mr. Cowherd: I suppose I am the only one that could possibly know all of the men, and it happens that I don't know the first one. I would have to start calling to find out who he is. We don't know whether we can answer it or not.

Mr. Robertson: That is why I am bringing it up. I ask the Court to set a date.

Mr. Mullen: I certainly don't want to pass on it. I have been sitting here with no chance to read them.

Mr. Robertson: I am asking the Court to fix a date.

Mr. Mullen: Wait until we read them.

Mr. Robertson: I ask the Court to fix a date.

Mr. Mullen: I have taken the last two weeks with you.

Mr. Robertson: I am not asking favors. I will ask the Court to fix a date.

Mr. Mullen: I am submitting to the Court that I have two cases which have got to be answered, all the pleadings and everything, by the 28th of October, and it is jurisdictional unless I answer. And for two weeks or more, I have been working on this thing. I have got to do that.

Mr. Robertson: I ask the Court to fix a fair date.

The Court: It is a question of when we can, of when I

am here. It may be that after you all read those interrogatories—

Mr. Robertson: Then we can release the date, just as we released two here this time.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

How about the 24th at three o'clock?

Mr. Robertson: I want to refer now to another letter I received from Mr. Mullen on October 10, by messenger, regarding a letter I wrote him on September 28, setting out my recollection of what occurred in here on September 26.

I sent a copy of that letter to the Court. Mr. Mullen says this:

"This will acknowledge receipt of your letter of September 28, in which you outline your understanding of what occurred on September 26, 1950, at a conference between Judge Snead and counsel for all parties.

"Paragraphs numbered 1, 2, 3, 4, 5, and 6 correctly state what took place.

"7, I do not recall giving any definite date on page 179 } which you or the Court could be advised whether the cases referred to therein would be consolidated. Certainly I did not give as such date, October 10. I will, however, endeavor to dispose of this question on October 12, or certainly during the present week."

Now, as I understood it, the reason I am bringing that up, it has been intimated here, you remember there is a case pending in this Court with the Unions, I think, and various individuals brought against Laburnum Corporation, and Bryan, individually. It has been intimated here that the counsel for those plaintiffs may ask the Court to consolidate the two causes. We think that they should not be consolidated. The parties are different, the pleadings are different, the issues are different. We are going to oppose it, if they press their motions. We want to argue it and cite authorities. And we don't want to get up here to the trial date before that happens.

I understood Mr. Mullen will let us know this week whether or not they do want to press that motion. If they do, I want to fix a date for that.

Mr. Mullen: I said I would let you know. I think there are some matters Mr. Pollard has got to take up with the

Judge on that. I think there are certain questions he wants to take up with the Judge, and that the Judge wants to take up with him.

Mr. Robertson: I want to get that out of the way.

The Court: Why can't we dispose of that on page 180 } the 24th?

Mr. Robertson: If they are really serious about it, I don't think we can. We will go ahead as far as we can. That is all right with me.

The Court: Do you want to say something?

Mr. Pollard: Yes. We are confused, and I want to broaden the scope of the discussion just a bit, about the application of the new trial procedure to this case. This case was started in 1949, and under the old rules, we filed a plea of not guilty, which completes our pleadings. And since our pleading was completed, we do not know whether or not any provisions of the new rules apply, and our first problem is this:

Mr. Robertson: Are you talking about this case we are discussing here today?

Mr. Pollard: Yes.

Mr. Robertson: I can tell you right off the bat what I think.

Mr. Pollard: I wasn't quite through.

I can tell you that we have got to file our grounds of defense by the 16th of October. I understand from the new rules, that when you file your grounds of defense, you have got to either admit or deny the allegations of the bill of complaint.

Now, in filing our grounds of defense, do we page 181 } have to do that, or do we file grounds of defense under the old rules because we had completed our pleadings under the old rules, when we filed a plea of not guilty?

The Court: Do you want to express yourself on that?

Mr. Robertson: I don't know. He is raising a new point. I think he ought to come up here with grounds of defense or a fair statement of the grounds of defense. I think that should be adequate.

Mr. Pollard: That is what would like to do. We don't want them taken as admitting—

Mr. Robertson: It is not a complaint. It is a notice of motion for judgment. I think we are entitled to know what you admit, what you deny, and what your grounds of defense are. I file them every day. That is what I put in them.

Mr. Pollard: We have got this problem, the new rules specify that in the notice of motion for judgment shall set out in numbered paragraphs the grounds on which the plain-

tiff relies, or facts on which it relies for the claim for relief. This is not in numbered paragraphs. That runs five pages. It is just the most difficult thing in the world to go through there—

The Court: Couldn't you say the first paragraph on Page 2—

page 182 } The Court: The second paragraph on Page 2?

Mr. Robertson: I do it that way all of the time.

Mr. Pollard: In other words, you think the new rules require that we admit or deny the allegations in the bill of complaint, even though we had completed our pleadings before the new rules became effective?

The Court: I haven't had opportunity to pass on that since the new rules went into effect.

Mr. Robertson: I don't think it is necessary to pass on it at this time. If you come up here in good faith and give a garden variety of grounds of defense, which is a fair statement of grounds of defense, I think that is adequate under any of the rules.

Mr. Mullen: Will you stipulate that?

Mr. Robertson: If there is just going to be a difference on what a fair statement of grounds of defense is, if you come up here, don't quibble, I will tell you whether they are satisfactory or not.

The Court: If you don't think it is a fair statement, of course you can apply to the Court.

Mr. Robertson: I don't think we would get any where now on what is a fair statement.

Mr. Mullen: If we come up here with a ground of defense, you say it is not fair, the Judge so rules, we will have opportunity to come in.

page 183 } The Court: That will be in the discretion of the Court, as I understand.

Mr. Mullen: Yes.

Col. Harris: There is no stipulation?

Mr. Robertson: No, sir.

Mr. Pollard: In that connection, getting back to the question Mr. Robertson originally brought up about whether we would ask him to consolidate, it is not clear under the new rules whether or not we have the opportunity of filing counterclaim or cross claim in this suit. Of course, after he files it, it is up to the Court to determine whether or not we have a separate trial on it. And there is something in the rules that indicates it may be necessary to bring a separate suit; to protect ourselves against any question, any statute of limitations, we filed the suit prior to the expiration of one year.

We would be perfectly willing to take a non-suit, I would recommend it, I will put it that way, to take a non-suit in the separate suit we have filed in this Court and come in by way of cross claim or counter claim at the time we file our grounds of defense, without bringing in any new parties.

Mr. Robertson: I will not agree to that. I don't think they have the right to do it. I will oppose it and want to be heard on it, if they seriously press any such suggestion.

The Court: I don't think I would take the non-suit until you knew how the Court was going to act on the page 184 } cross claim. What about the time for filing cross claim?

Mr. Pollard: Under the old rules, there was no time limit. That is one of our problems. Under the new rules, the new rules say you can file your cross claim and your counter claim in the same paper with your grounds of defense.

The Court: You have to do that within so many days, don't you, under the new rules?

Mr. Moore: It is 21 days.

Mr. Pollard: I don't know whether you do or not.

Mr. Robertson: Here is another thing, the issues in that thing are entirely different. Among other things, they have filed exactly the same kind of suits, one up here and one down in United States Court. We are claiming you can't run both of them. There is no use trying to dispose of it here this afternoon.

The thing is, if they are going to seriously press it, I should think from a half day to a full day's time would be required to dispose of that.

The Court: I don't want to give you any encouragement about trying these suits together. I am not saying I won't grant the motion, and I am not saying I will. Offhand, it seems we have got enough problems as it is, in one case here.

Mr. Pollard: If our claim for liability arises page 185 } out of the same set of circumstances in Breathitt County, Kentucky, it would certainly be serving the ends of justice.

Mr. Robertson: Coming back to Paragraph 8, I admit I am wrong on that; Paragraph 9 states correctly the agreement of the parties. Now No. 10, that was the word "why".

The Court: I think that has been settled as to these interrogatories to the United Mine Workers.

Mr. Robertson: I think that disposes of that.

The Court: All right, gentlemen, it is a quarter to five.

Mr. Pollard: It is stipulated on the 24th there will be taken up the defendants' objections to the plaintiff's answers

to the defendants' interrogatories, and that in the next three days those objections will be served on the plaintiff in writing and filed with the Court.

. . . . .

page 2 }

. . . . .

Transcript of all the incidents of the above matter when heard in chambers on October 24, 1950, before Honorable Harold F. Snead.

Appearances: Mr. Geo. E. Allen, Sr., and Mr. T. Justin Moore, Jr., counsel as before noted;

Mr. James Mullen, Mr. Fred G. Pollard, and Mr. Yelverton Cowherd, counsel as before noted;

Others present: Mr. A. Hamilton Bryan, President Laburnum Construction Co., Col. Crampton Harris;

Mr. Willard Owens, of Washington, D. C.

page 5 }

. . . . .

Mr. Allen: May it please Your Honor, before we go any further into this matter may we note appearances here? I just don't know who represents whom today.

The Court: All right. The Minutes of the last hearing were just presented to me a few moments ago.

Note: Here are stated for the record the representations herein.

Mr. James Mullen, representing all the defendants.

Colonel Crampton Harris, representing all three of the defendants.

Mr. Yelverton Cowherd, representing District 50, United Mine Workers of America, and United Construction Workers. He does not represent the International Union, United Mine Workers of America.

Mr. Fred G. Pollard, who will be here, he is momentarily detained, he represents the three Unions.

This gentleman sitting over here, Willard Owens, is not appearing as counsel in the case, he is a mere spectator and has not entered an appearance and will not.

Mr. George E. Allen, representing plaintiffs.

Mr. T. Justin Moore, Jr., representing the plaintiffs.

Mr. A. Hamilton Bryan, President of Laburnum  
page 6 } Construction Corporation.

Colonel Harris: At your convenience I am prepared to hand Your Honor the Minutes. I have them with me, and they are my personal responsibility. When Your Honor has finished with them if you will communicate with me in some way I will arrange to be here and get them. They do not want the Minutes entrusted even to Registered Mail. They were not entrusted to the mail in coming down here, and Mr. Lewis said he would turn them over to me personally, and it was up to me to deliver them to the Court.

Mr. Allen: May I ask what Minutes they are?

Colonel Harris: Minutes of the Executive Board of the International Union, United Mine Workers of America, from October 28, 1948, up to the present time. I have not opened them. They are all tied up.

Mr. Allen: May it please Your Honor, before you open those Minutes there—

Colonel Harris: They are not to be opened before any of us. The agreement was that Mr. Robertson didn't care to see them, and the secrecy was to be preserved. The agreement being that the Judge would go over them himself, and then inform counsel as to which he thought if any  
page 7 } were pertinent, and Mr. Robertson stated, in fact he suggested, he stated that he would rely on the judgment of the Judge, and we have accepted the proposition under the statement that their secrecy would be preserved.

Mr. Allen: I had a conference with Mr. Robertson this morning, and I did not understand that any such agreement was entered into, and I might ask Mr. Bryan about that. You were there at the conference. I did not understand that any such agreement was entered into, and we should certainly like to say something on the subject of that procedure.

Mr. Mullen: It would seem to me that that is a little late. They have been delivered here under that agreement.

The Court: That was I believe toward the end of the former discussion, wasn't it?

Colonel Harris: Page 168, at the very bottom shows I made a statement which summarized it, and Your Honor answered me. It is the last line on Page 168.

The Court: I am of the opinion that Mr. Harris' statement is substantially correct, from my recollection. We will look at the record and see what it shows. You said Page 168?

Colonel Harris: At the very bottom. The last page 8 } line on the Page is where I make a statement, and Your Honor is telling us what to do.

The Court: "That means by no device and maneuvering or change of position or anything else does anybody get to see it if Your Honor has it. The Court: It will be private property. The agreement will be strictly complied with as far as the Court is concerned."

The purpose of exhibiting these Minutes to the Court, Mr. Allen, as I understand it is for the Court to go through the Minutes to determine whether or not there is anything that pertains in anyway to this case.

Mr. Allen: And that the Court is ruling without counsel knowing what the Court saw and what the Court is ruling on, and the Court's ruling will be final? Is that the status of the thing?

The Court: This is the result of Interrogatory No 125, in which the plaintiff asks that all of the Minutes of the Executive Board of the International Union, United Mine Workers, be furnished to the plaintiff. Copies of those minutes,—

Mr. Allen: Yes.

The Court: And as I understand it the Court is to look through these minutes to see whether or not there is anything pertinent to this particular case.

Mr. Allen: My question was—

page 9 } The Court: I may go a little further and state: That by pertinent it is meant anything that deals with directives to any of the agents ratifying or confirming any of the acts of any of the agents, if any. Is that correct, gentlemen?

Colonel Harris: Relative to the Laburnum Construction Company.

Mr. Allen: What is that?

Mr. Moore: If there was some overall policy in the region, Laburnum might not be specifically named. You can still go into that, can't we?

The Court: The question of agency.

Colonel Harris: There has been a difference of opinion, as I understand it, all along as to the extent of collateral matters the plaintiff was entitled to look at. And our opinion as to the limitations on what the plaintiff was entitled to see—I understand there has been a difference of opinion all along before I got into the case on that.

There is an earlier statement back before that where Mr. Robertson stated that he did not want to see them; that he was willing to rely on the judgment of the Court, and it was

on that statement that we met in Washington and page 10 } they decided to turn them over to the Judge.

Mr. Moore: Are you of the understanding that the Judge can only take into account the parts of those Minutes where Laburnum Construction Corporation is specifically named?

Colonel Harris: No, I don't feel that way. And, you correct me, Mr. Mullen, because you agreed, if I am wrong: I understood that the Judge was to look over those Minutes and decide which Minutes he thought we should furnish copies.

And at this point may I ask is it customary in Virginia where you have an original paper of importance to have it photostated and have the Court authorize the withdrawal of the original in substitution of the copy?

The Court: Yes.

Mr. Allen: Yes.

Colonel Harris: We should like to do that whenever the proper time comes to have Your Honor so rule. I didn't understand it was a limitation on what the Judge was going to do. There has been a disagreement among us. In other words, we have turned those papers over to the Judge at this time.

The Court: And the Court, if it thinks advisable, can order copies of all of the Minutes. That is, if in the judgment of the Court it has anything to do with this case, page 11. } of course.

Colonel Harris: Yes.

The Court: Is that your understanding, gentlemen?

Mr. Moore: Yes.

Colonel Harris: If the Court thinks none of them should be copied, then none of them will be.

The Court: Then the Court will not require that question to be answered.

Mr. Moore: So that the record may be complete: Could we not here note that we object and except to the Court not granting this question 125 of the Interrogatory No. 4, as originally offered by us? We want to offer our objection and have our point clear.

Mr. Mullen: At this point I haven't read the record.

Mr. Moore: We went through it.

Mr. Allen: There is a dragnet objection, but I don't think it will suffice. May I get a little clearer understanding of this matter, Your Honor, from the agreements which have been recorded there: The Court is going to clarify the situation by carefully going through all these Minutes, and the Court is going to determine which of them bear on the issues involved in this case, and which of them we are entitled to in-

roduce in evidence, and then the Court will have  
page 12 } those photostated, or will order copies of them, and  
they will be turned over to us, is that correct?

Colonel Harris: We didn't agree the Court was to photostat them. It would be a lot of trouble to the Court to do that, and in order to preserve their secrecy and integrity if the Court points out that it wants some photostated I personally would prefer to have the responsibility of having them photostated.

The Court: I don't see any objection to that.

Mr. Allen: That is all right.

The Court: I didn't understand that the Court would be finally ruling on whether or not they were admissible in evidence. The ruling of the Court would be as to whether or not any or all copies would be required to be furnished the plaintiff.

Mr. Allen: That is right.

The Court: And of course the Court reserves the right to reject any and all at the time of trial.

Colonel Harris: That was my understanding, Your Honor.

The Court: If any of you gentlemen have a different understanding I would like for you to state it.

Mr. Allen: I didn't mean you were to pass upon the admissibility at all. I used that word inadvisedly.

Mr. Bryan: I am not appearing in this case at  
page 13 } all as counsel, and it may be a little unusual—

Mr. Allen: We ask permission that Mr. Bryan may assist us in the absence of Mr. Robertson this morning, not as counsel but from his own knowledge of the situation, and that he may not be required to enter his name here as counsel in order to have something to say to help us this morning along.

The Court: Any objection to that, gentlemen?

Mr. Mullen: No objection.

The Court: Then that seems to be perfectly all right.

Mr. Bryan: I didn't want to do anything which might jeopardize my position as a witness later on, which would cause any one to say I had disqualified myself, because if that is the case I just can't say anything.

The Court: Is it stipulated then that Mr. Bryan will not be disqualified as a witness by reason of the fact that he is assisting today in this hearing? Then it is so stipulated.

Mr. Bryan: Before we proceed any further in connection with these Minutes: I would like to point out why we think they are important to our case, and why we think that we are entitled to them without restrictions.

page 14 } We have what we believe to be a copy of the Constitution of the United Mine Workers of America, International Union. Article XX of that Constitution reads as follows, Section 1.

“District 50, United Mine Workers of America, subject to the jurisdiction and regulation of the International Executive Board, is hereby created and set up under authority of the International Union and may adopt by-laws and rules not inconsistent with this Union.”

We have information which we believe to be correct that District 50 was organized in about 1936. Prior to that time we think that Mr. John L. Lewis and the United Mine Workers were part of the American Federation of Labor.

Around 1936 some difference or trouble arose and those Unions separated, and District 50 was organized by the United Mine Workers of America, not for the purpose of organizing coal miners, and the production of coal, but for the purpose of organizing people engaged in chemical companies, like Solvay, duPont, any of those big companies, and all other industries not directly connected with coal mining.

It was organized in a way to compete with the American Federation of Labor, and afterwards the C. I. O.  
page 15 } in organizing various workers who were not organized. After that it appears that United Construction Workers was organized as a division of District 50. The exact distinction between those two organizations we haven't been able to find out as yet.

We also have what we believe to be the rules of District 50, Article I of those rules provides:

“This organization shall be known as District 50, United Mine Workers of America, and shall work under and be subject to the constitution of the International Union as provided in Article XX thereof.”

In other words it ties right back again to the International Executive Board, which the Constitution of the Union, International Union, said should have jurisdiction over and should regulate District 50.

We also have the rules of United Construction Workers. Rules of United Construction Workers provide that it shall be operated under the authority of the Certificate of Affiliation granted by the United Mine Workers of America. Article XVI, Section 3, of those rules provide that all policies pertaining to the administration and the government of the

United Construction Workers shall be determined by the National Director, and his rulings shall be binding un-  
page 16 } less changed by the International Executive Board.

In the Notice of Motion for Judgment it was alleged that United Construction Workers in District 50 are simply agents of United Mine Workers of America carrying out the policies of United Mine Workers of America, that is to organize labor.

In 1941 there was a reorganization of District 50. At that time, in Volume 52, No. 16, published under date of August 15, 1941, there was an article stating that:

"The International Executive Board of the United Mine Workers of America has laid out a program for the further expansion and organization work of District 50, and changes affecting the District Personnel will be made in official effect on August 1."

It is our belief that there are numerous resolutions and other things pertaining to the management and the regulation of District 50 in United Construction Workers, which appear in these Minutes. If we are correct in our belief we believe that we are entitled to see them. They are very germane, pertinent. Will prove in a large way, if not completely, the allegations of agency which we have made, and which will result we believe in the United Mine Workers of America as a matter of law being liable for the acts alleged of District 50 United Construction Workers in Breathitt County, Kentucky.

We would like to renew our motion that we be  
page 17 } permitted to see those Minutes. We don't believe it is a fair thing to impose upon the Court to go through those Minutes for anything that might pertain to District 50, we think we would like to see them.

Mr. Allen: I don't know in what order we are supposed to present this matter. I wanted Mr. Bryan to say what he had to say as enlightenment for the Court.

The Court: I thought this matter was determined at the last meeting.

Mr. Allen: Let me approach it from a little different angle, Your Honor. Let us suppose it was. I believe we would have a right, and probably Your Honor would want us to bring to your attention, matters which we think you should bear in mind in going over those Minutes, and in order to determine what we are entitled to, and what you eventually will have to decide we are entitled to.

The Court: I would like to have that information.

Mr. Allen: Let me start with this proposition, that a lot has been said here about principles of agency, and the question of principal and agents being involved here, which is very true. But this matter should be approached, and in reading those Minutes I think it should be borne in mind that the principles applicable in this case go even beyond page 18 } that.

For instance this is a tort, and it is not an ordinary agent who is being charged with a tort. It is a group which we submit constitutes part and parcel of the United Mine Workers of America.

Now in a situation of that kind the tort law applicable is that anyone who encourages, even encourages, doesn't even have to instigate, if he, as the Virginia cases say, by word, acts or signs encourages another to commit a tort, he is liable as principal.

You have here, and I ask Your Honor when you go through those Minutes, to remember this: Mr. Bryan has hit the question squarely, so to speak, but not quite fully. You will find upon reading those three books here that the United Mine Workers of America is composed of various and sundry districts, all over the United States, and in Canada.

They are ordinary districts. They are numbered not consecutively, you might say from one up to the thirties, but just numbered at random. They are, you might say, the ordinary districts that have powers of local groups, but when this District 50 was organized, that is the last district that was organized, it was organized by the United Mine Workers of America on an entirely different basis for an entirely different purpose, and its jurisdiction both geographi-

page 19 } cally and industrially is coextensive with the jurisdiction of the United Mine Workers itself. And it was organized for the purpose, after competing with the American Federation of Labor, and the C. I. O. in the industrialization of workers, after John Lewis had his break with the American Federation of Labor, and the C. I. O.

It is purely an organizing body, and its representatives; it is part and parcel of the United Mine Workers of America itself.

Now that District 50 is composed of various and sundry regions. The offices of District 50 is in the United Mine Workers Building in Washington in the very same room, same building, same place where the United Mine Workers have their offices—

Mr. Mullen: Is there any evidence before the Court to argue the case on at this time?

Mr. Allen: All that will appear, I think, from these documents here.

Mr. Mullen: It doesn't appear from that.

Mr. Allen: Every bit of it will become clear. And we find that District 50, I say, is divided into many regions with offices in the numerous cities all over the United States. For instance, Region 58, at Pikeville, Kentucky, is the region where this cause of action arose. A man named David  
page 20 } Hunter there is Regional Director. Region 19 is  
here in Richmond, a man named Robert Folds is  
Regional Director.

The United Construction Workers is simply a division of District 50. And you will find not only in these books here, but we think you will find in those Minutes reference after reference to the effect that District 50 is affiliated with the United Mine Workers.

United Construction Workers, affiliated with the United Mine Workers. And you will find the term affiliated described in the books as being a part of, united with, allied with, working in alliance with.

Now if you bear in mind in reading those Minutes the principles of tort law which holds that any encouragement makes the party doing the encouraging liable, and that any group which is a branch of the main body, the actions of that group, makes the main body responsible.

You take these books here, and Mr. Bryan didn't go into them quite fully enough, but I have the rules here of District 50 of United Mine Workers of America.

"This organization shall be known as District 50, United Mine Workers of America."

You find the Administrative Officer operating under authority of Article XX of the Constitution of the International Union, which we have here, shall have general and  
page 21 } complete supervision over and administration of  
the affairs of District 50.

You will find "unless otherwise directed by the Administrative Officer of District, or International Executive Board"—It goes on to say the District shall receive and receipt for all monies and so forth. The Secretary-Treasurer and all aids and assistants to handle funds of the District shall give bond for the faithful performance of their respective duties in such sums as may be fixed by the International Executive Board.

On Page 8, I am reading still from the rules of District 50: "All local unions must be chartered by, and shall be under

the jurisdiction of, and be subject to the laws of the International Union. The Administrative Officer shall have authority to designate an officer to administer the affairs of any local union when it is found to be within the best interest of the local union to do so. Charter territories may be issued to handle all union affairs, affairs that shall be charged in accordance with provisions of the Constitution of the International Union, United Mine Workers of America. Charters may be issued only by authority of the Administrative Officer, local union shall be composed of 10 or more members engaged in occupations within the jurisdiction of the District."

Now, that is District 50.

page 22 } Mr Mullen: Now, if Your Honor please, we have been all over this time and time again. It has been repeatedly stated by us District 50 is a District of United Mine Workers; that United Construction Workers are affiliated with United Mine Workers. We have been over this whole thing before. The question here now is as to those Minutes.

We have a definite agreement made with counsel before the Court, and sanctioned by the Court, and those Minutes have been delivered here under that agreement.

Mr. Allen: I am not trying to get away from the agreement. I am asking the Court to bear certain things in mind when going through the Minutes to determine what we are entitled to have.

Mr. Mullen: I think you are trying to argue the case before there is any evidence before the Court.

Mr. Allen: You admit, then, District 50 is a part of United Mine Workers?

Mr. Mullen: As I said once before, anybody who can read English can see that District 50 is a District of United Mine Workers. It is specifically stated in its Constitution, and in the rules of District 50. We have said it again and again and again.

Mr. Allen: To which the principles of agency page 23 } would apply?

Mr. Mullen: I haven't said anything about the law. There is no question about that. No, we don't think so.

Mr. Allen: You don't mean then that District 50 is an agent of United Mine Workers?

Mr. Mullen: Not anything like that. I am not admitting anything whatsoever.

Mr. Allen: That is why I think it is important that these things should be borne in mind.

The Court: How would it be for you gentlemen, Mr. Allen, and your associate to furnish the Court with a memorandum

of what you think the Court should take into consideration in viewing these Minutes?

Mr. Allen: I think that would be a good idea.

The Court: That would save time and furnish counsel for the defendants a copy of that.

Colonel Harris: I have a number of papers of excerpts from the Digest on Admissibility of Evidence in Virginia, and we would be glad to give you a little statement of how we think Your Honor should limit it to the applicable rules of evidence.

The Court: And furnish counsel with a copy of it. It seems to me that would perhaps save time, and the Court would like to have the views of counsel for both sides on this subject.

page 24 } Mr. Pollard: If Your Honor please, we renew our objection at this time that this particular Interrogatory asking for the Minutes of the meetings does not meet the requirements of Section 8324 of the Code.

Mr. Moore: Is that the Section of Interrogatories—

Mr. Pollard: It is part of the Section of Interrogatories.

The Court: It is my recollection that objection is in the Minutes? Is that true?

Mr. Pollard: Did you overrule it?

The Court: I reserved, I think, my ruling on that. I haven't stated at this point whether I am going to require the defendant to answer a question there numbered 125 or not.

Mr. Allen: All right.

Mr. Pollard: Then we also renew our objection that none of the questions in any of the Interrogatories which require the defendant to produce—Any of the defendants to produce documents meets the requirements of Section 8 through 24, which you overruled.

The Court: Overruled.

Mr. Pollard: And we except.

Mr. Bryan: We were with Mr. Robertson all morning, and based on our talk with him I don't believe that his recollection of any agreement made up here last time is  
page 25 } exactly the same as Colonel Harris or Mr. Mullen have stated it to be.

The plaintiff is very anxious to preserve its right to call for those Minutes, not only during the period from October 28, 1948, to August 4, 1949, but all Minutes of the International Executive Board from the date of the formation of District 50. That is what we would like to see.

Any kind of an agreement that they think we are under to the contrary, we would like to be relieved of it. We want to call for the—

Mr. Mullen: We certainly will not relieve counsel of an agreement entered into in the Presence of the Court and sanctioned by the Court, and we have represented to our clients what that agreement was. It is there in writing.

These Minutes will serve the purpose as covered by the agreement, they were entrusted to the care of Colonel Harris to be brought down here to the Court pursuant to that agreement, and we are very much surprised that counsel now takes the position that it having gotten the Minutes here can get out of that agreement. That is what your position amounts to.

Mr. Allen: May I say this at this time—

Mr. Bryan: I wanted to bring that question up page 26 } before proceeding further.

The Court: Have you gentlemen read the Minutes of the last meeting?

Mr. Allen: I have not, but even if it be true that that agreement was entered into, I don't see any reason in law or equity why if we think that Mr. Robertson entered into it, maybe inadvertently, from what he said to us this morning, he didn't consider that he had entered into such an agreement.

But let's assume that he had: We have a right to come here and ask Your Honor to permit us to withdraw from the agreement. I have asked the Court of Appeals to permit me to withdraw from an agreement there, and they did allow me. Therefore I don't see why I can't ask this Court to permit me to withdraw from an agreement, since no one's position has been made any worse by it.

And if Your Honor should grant that motion, they would be entitled to their Minutes back, and let the gentlemen take them right back to Washington. Then you could pass on the question as to whether we are entitled to them. But at any rate we would like to file a written memorandum setting forth the matters that we think you, Your Honor, should bear in mind in determining which of those Minutes we are entitled to see, and we should like to also file a memorandum asking permission to withdraw from the agreement, if an agreement was made as the Minutes indicated was.

page 27 } We don't see where these gentlemen have been put in any worse position by it. They have brought the Minutes down here, and they can take them back without they being opened, if we got them to bring them down here on the faith of that agreement. Then we can proceed anew and determine whether we are entitled to the Minutes or not. It is perfectly apparent that the United Mine Workers of America run the whole show, so to speak, and that these Minutes will show that they run the whole show.

Mr. Bryan: I have before me a copy of a Resolution passed by the International Convention in its session in October of 1948. This is just a sample, I believe, of some of the things that will appear in those minutes.

"Whereas for some years District 50 has been an integral part of our great organization with an office staff that is efficient and energetic, they leave no stone unturned to bring under the banner of this branch of the UMWA thousands of unorganized men and women in our Nation. And whereas were it not for this branch of our union many who are now enjoying the benefits of working under a contract would have never heard the story of collective bargaining, and what it means to the men and women who toil. Therefore, page 28 } be it resolved, that we commend the able officials of

District 50 for their past untiring efforts, for their splendid victories, their unity of purpose to never rest on past victories, but to press forward ever diligent until the last man and woman who toils in our Nation has learned of the many good things of life that can come to them by associating themselves with a trade union.

"And be it further resolved that our great Parent Body through its responsible and efficient officers continue to lend every moral and financial support to District 50, that the coming generations may reap a harvest of increased wages, shorter hours, and enjoy more of the better things of life. That the officers of this fine District may be able to continue their ceaseless efforts to make the luxuries cherished by our people a reality."

How many more resolutions like that appear in the Minutes of International Executive Board we don't know, but—

Mr. Mullen: What does that prove?

Mr. Bryan: I think it definitely shows District 50 is constituted an agent of United Mine Workers of America.

Mr. Mullen: We have said again and again and page 29 } again that District 50 is a District of United Mine Workers.

The Court: Yes.

Mr. Bryan: But you do deny the agency, Mr. Mullen.

Mr. Mullen: It is a part of United Mine Workers. District.

Mr. Allen: And if District 50 is a part of United Mine Workers, then we are entitled to see the relation, and the Minutes showing the relation to District 50 are admissible in evidence here.

Mr. Mullen: You are not entitled to anything except that

you can show is pertinent, otherwise it is a fishing expedition, and you have no right to the papers themselves. You have to file an affidavit showing what is pertinent, and how it is pertinent. That is provided for by the Code.

It was fully argued by me here at the last hearing. So I won't go into the details of it again at this point, but you cannot call for all the books of either a corporation or an unincorporated organization and get them in that fashion.

Colonel Harris: If the Court pleases: We made a solemn agreement in open Court, and the Court approved of it. Now he says he does not know of anything that we have done in opposition to that, but he has changed his position. This isn't a question of an estoppel. This is a question page 30 } of an agreement made in open Court.

I could tell him many various things that we might have done, but on the suggestion of Mr. Robertson this method was used, and we agreed to it. We didn't suggest it. We say that counsel can't at this time ask us successively, or ask the Court, to release them of an agreement solemnly made.

You will find a statement there by Mr. Robertson that he didn't even want to see the Minutes himself.

The Court: Suppose we read several pages of the Minutes. You gentlemen say you haven't read them, and neither have I, as a matter of fact. It might refresh our memory if we did that at this time. Let's start on Page 161 and read.

Note: At this point the Court reads aloud to counsel present at length from the transcript of the former hearing.

The Court: That is the story, gentlemen.

Mr. Allen: I do not see where Mr. Robertson has waived his right to insist upon an answer to Interrogatory 125. That is held open. And 125 calls for these Minutes.

page 31 } Note: The Court now examines a paper writing handed to the Court by Mr. Bryan.

Mr. Bryan: I don't think Mr. Robertson intended to waive by consent all further rights to ask for these Minutes, or other Minutes.

Mr. Mullen: There is nothing ambiguous in the record on that point at all. The matter was left to the Judge to go through and determine if any part was necessary, or pertinent, to this case, and if so he would require it be furnished.

Mr. Robertson agreed to it definitely. I am very much surprised that you now want to go back on that agreement.

Note: We further pause while the Court further reads this paper writing handed to him by Mr. Bryan.

Mr. Mullen: We don't understand you are offering that Order at this time. Is that correct?

Colonel Harris: I assume we will have a chance to check their Order. And if we have any suggestions we can submit them to them?

The Court: I would think so. This is the first page 32 } time you have seen the Order?

Colonel Harris: Yes, sir.

Mr. Moore: We just went through all the Interrogatories and tried as best we could to consolidate the Court's ruling on all of them in a logical order so you could easily see what parts were given and refused and modified and what not. That is all that there is in there, and it is just the part about the Interrogatories.

Mr. Pollard: I think it is better to have a written—

Mr. Mullen: We are up there today to take up Interrogatories and object to the Answers to those that we filed to you. That is our purpose here today mainly. We would like to get on with that.

Colonel Harris: Your Honor will notice there that that statement of mine, beginning at Page 168, where I looked down the road and tried to envision the possibilities, and I used the express words "any device, maneuvering, change of position, or anything else."

Now that was as broad as my mind was capable of making it. That was my understanding of what we had agreed to, and to ask something else seems to be right in the face of the plain agreement. To come in now and say they want to withdraw that stipulation, I don't understand that people can enter into a solemn agreement and then with-  
page 33 } draw from it.

The Court: The Court was of the opinion that that was the agreement, and the question now is, as I see it, whether or not to entertain the motion to relieve the parties of this agreement.

As I read the record it reads that the agreement was as stated. Do you gentlemen differ with the Court from the standpoint of the record?

Mr. Allen: I don't quite understand what effect that agreement has upon our Interrogatory No. 125. It seems that the answer to that is left in abeyance for the time being, but it doesn't seem that we have waived our right completely to an answer to that Interrogatory.

Colonel Harris: I understood you agreed to leave it to the judgment of the Court.

The Court: That was my understanding. The Court reserved its decision on 125, and after the Court looked at the Minutes, and the Court then being of the opinion that copies ought to be furnished then the same will be ordered.

If it is of opinion none should be furnished, that would be the Order of the Court. It may be that after looking through the Minutes the Court might order all of them to be furnished. It was a plan to be helpful to the Court in determining whether or not to grant question 125 to United page 34 } Mine Workers of America as written.

Mr. Mullen: That is the way I understood.

The Court: That is right, is it not, gentlemen?

Mr. Bryan: After listening to the statement in the record, it would appear that is what Mr. Robertson said. But it also appears that the Court reserved any final ruling on that Interrogatory, and I didn't think that the plaintiff had finally and fully waived all its rights to request that those Minutes be produced.

When we saw the Minutes here today we thought that before proceeding any further we better get that matter straight before the things are opened. We again think that material information is contained in those Minutes, as well as in Minutes of the meeting of the International Executive Board held prior to that time.

In fact, ever since District 50 was organized.

The Court: Maybe the Court will rule with you, but the Court hasn't ruled on that question as yet.

Mr. Bryan: We didn't want to be in the position of having anyone think that because these Minutes came down here and were opened that we had lost all our rights to forever after asking to see the Minutes.

Mr. Mullen: My understanding was that they were brought to help the Court to determine its ruling on that question, and after the Court had examined them it would page 35 } rule whether all or none or a part of those Minutes should be furnished, and that would be the Court's ruling, and either side then would have a right to except. That is what I understood the situation to be.

Note: Here ensues an off the record discussion by request.

Mr. Allen: I wonder if you would let Mr. Bryan, Mr. Moore and myself have a little conference for a minute?

The Court: Yes. We will recess for five minutes.

Note: At this time a five minutes recess is had, following which the matter is further discussed, as follows:

The Court: All right, gentlemen. After the conference do you gentlemen have anything further to say?

Mr. Allen: If Your Honor please, I have conferred with these gentlemen here, and we are willing to go along with the understanding, which Your Honor has expressed here, but inasmuch as Your Honor is going to examine the Minutes we think it is vitally important that you examine all page 36 } of the Minutes from the organization of District 50 showing the organization and management of District 50, and examine them just like you examined these, and under the same circumstances and same restrictions.

Also, subject to no change by any device, change of agreement or whatnot.

Colonel Harris: That is not in the question. Question 125 starts off with October 28, 1948.

Mr. Allen: You didn't let me get through.

Colonel Harris: Then pardon me.

Mr. Allen: I was going to ask for leave to amend the question to go back to the date of the organization of District 50.

Colonel Harris: Now are you through?

Mr. Allen: Yes.

Colonel Harris: Judge, I suppose you have other duties to perform, and other cases to handle, and I assume that you don't want to devote all of your time to going back and reading Minutes that can't possibly have any bearing on Laburnum Construction Company.

We believe when you read all those Minutes you will know far more about how you intend to rule than you can possibly know today. It seems to me that at this time to carry out the agreement we made on which we brought the Minutes into this jurisdiction, there is nothing left for either page 37 } side. We can't do anything but live up to our agreements as members of the Bar. There is no alternative left for us.

Mr. Allen: I was asking leave to amend the question. That didn't have anything to do with the agreement.

Mr. Cowherd: I think that that in itself is the very essence of the agreement. I am a little bit older than 20, and I have been around quite a bit over the United States, and this is the most unusual request I have ever heard in a law case.

I have always been able to feel secure in any agreement I ever made in Court, and counsel for the other side have never even proposed such an idea as this.

Mr. Allen: Wouldn't we have a right to file another Interrogatory asking for other Minutes?

Mr. Cowherd: I suppose you have had 7 or 8 now, so you would have some more. The way this matter is shaping up we will have nothing to do but run back and forth. We have other business that needs attention as well as this case.

Mr. Mullen: If we have to answer Interrogatories by November 15, we just can't keep on getting them. We have been delayed today because you have taken up time on page 38 } these other matters. We were here to submit objections to the last Interrogatories, so we could get into position to answer them on November 15.

So far as this request is concerned I think it is unreasonable. District 50 was formed back in 1935, and it would have a vast amount of reading to do, and, further, this is purely a fishing expedition.

Those Minutes have nothing to do with what was done, said or happened in Breathitt County in 1949.

Mr. Bryan: What Mr. Mullen has said, Your Honor, strikes the nail on the head. He keeps referring to the phrase about Breathitt County in 1949. They would like to have this inquiry just limited to Laburnum Construction Corporation and Breathitt County over a week end in July, 1949.

We feel that our efforts to prove the relationship of agency which existed between the International Union, which is a parent organization, and the affiliates or branches, District 50, and United Construction Workers, we can show the connection by showing the dealings and course of conduct between these organizations over a period of time.

The inquiry should not just be limited to one locality over a little short space of time. It is not what happened in Region 58. Anything that is in those Minutes that page 39 } pertain to District 50, to the management of District 50, or United Construction Workers, or the conduct of its affairs, we think is pertinent.

The Constitution of the United Mine Workers of America says, as I stated, District 50 shall be subject to the jurisdiction and the regulation of the International Executive Board of United Mine Workers of America.

The Court: The Court will overrule the motion to grant leave to amend.

If you gentlemen wish to offer another Interrogatory the Court will pass on that at the proper time.

. . . . .

. . . . .

The Court: We had several Interrogatories we didn't pass on.

Mr. Allen: 11, 12 and 13, weren't they?

The Court: No, Mr. Robertson presented some new Interrogatories.

page 41 } Colonel Harris: 14, 15 and 16 were the numbers in pencil on the top of mine.

Mr. Mullen: No, this is some further Interrogatory presented to United Mine Workers.

Mr. Bryan: He has numbered these for convenience 11, 12 and 13.

The Court: The originals are probably in the papers.

Mr. Bryan: That Order which you have a copy of undertakes to give numbers to all these different Interrogatories.

The Court: Further Interrogatories—(Starting off to read something to himself)—is this the copy?

Mr. Cowherd: Ones submitted to us were 14, 15 and 16. I don't know if it was marked that way for convenience or confusion.

Mr. Mullen: Here are the objections we are going to make to them (handing counsel a paper writing).

The Court: Before we leave the Minutes of the Executive Committee of the United Mine Workers: It is understood that you gentlemen, counsel for the plaintiff, are going to furnish the Court with a memorandum of points that you think the Court should take into consideration in viewing these Minutes.

Mr. Allen: Yes, sir.

page 42 } The Court: And it is further understood that counsel for the defendants will furnish the Court a memorandum of authorities showing the limitations, and both sides will furnish the other side copy of the respective memorandum.

Mr. Allen: Yes.

The Court: Is that understood, gentlemen?

Mr. Bryan: Also understood we reserve the right to request that the defendants furnish copies of the Minutes prior to October 28, 1948.

Colonel Harris: The Court ruled on that already.

Mr. Bryan: I thought he ruled couldn't amend the question.

Colonel Harris: But if you want to file another Interrogatory, the Court will pass on that later.

The Court: I will pass on that point if and when further Interrogatories are filed.

Mr. Mullen: Now, if Your Honor please—

The Court: Which one first?

Mr. Mullen: United Mine Workers. There was served on us further Interrogatories on October 12, 1950. We object to Question 5.

Mr. Allen: What was that? Please orient me so I will know what you have there.

Mr. Mullen: What did you say?

page 43 } Mr. Allen: I wanted to see which Interrogatory you wanted to discuss. Read the first line on the first question, so I will know that I have the right one.

The Court. Yes.

Mr. Allen: Just what was that?

Mr. Mullen: Qestion 5, the first question we object to. Here is the question: "With respect to the work which was being performed by Link Belt Company of Chicago, Illinois, for Inland Steel Company, at Priceville, Kentucky, or Wheelright, Kentucky, during the year 1949, did Thomas Raney as an official of United Mine Workers of America, or in any other capacity attend certain meetings held between representatives of United Construction Workers, affiliated with United Mine Workers of America, (hereinafter sometimes called United Construction Workers) or representatives of the District 50 United Mine Workers of America, (hereinafter sometimes called Distrct 50) and representatives of Link Belt Company during the months of May, June or July of 1949, for the purpose of negotiating an agreement by which Link Belt Company would recognize United Construction Workers or District 50 as the collective bargaining agent for some or all of the employees of Link Belt Company on

page 44 } said work at Priceville, Kentucky, or Wheelright, Kentucky, and in this connection did Thomas

Raney as an official of United Mine Workers of America, or in any other capacity, participate in any manner in negotiations with Link Belt Company? What meetings between representatives of United Construction Workers or District 50, and representative of Link Belt Company did Thomas Raney attend, and to what extent did he participate in the negotiations carried on with Link Belt Company?"

Now, we object to that as it calls for testimony that is immaterial, irrelevant and incompetent. It has to do with transactions *res ipsa loquitur*, and that it calls for testimony that will throw no light on the issue in this case, and the matters inquired about in this Interrogatory relative to Thomas Raney would shed no light on the actions or statement of Thomas Raney in any connection with any business or claims of the plaintiff Laburnum Construction Company.

The Interrogatory calls for testimony which on the surface would only serve to confuse the jury, and it is pro-

pounded for the purpose of creating prejudice against this defendant.

Now, it is entirely a separate company, has nothing to do with Laburnum Corporation, we don't know any-  
page 45 } thing about any of the circumstances under which  
they were working, or anything about their deal-  
ings with any Union.

We cannot see how it can possibly have any bearing whatsoever on this case, or that it is relevant testimony in this case.

Mr. Bryan: Are you through?

Mr. Mullen: Yes.

Mr. Bryan: Your Honor, we expect the evidence to show that during the first part of July, 1949, Mr. William O. Hart, who is a representative of United Construction Workers in District 50, United Mine Workers of America, called us over the telephone, called the plaintiff over the telephone, in Richmond, he was in Pikeville, Kentucky, and said that it would be necessary for the plaintiff to enter into an agreement recognizing United Construction Workers as the sole collective bargaining agent for the employees of the plaintiff on the work for Pond Creek Pocahontas Company in Breathitt County, Kentucky.

Mr. Hart said that they had recently broken up work and run employees off of the job in Wheelright, Kentucky for Inland Steel Company. That is, employees of Link Belt Company and Becker Construction Company. We expect to have testimony which will show that. We further expect to show,  
and are advised, that after this Link Belt Company  
page 46 } entered into an agreement with United Construction Workers recognizing that Union as collective bargaining agent for employees of Link Belt.

In connection with negotiating that agreement it appears that Thomas Raney, who is a member of the International Executive Board of United Mine Workers of America participated in the negotiations with Link Belt.

We believe that that establishes or shows that United Mine Workers of America and United Construction Workers are in an agency relationship, United Mine Workers backstading United Construction Workers through its International Representative Mr. Raney.

Therefore, United Mine Workers of America participates in connection with the negotiations between United Construction Workers and people like Link Belt, or Becker Construction Company, or could be Laburnum, if Laburnum had entered into an agreement with United Construction Workers.

That is the purpose of the question. We think it is relevant, it calls for pertinent evidence.

Mr. Moore: I would like to say one thing about this to you, Your Honor, if that is all right, at this time:

It brings up the question of proof of other acts, page 47 } which may on their face seem to be irrelevant. But,

as you well know, Your Honor, under the law of evidence, which of course is in this case governed by Virginia Law, proof of past acts in similar instances is perfectly admissible when it goes to show a general scheme or a general pattern, and an overall picture.

Because then it tends to prove the particular act under question. We have authorities which we would be glad to quote to show if there is any doubt in your mind on that point. We believe this is perfectly pertinent to show this general plan that the defendants were using here in Kentucky.

We think that it should be allowed on that basis, as well as the agency basis.

The Court: I will allow the question, and of course I will reserve the right to refuse to admit it into evidence at the proper time.

Mr. Mullen: We note the exception.

Mr. Mullen: Next we object to Question 6, furnish a copy of each of ..... Journal.

Then they call for some 38 different issues of the publication of United Mine Workers Journal, and the furnishing of those can simply serve to only confuse the jury, as counsel will show you, it is a design also to prejudice page 48 }

the jury against the defendant for the reason that the issues of the United Mine Workers Journal contain various and sundry expressions of opinion, and discussions of economic, social and political questions, which would tend to arouse debate and disagreement on the part of the members of the jury, who hold principles contrary to the principles expressed or positions taken, in said Journal, and possibly could arouse a feeling in such jury or prejudice against the said defendants. Said Interrogatory calls for testimony that would unduly burden the record in this case, and the requirement of Section 8-324 Code of Virginia of 1950, have not been met with in respect to this Interrogatory.

This Journal is a paper setting forth the view and so forth of the United Mine Workers. It contains criticism of laws proposed to be passed which they believe somewhat designed against labor. Such, in late years, as the Taft-Hartley Act. It tends to bring about discussions as to the acts of members which criticised throughout the country in connec-

tion with strikes and so forth, all of those things would go to prejudice the Jury.

Now it is just the same as if you were asked the hand to the jury a series of copies of the Times Dispatch and the News Leader, which in turn criticised the United Mine Workers in the case of strikes, criticising John Lewis in attempting to negotiate contracts, it attacks the Wagner Act, and similar things. All of it would simply prejudice the jury.

I want to ask Your Honor what would be the chances of a defendant before a Virginia jury with something like that before them (now handing to the Court a paper writing, or pamphlet).

These are partisan papers. If they can point out any item that has a bearing on this case, that is all so well and good. But 38 issues of a newspaper that contained all of these criticisms, that expresses opinions that may be contrary to every one of the opinions of the jury, it can have nothing and no effect whatever except prejudice the jury.

I have read a number of these. I have the whole bunch here. I have read them. Those I read didn't have a word in them that could have any reference or bearing to this. If they have any particular Article that they want to call for, and can point out as having any bearing or anything to do with the case, that is one question. But to put these issues of these papers before the jury will not only confuse the jury, it would prejudice the jury, and certainly they have no right to put those before them anymore than we would have a right to put the papers of the Times-Dispatch or the News Leader into evidence, any of those things, in a case where they were concerned with the other side.

Mr. Allen: If Your Honor please, may I say this: The question simply provides "furnish a copy of each of the following issues or United Mine Workers Journal."

There is not one word said about introducing the copies into evidence, and of course that will be a matter entirely within Your Honor's discretion and ruling, and the only certain things about it is that they would be inspected to see what parts are material. There are only certain things in those Journals that we will even ask be read to the jury, and that will be considered evidence when read to the jury.

The Journal is the official organ of the defendants, or the defendant United Mine Workers. And anything that that Journal contains with reference to the admission, or evidence that we consider proof of some of the things we allege, is certainly evidence in the case.

It is their official organ. It is their official document over their own signature. Now we won't offer any evidence except what is pertinent, we won't offer any inflammatory Articles as Mr. Mullen has referred to here. Your Honor would pass on the particular portions of those Journals which would be admissible in evidence, and would read both page 51 } portions to the jury, and that is all there would be to it.

Mr. Mullen: Haven't you copies of all of these that you called for?

Mr. Allen: I don't think that we have.

Mr. Ryan: I have one in my hand here, designated Volume 52, No. 16, dated August 15, 1941, at the top of the page No. 2, I might say Page 2 and every other issue of the United Mine Workers Journal that we have ever seen contains an official roster of the United Mine Workers of America, showing the president, vice-president, secretary-treasurer, all the members of the United, or all the members of the International Executive Board, and a District President and a District Secretary-Treasurers.

At the bottom it says "United Mine Workers Journal, Official Publication United Mine Workers of America. Published on the 1st and 15th of each month by the International Executive Board of United Mine Workers of America. John L. Lewis, International President. Philip Murray, International Vice-President. Thomas Kenny, International Secretary-Treasurer. Ellis Sills, Editor. Publication Office 912-918 Burlington Avenue, Silver Springs, Maryland. Editorial Office United Mine Workers Building, Washington, D. C."

This particular Article, this is just an examination page 52 } tion of some of the things that we believe that we can show and should be able to show is shown on Page 3 of this particular issue under large headlines, "Plans for expansion of District 50 under way."

Under that is a picture of Miss Catherine Lewis, Secretary-Treasurer; picture of Martin Wagner, International Executive Board. The Article starts off by saying that the International Executive Board of United Mine Workers of America has laid out a plan for the further expansion and organization of District 50, and changes affecting the District Personnel have been made in official effect on August 1, 1941.

Many of these copies of the Journal which we have contain accounts of International Convention of the United Mine Workers of America. They have speeches and so forth in them made by John L. Lewis, referring to District 50, referring to United Construction Workers, telling what they plan to do, all of which we believe to be very relevant.

In one particular case we have a copy of a Resolution passed by an International Convention offering moral and financial assistance by United Mine Workers of America to District 50. Also its affiliate.

All of which goes to show the agency which we page 53 } have alleged, and which these people have denied.

They say in one breath that District 50 United Construction Workers are part of the United Mine Workers of America, might say part and parcel of it, and yet in the other breath they say but they were not the agents of United Mine Workers of America, United Mine Workers of America can't be held liable for anything District 50 did, even though all the time they were carrying out the policies of United Mine Workers of America.

We already have these copies of the magazine that we have called for. We are supposed to return them. And another question comes up, suppose we get into the trial of this case and then they raise a question and say that this hasn't been properly identified. How do we know it is a copy of United Mine Workers Journal.

We would like to have these things identified and furnished by them, so that that question will be obviated at the time of the trial.

We have already made a summary of everything in here that we think is pertinent. Of course, everything that is in the magazine isn't relevant, of course.

Colonel Harris: We call Your Honor's attention to the remoteness into which that Interrogatory goes. The alleged wrong that took place in Breathitt County, Kentucky, was in

July, 1949, as I recall from this long Notice of page 54 } Motion for Judgment, and those questions, some of them go back to 1940 and 1941, 8 or 9 years before. I don't see how it is possible to confine the trial to the pertinent issues if they can go and bring in stuff by the armful going back over a long period of years.

It seems to me that the limitations of time, the limitations of the human mind, and the memory of the jury, plus the points that Mr. Mullen made about the necessary prejudice, he explained, that would be created, many of the opinions held by the United Mine Workers of America Editorial Writer do not square, no doubt, with many of the opinions of many of the citizens who would be serving on the jury, men who would be called as jurors in the trial of this case, and when you come to try a law suit you don't try a man from the cradle to the grave. That is reserved for the judgment of the dead that takes place hereafter. All you try anybody for is the one controversy and the one alleged wrong.

Mr. Bryan: This goes right to the meat of the case, Your Honor, in a way. We are not attempting to try the United Mine Workers of America for a lot of different things that they had done. But in an effort to hold the United Mine Workers of America liable for one thing that they did, I think it is necessary for us to prove a relationship of agency.

At least, that is what we said. Either that or that  
page 55 } they are all one big organization, each principal  
and agent of the other.

They have denied that allegation, in their grounds of defense, and the question comes up as to how are we going to prove that. How better way can we do it, than by showing what they have done and what their officers, Executive Officers, have said, and what their International Executive Board, the Supreme governing body, has done.

The Court: Gentlemen, I will allow the question, but of course at the time of trial if any of these items are offered in evidence the Court of course reserves the right to reject any and all of them. It may be helpful to you gentlemen if it can be stipulated that they are copies, and that might save some time.

Mr. Moore: We will have to return these?

The Court: Return them after the trial?

Mr. Bryan: I expect we could return them after, Your Honor. But if they have extra copies which they probably have I believe it would be better.

The Court: Do you all have copies of these, Mr. Harris?

Colonel Harris: We have except for two.

The Court: Maybe you could stipulate about them, then.

Colonel Harris: Two of them are in the bound  
page 56 } volume, which is the only record that the United  
Mine Workers have. We haven't been able to get  
any extra copies of these two. The others we have.

The Court: Why not stipulate about those two? Couldn't you stipulate those two that you don't have that they are true copies?

Mr. Mullen: Do you have them, the first two called for?

Mr. Bryan: First two?

The Court: It is not to be understood the Court is declaring these magazines as admissible in anyway in evidence. The Court is not passing on that at this time.

Mr. Allen: Just requiring them to produce them and identify them as the official organ.

The Court: That is right.

Mr. Mullen: We note the exception.

Mr. Allen: May 15, 1940, and June 15, 1940.

Colonel Harris: What was the stipulation that Your Honor suggested? Do you mind repeating it?

The Court: I suggested that there are two copies that you gentlemen have in bound volumes that you would not like to get out of your hands. And I am informed that counsel for the plaintiff has those two copies. Am I correct in that statement?

page 57 } Mr. Bryan: I think so.

The Court: If that be true I am wondering whether or not you would be willing to stipulate that they are the two copies referred to in this question.

Mr. Mullen: I see no objection to that. We can take the bound volume back, then.

The Court: That would save you from trying to get copies.

Mr. Mullen: We will stipulate those two copies.

Mr. Allen: Shall we produce them here now and identify them so we will know what we are stipulating?

Colonel Harris: We said it was the first two in the question. And the question identifies them.

The Court: Then they are identified.

Mr. Allen: Yes. One No. 10, the other No. 12. That is right.

The Court: All right.

Mr. Mullen: We have no further objection to the question. We make the same objection to the question which is question No. 5. We make the same objection to that question in the Interrogatories addressed to United Construction Workers, and to District 50.

The Court: All right. Same ruling, of course, and the same exception.

Mr. Mullen: Yes.

page 58 } Mr. Bryan: You say that is question 5?

Mr. Mullen: I think it is question 5 in all of them? Yes, I know it is.

The Court: What about No. 6.

Mr. Mullen: No. 6 was only in that one.

The Court: What are these papers you presented to the Court?

Mr. Mullen: The objections that we made.

The Court: You want these filed?

Mr. Mullen: Yes, like I did before.

The Court: I will mark them as filed. There is no objection to the Court marking those objections to Interrogatories filed?

Mr. Allen: No.

Mr. Mullen: I gave you a copy of the United Mine Work-

ers. Yes, United Mine Workers. Here is the United Construction Workers.

Note: Handing paper writing to Mr. Allen.

The Court: Let the record show that the Judge is delivering the Minutes of the Executive Committee of the International Union to Mr. Mullen for safe keeping. When the Minutes are called for an returned to the Court the Court will give Mr. Mullen a receipt for same.  
page 59 } Colonel Harris: All right.

Th Court: And the record will also show Colonel Harris, who was designated as custodian of these Minutes, has agreed to that arrangement.

Colonel Harris: That is right. And when Your Honor is through with them you will let me know so that I personally can come and receive them.

The Court: They personally will be placed in your hands. All right, Mr. Mullen, the Court now hands them to you.

Note: This package is now taken by Mr. Pollard.

Mr. Mullen: I will lodge them in my safe for tonight.

Mr. Allen: As far as we are concerned you may keep them in your safe.

Mr. Mullen: I would rather not do that.

Mr. Pollard: There is one other matter, Judge, we would like to go into. We did not have a reporter there and it is again a question of recollection, but I don't think anyone will disagree—

The Court: All right.

page 60 } Mr. Pollard: That is with respect to the depositions which were taken in Kentucky, when we dropped our objection to it it was with the understanding that the reporter was not necessarily correct in the objections, which we made to the admissibility of the evidence on the record, and that we would lose no right by that.

I have made an investigation into the law on that, and it is my understanding that we have to file the objections with the Court within a reasonable time after the depositions are filed with the Court, and we would like for you to fix a date by which we have to have that in.

The Court: What do you gentlemen have to say about that?

Mr. Bryan: Your Honor, when we were here before you may recall that depositions were taken in Pikeville, I think on August 18 and 19, and they were continued over until Octo-

ber 2. Mr. Mullen, Mr. Pollard, had indicated that they wanted to cross examine those witnesses. We had a hearing, I think here on either September 20 or September 26, and at that time it is my recollection that they said that they would withdraw all objections to the depositions which had been voiced, and that they were not going to cross  
page 61 } examine the witnesses. Nobody went out there.

Mr. Pollard: That is correct, Mr. Bryan, as far as it goes. We are withdrawing our objections to the incompetency of the court reporter, and Mr. Robertson—I don't like to say this in Mr. Robertson's absence, particularly in view of the fact that there have been so many times in this case that Mr. Robertson and I have had differences, and I think thus far I have been borne out on every one—But in view of his absence it is necessary to make this statement. We said that of course in dropping the objections to the depositions because of the manner in which they were taken by the reporter we were not giving up our objections to the admissibility of the depositions in evidence. That is, the objections to the questions and answers.

Mr. Moore: You waived your right of cross examination?

Mr. Bryan: I understood you were withdrawing your objections to the depositions, and you would not pursue a motion to have them—Don't know what the technical word is—

Mr. Pollard: Quashed, or suppressed.

Mr. Mullen: It is a very different thing from objecting to the individual questions.

Mr. Pollard: The admissibility of the testimony.

Mr. Mullen: I made that very clear, I thought.  
page 62 } Mr. Bryan: I think Mr. Robertson wrote a letter to Mr. Mullen about that.

Mr. Mullen: Not on the question of the individual questions.

Mr. Allen: Why were not the questions followed by the objections?

Mr. Pollard: The court reporter was so incompetent she had everything backwards and forwards. So we say we will not object to the evidence as written up by the reporter, and we asked Mr. Robertson specifically that today about the objections to the introduction of the testimony, and he said of course as I have indicated.

Mr. Allen: You mean by that you are not objecting to the correctness of the testimony as recorded, but you were reserving your objection on the subject of admissibility?

Mr. Pollard: That is right.

Mr. Mullen: We had indicated we might ask to have the whole thing thrown out because it was botched so, and we

said finally we will let it go, but we do not in that way give up the right to object to the individual questions, objections being not incorporated in the depositions themselves.

The Court: Objections were not noted in the page 63 } depositions?

Mr. Allen: But she didn't get them.

Mr. Mullen: She would just get the word "Object", for one thing, not saying what it was.

Mr. Cowherd: I was present during those depositions and the thing that caused this action was in part, probably almost entirely, as stated by the Court Reporter herself. When an objection was made by Mr. Pollard she would say "I will be the judge of what goes into the record."

Mr. Bryan: Who said that?

Mr. Cowherd: The court reporter herself. It was for that reason that we are positive that the record wouldn't be absolutely accurate, and she might or might not have gotten all of the objections properly placed, even if she had tried.

The Court: As I understand the situation now it is that Mr. Pollard, by withdrawing his objection to the depositions, did not withdraw his objections to the admissibility of the questions and answers contained therein.

Mr. Pollard: That is right. And Mr. Robertson said he wouldn't object to any objections made to that because, for instance, the objections that were made there the court reporter just would put down the words page 64 } that the defendants objects, and that was not sufficient. As long as Mr. Robertson agreed that we wouldn't be bound by just the defendant objects, or in cases where she failed to note the objection, that he wouldn't object to the manner in which the depositions were taken by the reporter.

The Court: But you reserved your objections, which are stated in the record?

Mr. Bryan: That is right.

Mr. Allen: In other words, assuming the testimony was recorded correctly you still object, you observe your objection to the admissibility.

Mr. Bryan: Didn't assume that you assumed the right to challenge the accuracy.

Mr. Pollard: No.

The Court: Not the accuracy.

Mr. Mullen: That is what we gave up.

Mr. Pollard: We understood we reserved the right, and Mr. Robertson agreed to challenge the admissibility to any and all of the depositions on the grounds as to whether or not they were proper evidence. And we understand that we

have got to state those objections and those grounds within a certain time, and we would like the Court to fix the time within which we have to state our objections to the admissibility of the evidence. Not to the accuracy of page 65 } them.

The Court: I see what you mean.

Mr. Mullen: Here is an example, Your Honor—

The Court: It may not be necessary, Mr. Mullen, to go into that. These gentlemen I think have agreed. Any objection to that, gentlemen?

Mr. Bryan: Mr. Pollard from time to time objects to various questions, and I suppose that objection would still hold. I didn't understand that he was withdrawing his objections.

The Court: He is asking now for a time limit within which to file objections in writing.

Mr. Pollard: That is right. I don't understand we are limited to those which actually appear in the record.

Mr. Bryan: We do.

Mr. Pollard: That was the whole point, Mr. Robertson said that he didn't object.

Mr. Moore: I don't recall the exact words, Your Honor, but I thought that after counsel for the defendants left the room for a short intermission there, and then they came back and said "We waive all objections to this testimony, but we reserve our right as to the admissibility of these questions at the day of trial", and that is what was said between the parties. I may be wrong, but that is my recollection of it.

Mr. Mullen: We reserve the right to make objections to the questions that appear in the depositions, and to, even though it is not stated that specifically counsel objected, or the grounds are not observed, because they left out a great deal of that, it comes down to the same thing, I think anytime that we introduce them in Court we have a right to object to any part of the depositions.

Mr. Pollard: May I point out one more thing? Mr. Mullen on the last page of those Interrogatories stated that the defendants reserved the right to object to any and all of them at the time of trial, and the plaintiff didn't object to it.

The Court: Why not set a time limit for counsel for the defendants to file their objections, as they see fit.

Mr. Allen: How much time would you all want?

Mr. Mullen: We have got some 500 questions between now and November 15, for one thing, and we still have to argue the question when it comes up here, and it takes time to do that. That would be quite a laborious thing to go through there

160 pages of depositions and state your objections and write out the reasons for them all.

Mr. Allen: Yes.

page 67 } Mr. Mullen: To state the basis, reason for the objection. It will be a pretty big job for somebody to do.

The Court: How much time do you think you will need, Mr. Mullen?

Mr. Mullen: Fred, how much time do you want? I will not do it. Fred will do it, he don't know it up until now.

Mr. Pollard: I think December 1 would be reasonable, gentlemen. Your Honor, it is really some question as a matter of law whether we have to do it until the deposition is really offered. But to avoid that bridge I thought we might get it in in advance.

The Court: How would December 1st, suit you, gentlemen?

Mr. Allen: If the objections take a form which could be readily remedied we ought to have time enough to remedy it. That is, if we consider the objections meritorious, and want to cure the objection we ought to have an opportunity to do it. Wouldn't have an opportunity to do it if you wait until December 1st. How about November 20? That will give you about three weeks.

Mr. Pollard: November 20.

The Court: All right. Set November 20, on or before.

Mr. Mullen: We will be up against it until the page 68 } 15th. That will only leave you 5 days after that—

The Court: Let's say November 25.

Mr. Bryan: Do the defendants intend to present a motion to consolidate these various causes?

Mr. Pollard: Yes, sir, we do.

Mr. Moore: You do want to consolidate the cases?

Mr. Pollard: Amend our other suit and then consolidate.

Mr. Allen: We would have to oppose that strenuously.

Mr. Bryan: Different parties, different issues.

The Court: It will take some time to hear argument on that, I suppose.

Mr. Cowherd: It seems as though you will give all the time of the Court between now and December 1 to this one case, the way we are proceeding.

Mr. Mullen: Of course we haven't done what we came up here to do today. That is, Your Honor, to argue our objections to the answers on there.

The Court: May I ask how long you think it will take to settle those questions, Mr. Mullen?

Mr. Mullen: It won't take me very long. I won't talk very

long. Might take the other side right long. We served you  
a copy of our objections.  
page 69 } Mr. Allen: Yes.

The Court: Only date that I know I have open  
at the present time would be from 11:00 o'clock on the 30th.

Mr. Mullen: We would be in Washington. Made all arrangements to have everybody up there.

Mr. Cowherd: Have called in men from all over the field for the 30th and 31st.

The Court: Then it would not be reasonable to set it on that day, then.

Mr. Cowherd: Mine you, if you please, every bit of this is occasioned by their Interrogatories, trying our best to get the answers up to their Interrogatories.

The Court: I realize the tremendous task of work involved.

Mr. Mullen: There is nothing that I could do, I mean no time that I would have between now and the 6th, 6th of November except the 2nd day of November. Fred, we don't have but one day in Newport News, will we, that is the first?

Mr. Pollard: I hope so.

Mr. Mullen: Then I have to leave again on the 3rd. I have the 2nd, and after that I have the week of the 6th.

The Court: You gentlemen give me your open dates, and

I might have a case that would go off the docket,  
page 70 } and I could communicate with you.

Mr. Mullen: The 2nd day of November.

The Court: November 2 is open?

Mr. Mullen: The whole week of November 5th, yes.

Mr. Moore: November 7 and 8 is not open for Mr. Robertson.

The Court: What else, Mr. Mullen?

Mr. Mullen: These are open dates.

Mr. Allen: November 5th is Sunday.

Mr. Mullen: The week of—

Colonel Harris: November 2 is open, Mr. Mullen.

Mr. Mullen: Yes, and all the week of the 5th.

Note: At this point the reporter is requested to not take down this discussion as to open dates, which is not recorded nor transcribed here in the record. Following this discussion on open dates, the following occurs:

Mr. Moore: What are the exact things to be taken up at that time?

The Court: Objections to the plaintiff's Interrogatories to the defendants will be taken up at that time.

Mr. Mullen: The plaintiff's answers—  
page 71 } The Court: Strike that, then, Mr. Edwards.  
The plaintiff's answer to the defendant's Inter-  
rogatories will be taken up. (Speaking to the Reporter.)

Mr. Allen: Objections of the defendant to the plaintiff's  
answers?

Mr. Mullen: Yes.

The Court: What else?

Mr. Pollard: Question of consolidation of suits.

The Court: Those two questions.

Mr. Moore: I have one more that Mr. Robertson prepared,  
which is a ruling, as far as his records show, on the Interroga-  
tories so far, we would like to get that officially entered be-  
fore the answers to the Interrogatories come in, if possible.

The Court: In other words, you would like to discuss at  
this time the entrance of the order. I think it well to enter  
an order at the earliest possible moment.

Mr. Moore: Most of those questions are those that have  
been reframed, and are set out there.

The Court: You want to keep this order—

Mr. Moore: Leave that with you.

Mr. Mullen: Have you given us copies?

Mr. Moore: Yes.

Mr. Mullen: Exception to the Court overruling  
page 72 } the objections to the Interrogatories described as  
further Interrogatories addressed on October 12,  
1950, to United Construction Workers, and the same District  
50, United Mine Workers.

The Court: I think the record will show you did except.  
But anyhow it won't do any harm to put it in the record  
again.

page 1 }

Before Honorable Harold F. Snead, Judge.

Richmond, Virginia,  
November 2, 1950.

Present: A. G. Robertson, Esq., George E. Allen, Esq., T.  
Justin Moore, Jr., Esq., Counsel for the plaintiff.  
James Mullen, Esq., Robert N. Pollard, Jr., Esq., Crampton  
Harris, Esq., Counsel for the defendants.

page 2 } Mr. Robertson: Is it agreeable that Mr. Bryan, without disqualifying him as a witness, can participate in the proceedings in chambers with the understanding that he does not thereby forfeit his right to appear as a witness, it being understood that he shall not participate as counsel in the trial in the presence of the Jury.

Mr. Mullen: That was agreed to the last time we were up here. I didn't know it was going to continue.

Mr. Harris: I am willing to defer to your judgment and your feeling in it.

Mr. Mullen: All right.

Mr. Robertson: Let the record show that Mr. A. Hamilton Bryan is also present. He is President of the plaintiff corporation. Mr. W. P. Owen—

Mr. Harris: He is present as a spectator and not as counsel and not appearing as counsel.

The Court: Add that Mr. Bryan is the President of the Laburnum Construction Corporation, the plaintiff.

Mr. Robertson: And it is stipulated between counsel for all parties that he may participate in the hearing today without disqualifying himself as a witness in the case.

Mr. Mullen: I objected to the order because that order shouldn't be entered until we complete the rulings  
page 3 } on this matter of today. It covers the same thing and I frankly have not looked at it. I have been in Richmond one day since the hearing and have been in Washington working on these interrogatories, and I notice some additional ones. I don't know how long they are or whether it requires any investigation or whether it requires us to go back to Washington but we are not prepared to take up the question of that order today and we don't think it is the time of take it up.

Mr. Robertson: The reason I suggest that order and the reason I think that order ought to be entered, if it is correct—of course, there are going to be orders entered all along through the progress of the case—there have been so many interrogatories and they have been handled in such a sort of free and easy way and it is so easy to get confused on them. What I have tried to do in that order is to have the Court record its rulings in orderly and correct sequence. I think that those orders are factually correct. I have checked them just as carefully as I know how and I have had Mr. Lowden and Mr. Moore and Mr. Bryan and Mr. Allen check me as well as they could. I think they are correct. You may find some errors in them but there are not any that I know of, and the purpose of the order is to have something to pin to

when people's recollections of what the rulings were fade out. I put the best part of several days on preparing that order and I think it is correct and I think it ought page 4 } to be there as a safeguard to everybody, including the Court.

Mr. Mullen: We don't have to argue the desirability of entering the order. We agree with that, but we must have time to examine the order and see whether it is correct as you have drawn it. That we have not had time to do because we couldn't do two things at once.

The Court: Suppose we take up first the defendant's objections to the answers to their interrogatories?

Mr. Robertson: Before you do that, let me call the attention of the Court to this: You remember throughout these preliminary hearings where objections have been made to the admissibility of various testimony and the propriety of various answers and everything, the Court has ruled time and again that it is going to defer its rulings on the actual admissibility of any evidence before the Jury until the case is in progress of trial because as the case develops and the issue is presented in the course of the trial, the Court can determine more justly whether the evidence is in or out. As I understand it—and I have put that in that order—time and again, and at the meeting before the last, at the last minute Mr. Fred Pollard asked would it be agreeable to me to have the Court consider the defendant's objections to our answers at that last meeting. I said I had no objection to it. I don't object page 5 } to whatever argument anybody wants on it or what-  
ever consideration anybody gives it provided the

Court will defer its ruling until the progress of the trial which I understand is what the Court has said it was going to do.

Mr. Mullen: I think you probably misunderstood Mr. Pollard. His statement to the Court was that, as he understood the law, he had to complete his objections and submit them to the Court within a reasonable time after the depositions were taken; otherwise, he would be prevented from so doing.

Mr. Robertson: I can save you something there because I consider myself and the plaintiff bound by what I wrote you in my letter of September 28th, paragraph 4, which I think covers this and I think will clear your doubt on that: "Mr. Mullen stated that unless the plaintiff wished to take further depositions at Paintsville, Kentucky, on October 3, 1950, pursuant to adjournment of depositions which were taken at Paintsville in behalf of the plaintiff on August 18th and 19th, 1950, the defendants would withdraw all objections to introduction in evidence of the depositions taken on August 18th

and 19th"—that was about the Court Reporter being a competent person—"it being understood that the defendants reserved the right to object to the introduction in evidence of any testimony to which they objected at Paintsville, whether or not the ground of such objection is actually set forth in the deposition."

Mr. Mullen: Read the last sentence of that.

Mr. Robertson: "It being understood that the defendants reserve the right to object to the introduction in evidence of any testimony to which they objected at Paintsville, whether or not such objection is actually set forth in the deposition."

Mr. Mullen: Do you consider that any different from what you stated a few minutes ago, that the Court would have the right to rule on objections to evidence at the time of the trial and that for that reason it had reserved the right from time to time to change the rulings it had made so far?

Mr. Robertson: Yes.

Mr. Mullen: If Mr. Pollard, say, should object to the introduction before the Jury of a portion of those depositions taken out at Paintsville on the ground that it was irrelevant, or for any other reason, that right he still has?

Mr. Robertson: Yes, sir, that is my understanding.

Mr. Mullen: I don't want that language to be confined solely to objections made at Paintsville.

Mr. Robertson: That is exactly what I do mean. If you didn't make the objection out there, I think you have waived it. I think the Judge has the right to reserve any ruling he wants to until we get into the trial. I don't think any objection will come up. I think they objected to everything on earth out there but I think, for instance, suppose you object to some of the testimony in those depositions on a ground that never occurred to anybody at Paintsville, that everybody overlooked. I think you have got a perfect right to do it.

Mr. Mullen: That isn't exactly consistent.

Mr. Robertson: I said if you objected but didn't state the grounds, then if you saved your objection and exception, I think every ground in law that you can think of is available to you under that objection and exception, whether you called attention to it at that time or not.

Mr. Harris: As I understood Mr. Fred Pollard in our last hearing, he made a statement to the Court that was not opposed by the gentlemen on the other side which involved a greater and more extensive right on the part of the counsel for the defendants as to those depositions and it was not limited to the elaboration of objections made with the details of the objection not specified but it was a reservation of the

right not only to elaborate on the objection by stating specific grounds but it embraced the right to state an objection that you had not made before.

Mr. Robertson: My suggestion on that is to let that ride until the trial.

page 8 } The Court: I think that would be advisable.

Mr. Robertson: You may urge some objections there that I am perfectly willing for you to make.

Mr. Mullen: I don't recall the exact language of it. It will appear when we get the transcript of that hearing which we have not gotten yet.

The Court: We should have the benefit of the transcript. That was the hearing last Tuesday.

Mr. Mullen: We will take up the objections to the answers to the interrogatories in the order that the answers were made.

Mr. Robertson: It was principally on the ground that they were irrelevant or self-serving. Read the objections out.

Mr. Mullen: The first objection was made to the answer to 1(d). 1(d) was "What was the maximum net profit the plaintiff could have earned under this contract?" The plaintiff has answered, "The maximum net profit which plaintiff could have earned under said contract dated October 28, 1948, for work in connection with construction of said coal preparation plant was the sum of \$12,000." The part we object to as surplusage is "With respect to the construction of said schoolhouse and other work in addition to said coal preparation plant, there was no limitation to the net profit which plaintiff could have earned."

page 9 } The Court: We are still on (d).

Mr. Mullen: On the second page. "There was no limitation to the net profit that plaintiff could have earned under said contract. Such net profit, however, would have been equal to 5 per cent of the cost of the work."

Our question was addressed to the specific contract which had been introduced, not to what other work they might have gotten. We asked simply in regard to the maximum net profit that could have been earned under the contract which had been introduced in evidence as the contract between the plaintiff and the Concrete Pocahontas Company.

Mr. Robertson: That goes right back to the point I mentioned here at the outset here this morning, that the Court is going to defer its ruling until the thing is introduced at the trial and then it will be perfectly apparent and obvious that it is either correctly in or correctly out, whereas at this time we are really guessing at it. I don't think that the Court at this time, for instance, wants to go into the ques-

tion of the deposition Mr. Salvati gave in Huntington which is in the papers here, whereas he talked about the business relationship which Laburnum had built up with Island Creek Coal Company. It was an overall picture of the thing and that may or may not affect the admissibility of this thing here and I think we are right back where we were before, that the Court would defer its ruling until the matter  
page 10 } comes up at the trial and I think by going through it item by item today we are going to do what we are going to have to repeat at the trial.

Mr. Allen: Mr. Mullen, how does this question come up—the matter we are discussing now? It seems to me it would come up under a motion to strike the answer. There is no motion to strike the answer and just simply a discussion of objections even under a motion to strike would be premature. What you want is to keep this from going before the Jury as evidence. It hasn't been offered yet and nobody can tell at this stage of the case whether it is relevant and material and proper until you get further into the trial.

Mr. Mullen: We are in this position: This is an answer to interrogatories made by plaintiff or propounded to plaintiff by the defendants. The plaintiff can't introduce this. The defendant is the only one that can introduce it in evidence. We are not going to say we are going to introduce these answers in evidence but we object to them.

Mr. Robertson: I don't care what form it comes up in. With me it is all right the way it is up here now but I think, for instance, suppose when we get into the trial you want to offer that and you say, "There is your answer and here is a whole lot of stuff strung onto it that we think ought to be eliminated and the other part put in." I think we would have that matter out right before the Court at that  
page 11 } time and the Court would rule and then put it in or keep it out accordingly.

Mr. Harris: Judge, I didn't understand that Your Honor ever used the words "You were deferring ruling." I understood Your Honor was making rulings as we went along. And you stated as to several of the rulings, that you reserved the right to change them, and that is why we are up here today. We understood that we had the right to make objections and that we would get rulings. We are not here just for idle discussion.

Of course, Your Honor has the right, and wherever you have felt so inclined you have stated, "I reserve the right to change my ruling," but it would cause confusion to wait until the trial, and we have filed too many things to take them up when we have a Jury sitting there.

Mr. Robertson: What the Court has said it is going to do conforms to the Virginia practice; that is, if we get in the trial and the evidence is offered, the Court will rule whether it is admissible or not, and then admit it or hold it out accordingly. The Court has said it was going to do that because you can't tell until the pattern of the trial is set.

The Court: That has been my thought. Of course I have been making all the rulings that I thought I could consistently make at the time, but I do consider that I reserved page 12 } the right to reject any of the interrogatories, or all of them, at the time of the trial. The Court does not know what trend the case is going to take as the evidence develops.

Mr. Robertson: I think if we do that, we are going to wind up doing it twice. For instance, if he rules against you on some stuff today you are certainly going to take another crack at it at the trial, and so are we. So we are doing it twice instead of once.

Mr. Mullen: Of course, the Judge understands in our practice he has the right at the time of the trial, as you say, to sustain objections to any part of the interrogatories or anything that is offered in evidence at that time. I had understood that is the way Your Honor did, sir, to try to dispose of as many matters as possible in preliminary hearings—at least I get that word from Fred Pollard.

The Court: That is true. I want to dispose of as many matters as we can.

Mr. Robertson: So do we, but I think this: Suppose you get a tentative ruling against you today on these things. You haven't got any idea of accepting that as final and not trying to upset it in the light of the way the trial develops. I certainly haven't got any idea of doing that.

page 13 } Mr. Mullen: That is a matter, of course for the Judge to rule upon. I, of course, understand what the Virginia practice is to some extent anyhow.

Mr. Allen: I would like to add this. The question here is the admissibility in evidence before the Jury of that part of the answer to the interrogatories they object to. I say at this stage of the trial you cannot pass on its admissibility.

The Court: In other words, you allege it is surplusage?

Mr. Mullen: Yes.

The Court: At the trial if the Court be of the opinion it is surplusage, the Court can strike it.

Mr. Mullen: That is it.

The Court: All of these objections are as to surplusage?

Mr. Mullen: Yes, I think they are.

The Court: Well, Gentlemen, having listened to the argument of counsel of both sides, the Court is of the opinion that it would be best to defer rulings on these objections until the trial.

Mr. Mullen: Let me see the papers Fred has prepared.

The Court: In connection with what?

Mr. Mullen: This is in regard to the consolidation page 14 } tion.

The Court: We will take up that question next dealing with the consolidation of the two suits pending in this Court.

Mr. Mullen: Fred has prepared a motion for non-suit, and a motion to amend. And he has eliminated every one as a party plaintiff to this motion except the defendants United Construction Workers.

Mr. Mullen: There has been brought in this Court a suit by United Construction Workers and by certain individuals who claim to have signed up to join the United Construction Workers, and who were employees of Laburnum. Under this motion, the non-suit and the motion to amend, all of those plaintiffs have been eliminated except the United Construction Workers, which is one of the defendants in the principal suit here. And there are no other allegations except what appear in the motion filed by the Laburnum Corporation other than the allegations that a majority of the laborers employed by the Laburnum Corporation had signed up to be represented by the United Construction Workers, and that the Laburnum Corporation on July 27, 1949, wrongfully and without lawful cause, justification or excuse, discharged from its employ all of its employees who had made application to join the union. Other than that there are no allegations that are not contained in the motion in the cause here filed page 15 } by Laburnum Corporation. This is a motion to non-suit and to amend and to consolidate the causes.

Mr. Robertson: Now, of course, if Your Honor pleases, it is perfectly agreeable to us for them to non-suit their plaintiffs if they want to. We have no objection to their non-suiting the individuals, but we say that it is undesirable to consolidate that cause with this cause for these reasons. The purpose of consolidation, which is largely within the discretion of the Court, is to clarify and simplify the issues in order to aid the Jury and the Court in reaching a just conclusion, and as the Court has said at one of our prior meetings here, this case already has enough angles and points and headaches in it to give anybody all they can do to bring these issues that the one case presents to the Court to an end.

Regardless of what Mr. Mullen says, the parties are still different; you have got different parties; you have got different issues as between different parties and the law is totally different.

To show you that, Your Honor—of course, if you have read that thing through you can see a large part of it is a paraphrase of the Taft-Hartley Act, and of course, I will come back to the law in a moment. What we are proceeding under here, everybody has agreed of record that this case now before the Court that we are arguing this morning page 16 } is governed by the law of Kentucky—the substantive law of Kentucky—and, of course, the procedure law of Virginia.

Let us see what they say back here. Come to paragraph 9.

Mr. Mullen: Let me suggest this: I got to Richmond last night and this was handed in this morning. Fred was called in a meeting that he had set quite sometime ago. I would much prefer, inasmuch as he prepared all the papers, to defer and let him present his own case. I am frankly not familiar with it.

Mr. Mullen: He will do it very promptly.

Mr. Robertson: If Your Honor please, I have inherited so much from Mr. Flippen. I was called out of town last week from Tuesday on, and I am just as busy as Mr. Mullen and Mr. Pollard—I mean, if he could come up here this afternoon or during the day—

Mr. Mullen: He is in a labor hearing and we never know when we get in those how long it is going to last.

Mr. Robertson: If we finish here at seven o'clock tonight I drive to Leesburg tonight to hold a meeting when I get there and drive on from there tonight—that's the pains I took to be here.

I think you can dispose of it right now if you will let the Court read paragraphs 9 and 10 of your motion.

page 17 } “9. By refusing to recognize the union as aforesaid and by discharging its employees who had made application to join the union as aforesaid, the Company wrongfully interfered with, restrained, and coerced the union and such employees in the exercise of the rights guaranteed them by the laws of the State of Kentucky, Section 336.130. Baldwin's Kentucky Revised Statutes.” There you have the Kentucky law—“By the laws of the State of Virginia and by the laws of the United States of America.” If that isn't a hodge-podge I never heard of it. We have got in our case to guard Virginia rights even against the law of Kentucky—

they come along here with Kentucky law, Virginia law and Federal law.

The next paragraph: "By adhering to and giving effect to the contract with Richmond Building and Construction Trades Council, as aforesaid, the Company unlawfully conspired with said Council and its members to create and carry out restrictions in trade or commerce and to abridge the right to work because of membership or non-membership in a union in violation of the laws of the State of Virginia (Code of Virginia 1950, as amended, Title 40, Chapter 3, and Title 59, Chapter 3), and of the laws of the United States."—laws of the State of Virginia and laws of the United States. I think what they have reference to is in the trust law—so they have got the laws of Virginia and and the laws of the page 18 } United States, and if that isn't a hodge-podge—

Mr. Moore has worked up a memorandum on that.

The Court: I am wondering about this. Mr. Mullen has certainly cooperated in every way he could in this case—

Mr. Robertson: So have I.

The Court: —so have Mr. Robertson and all of you, and I am very much impressed with the cooperation you have made on both sides.

Mr. Robertson: I am perfectly willing to do it provided I am in town. What I am trying above all else is to keep this case from being continued, and not going to trial on December 11th.

The Court: The Court is making every effort to accomplish that fact also. I might suggest, Mr. Mullen, in view of what you said, that Mr. Pollard might submit me a little memorandum, and I will look at it within a very short time; and I will ask that he furnish it within a very few days, and Mr. Moore can also submit one.

I realize that there are a lot of difficulties in this case and counsel on both sides have been very busy working up the case, and I don't want to rush Mr. Mullen into the matter this morning. I know you have been in Washington for the last two or three days—I imagine working on answers to interrogations.

Mr. Mullen: I have worked on nothing except page 19 } this case.

Mr. Robertson: What about your case in Federal Court? Are you going to lub that one in here?

Mr. Mullen: I understand they are going to dispose of that. I have not handled that phase of the matter.

Mr. Robertson: Don't forget that one—that's a mere matter of million dollars.

The Court: Do not overlook the Court in this matter. The

Court has worked in this, too. I have given you every spare day I have had, and my other work is getting behind. I am going to give you the right-of-way and get rid of it.

Mr. Mullen: Suppose we don't argue this motion at this time? Suppose we do not file this motion at this time?

Mr. Robertson: We want the motion filed so we will know at what we are shooting.

The Court: File the motion, and let Mr. Pollard file his memorandum, and you all may reply to it.

Mr. Harris: There are two motions.

Mr. Robertson: Will you put a time limit?

The Court: Yes, I will put a time limit on it.

Mr. Robertson: When do you want their memoranda and when do you want ours?

The Court: What will be a reasonable time?

page 20 } Mr. Mullen: Do you think it should be done by Tuesday or next week?

The Court: And give counsel one week to reply?

Mr. Robertson: That is all right. Of course, he has worked so hard to prepare this motion all we ought to have to do is—

Mr. Mullen: Fred may know about it.

The Court: The Court will request Mr. Pollard to file a memorandum earlier if he can, and if it is filed earlier and a copy is delivered to counsel for the plaintiff, then their time will begin to run from that day.

Mr. Harris: There is a certificate on the next page.

Mr. Allen: Why not file the memoranda simultaneously?

The Court: Each side file a memorandum simultaneously, and I will give you one week within which to do it.

Mr. Mullen: That will be all right.

The Court: And that is agreed to by counsel.

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page 24 }

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Mr. Robertson: We have filed here today interrogatories which we have numbered 14 and 15 and 16. They are addressed respectively to the three defendants and we would like to go over those at this time. You all may not object to them.

Mr. Allen: I thought the Judge had already ordered them to answer those.

page 25 } The Court: These are new ones.

We will recess about five or ten minutes and give counsel an opportunity to look them over.

I will mark the motions filed.

Mr. Mullen: If you keep on filing them the Court can't answer on five.

(A short recess was taken.)

The Court: Counsel has indicated to the Court that they would like to have time to study these interrogatories just presented.

Mr. Robertson: Couldn't we all take that up on Thursday of next week, too?

Mr. Mullen: We have to go to Washington to get the information.

Mr. Harris: What is the statutory time to answer interrogatories?

Mr. Robertson: The Court has entered it here. If you will not interrupt me I will try not to interrupt you.

Mr. Harris: It is a question of who has the floor as to who is being interrupted, if the Court pleases, and we were making a statement to the Court about our objections.

He hands us interrogatories as to three different defendants which seem to be, on a rapid reading, as general and as extensive as possible and we want a reasonable time in which to study those interrogatories, confer with our clients, and prepare formal objections that would be a part of the record the same as the interrogatories are, and at this time we ask the Court for such reasonable time.

Mr. Robertson: To keep this gentleman straight: This gentleman wasn't here and therefore he hasn't read the order and he doesn't know what he is talking about. I grant you that he is entitled to a reasonable time, and I unite in the request that he be given that—and I want a time limit put on it.

The order, which the Court entered here, (and apparently he has not read—the first time we were up here in one of these pre-trial conferences—and it is in the papers there) said that any interrogatories which the Court ruled to be answered either then or thereafter would be answered by, I think it was the 15th of November. It was either the 15th or 16. Of course, I realize if they put in a date which would not give them a fair time to answer, the Court would not hold

them to that and I would not ask the Court to do it, but I ask the Court to fix a time to act on them.

Mr. Mullen: I don't think you can keep filing interrogatories and claim they come under that order.

Mr. Robertson: I already said I didn't think it page 27 } necessarily came under that order, but I think if you have got thirteen days, which is practically two weeks, to answer those interrogatories—I think that is ample time.

Mr. Mullen: We are talking about time to make objections to them now, not time to answer them.

Mr. Robertson: Would the Court like to hear a discussion now as to why we think they are proper or would you rather wait?

The Court: I think we should wait, Gentlemen. These interrogatories have just been delivered to counsel.

Mr. Robertson: I think if you discuss it now you would wind up by doing it twice.

The Court: And the Court is going to give counsel a reasonable opportunity to look these interrogatories over.

Mr. Bryan: I would like to say this, Your Honor: Interrogatory 16, question 7 asks whether or not George J. Titler, President of District 29, United Mine Workers of America, on or about August 2, 1949, sent a certain letter to various local unions. That letter is quoted. The letter appears in full in an issue of the Welch Daily News, Welch, West Virginia, published on August 2, 1949. We know who wrote the article and we can prove the letter by him. I simply point that out because there is nothing in here to indicate to you where it appeared.

Mr. Mullen: I can't imagine by any reasoning page 28 } that that question is pertinent to this case. That

letter, as you quoted it there, refers to District 29 of the United Mine Workers undertaking to organize, and what that has to do with the United Construction Workers in this case—

Mr. Robertson: We will show you. Just give us time.

Mr. Mullen: I don't say we gain anything by attempting to discuss them now.

Mr. Robertson: I am asking the Court to put a time. What counsel is asking is for time to consider these further interrogatories, Numbers 14, 15 and 16. These interrogatories were presented to counsel for the defendant this day, and they have not had an opportunity to study the interrogatories.

Mr. Mullen: Judge, we have dictated and are trying to type up and revise, if necessary, the answer to five hundred

questions in those other interrogatories. We have spent a week doing that and that will be written up by the stenographers and we have to go over the copies, and I have got to do other work on that order with Mr. Robertson next week. There is just a limit to what you can do in a certain length of time and those interrogatories are very long, and it is going to take forty or fifty pages to answer them—and more. It has to be gone over, checked and revised. We spent days dictating it and the stenographers are writing it page 29 } up. We have got to go over and check every figure and date and everything in it.

The Court: Would you be in a position to inform counsel for the plaintiff when you gentlemen have your conference on the 10th, I believe, as to whether or not you are going to object to any of the interrogatories presented?

Mr. Mullen: We will do that.

The Court: Then, if you will call me I will try to find a time to hear you.

Mr. Mullen: There is only one week and two days before the 15th and—

The Court: The Court will give you a reasonable time.

Mr. Allen: Mr. Mullen, at that time that you inform us of the interrogatories that you will object to, would you mind indicating briefly the nature of your objections?

Mr. Harris: I think we ought to put in formal objections, if the Court pleases, and not have anything resting in parole.

The Court: I expect you to file formal objections, which won't bind them at all.

Mr. Mullen: We will notify you on the 10th whether we are going to object, and if we can we will have the objections written out by that time.

page 30 } Mr. Robertson: I think what Colonel Harris says is all right; I think it is better to have the whole thing nailed down in written form.

The Court: I think it ought to be in writing.

Mr. Robertson: If Your Honor please, we have five photographs here showing the scene of the job site involved in this case, and various angles of it, and we can, of course, get the photographer here and prove them but we hoped you might stipulate that they could come in as exhibits.

Mr. Mullen: I don't think there is anybody here who could say whether these are correct pictures or not. We will submit them to somebody who knows, and see what they say about it.

Mr. Robertson: You can question Mr. Bryan right now.

Mr. Mullen: If they are correct pictures, I don't think we will make you bring a photographer here.

Mr. Bryan: I know of my own knowledge that they are the pictures of the job site. I couldn't testify that I took the pictures.

Mr. Harris: We won't force you to bring the photographers here.

The Court: You will want an opportunity to present these pictures to some one of the defendants who have  
page 31 } visited the scene and have them state—

Mr. Mullen: And whether in their opinion in presenting these there should be additional pictures taken.

Mr. Robertson: Could you take those pictures with you and give us that information by next Thursday?

Mr. Mullen: We can do that.

Mr. Robertson: That is all I had on my list.

Mr. Harris: It will never be our position to put anybody to any unnecessary burden in proving something like that. All we want to do is have time to check up with our people.

The Court: I think you are entitled to that.

Mr. Allen: I would like to make this observation here: We are not assuming that under the law it would be necessary, or anybody else can take the witness stand and state that he is familiar with the locality, and that those pictures are accurate reproductions of the scene, that makes the pictures admissible in evidence under the law.

Mr. Mullen: There isn't any cause for taking the Court's time about that. There is not going to be any trouble about admitting them.

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page 1 }

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Transcript of a pre-trial conference before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, on November 28, 1950.

Appearances: Mr. Archibald G. Robertson, Mr. George E. Allen, Mr. T. Justin Moore, Jr., Counsel for plaintiff.

Mr. James Mullen, Mr. Crampton Harris, Mr. Robert N. Pollard, Jr., Counsel for defendants.

page 2 }

. . . . .

Mr. Mullen: Your Honor, would you like to dispose of this order on the interrogatories first? I think we can have that ready quickly.

The Court: I suppose that is the right thing to do first.

Mr. Bryan: The first thing was Question 4.

Mr. Mullen: I can cut it down a great deal. While I don't agree entirely with the form of the question, it is immaterial. We have no objection to the first eight pages. That cuts out a number of questions. A number of questions we have objected to, but they have been answered so it doesn't make any difference.

On page 9 that item there should read this way—

Mr. Robertson: Which one?

page 3 } Mr. Mullen: Number 2: "Need not answer questions in Interrogatories (4) numbered 78, 123, 124 and 125, but counsel for defendant United Mine Workers of America stated to the Court that they would recommend to said defendant that that said defendant submit to the Court the minutes of all meetings of the International Executive Board of United Mine Workers of America held between the dates October 28, 1943, and August 4, 1949, and also since August 4, 1949, for inspection by the Court."

Now right there we leave out: "in the presence of counsel for all parties."

Mr. Robertson: That is all right. I don't want that in there anyway.

The Court: "In the presence of counsel for all parties"?

Mr. Mullen: Strike that out.

Mr. Robertson: We can depend upon the Court to do what is right.

Mr. Mullen: "in order that the Court may determine what parts of such minutes, if any, shall be furnished plaintiff on or before November 15, 1950." Of course, that is impossible. Those words "November 15" ought to come out.

The Court: That is bound to come out "on or before November 15", but counsel for defendant United Mine Workers of America contending that portions of said minutes contain confidential information, the Court ruled that counsel for plaintiff shall not have access to the aforesaid minutes; and counsel for defendant United Mine Workers of America agreed to advise the Court on or before October 24, 1950, whether or not defendant United Mine Workers of America will follow the aforesaid recommendation of counsel."

Now I would like to add this: "Counsel for said defendant on or before said date advised the said Court that said defendant would follow that recommendation and said minutes

covering said period have been made available to the Court."

Mr. Robertson: That is all right. That is a new sentence.

Mr. Mullen: So we will add: "Counsel for said defendant on or before said date advised the Court that said defendant would follow said recommendation and said minutes covering said period have been made available to the Court."

Now, on page 10 we agreed to Question 35 (c)—that the words: "with affairs" in the sixth line from the top and the words "the affairs" in the fifth line from the bottom come out. It doesn't make any difference to me whether they come out or not; they have been answered.

Mr. Robertson: Just leave them in then, so as not to make it up.

Mr. Mullen: Now 37(c): "What interpretations of the meaning of said 'International Constitution' made by the President of United Mine Workers of America were put into effect between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949"?

Mr. Robertson: Mr. Bryan, you ought to listen to this.

Mr. Mullen: The Court ruled that that should read: "Were interpretations of the meaning of said 'International Constitution' made by the President of United Mine Workers of America"—"Were" instead of "What".

Mr. Robertson: Then the next "were" would come out.

Mr. Mullen: It should read: "What interpretations of the meaning of said 'International Constitution' were made by the President of United Mine Workers of America were in effect—"

The Court: "were" comes out there and "in effect" comes out.

Mr. Mullen: "were made between the dates October 28, 1948, and August 4, 1949".

Mr. Robertson: Of course, if they were made we want to know what they were.

Mr. Mullen: The Judge ruled we didn't have to furnish copies of the interpretations.

The Court: It seems to me we ought to change that.

Mr. Robertson: I want to make this point right now. That is why, in my opinion, the Court ought to insist that counsel on both sides ought to insist that some kind of an order is entered on these things.

Mr. Mullen: We agree on that.

Mr. Robertson: I worked on this thing way back in October and watched this thing and no one can remember what happened.

The Court: We are in accord. The transcript will show.

Mr. Robertson: What date were we here on in August?

Mr. Mullen: This was the October 12th hearing.

Mr. Robertson: All right, we agree on that one then.

Mr. Bryan: That is what you decide?

The Court: Yes.

Mr. Mullen: They are all except I want to call attention to one thing—I have cut all the others out because they have all been answered and there is no use objecting to them, but on page 17 it says that “On October 12, 1950, the Court ruled that the defendant United Construction Workers, Affiliated with United Mine Workers of America, must answer questions in Further Interrogatories (8) numbered 87, 88 and 89—”

page 7 } The Court: Where are you reading?

Mr. Mullen: The second paragraph.

The Court: I see.

Mr. Mullen: “that defendant District 50, United Mine Workers of America, must answer the questions in Further Interrogatories (9) numbered 89, 90 and 91 on or before November 15, 1950; and that defendant United Mine Workers of America must answer questions in Further Interrogatories (10) numbered 118, 119, 120, 121 and 122 on or before November 15, 1950.”

When Mr. Robertson and myself went over there we didn't have those, but they have all been answered in the originals because they were duplications.

Mr. Robertson: That is right, and I put this in here to complete the chronological story.

Mr. Mullen: They have been answered.

Mr. Robertson: So just leave it as is.

Mr. Mullen: With that exception then to change—

Mr. Robertson: Let's make those changes and get the order entered, which will really bring it up to date.

(Order changed accordingly.)

Mr. Mullen: My recollection is you and Mr. Lowden or Mr. Moore went out and added a section to cover one more hearing “On October 12, 1950, the Court continued argument and rulings”—wait a minute, here is it:

“On October 12, 1950, plaintiff submitted to the  
page 8 } Court and to counsel for defendants further inter-  
rogatories addressed respectively to defendant  
United Construction Workers, Affiliated With United Mine  
Workers of America, said further interrogatories being now  
designated ‘Further Interrogatories (11)’; further interroga-  
tories addressed to defendant District 50, United Mine Work-

ers of America, said interrogatories being now designated 'Further Interrogatories (12)'; and further interrogatories addressed to defendant, United Mine Workers of America, said further interrogatories being now designated 'Further Interrogatories (13)'; and counsel for all said defendants accepted said further interrogatories which were filed in Court on October 18, 1950."

Mr. Robertson: We discussed everything and I forgot to leave the copies up here to be filed by the Clerk and I brought them up on a later date and they were marked filed on a later date and I put them in the order so if anybody would be digging through the papers afterwards they would understand why that happened.

Mr. Mullen: I haven't any question on that.

Mr. Robertson: That might help anybody that searched through the record.

Mr. Mullen: What we discussed out there that day—you were there, Mr. Moore—was to bring them down page 9 } through those the Court had ruled on. The Court had ruled on all except the last—those that have been ruled on since.

Mr. Robertson: Here is what I will do and I think it might help. I think by going back through my calendar and through these transcripts that I can recite the facts of what pre-trial conferences have been held and what was done at each one and bring it down to date like this order. In other words, my thought on this order is that so far as any lawyer in this case is concerned, to get the story of what happened, we need not go back of this. If I bring another order—

Mr. Mullen: I thought we could dispose of it all here.

Mr. Robertson: What have you got?

Mr. Mullen: I haven't got anything. I thought Mr. Lowden would write it.

Mr. Moore: It was 11, 12 and 13.

Mr. Mullen: Since the Judge ruled on those we can include those, too.

Mr. Robertson: What do you want to add on that final paragraph?

Mr. Mullen: On what date was it done?

Mr. Moore: It was a date Mr. Robertson wasn't here.

Mr. Robertson: October 24th was the date I page 10 } wasn't here. That was a Tuesday afternoon.

Mr. Mullen: Yes. Those particular ones which were filed on October 12th I see we answered all the questions in them. It was October 24th when we had the hearing.

Mr. Robertson: Why not add there: "And subject to

their aforesaid exceptions, the defendants filed their answers to said interrogatories on October 24, 1950." That would bring it down to date.

Mr. Mullen: On November 15th we filed the answers to these.

Mr. Robertson: Make that a semi-colon there and say: "And subject to their aforesaid exceptions the defendants filed their answers to said Interrogatories 11, 12 and 13 on November 15, 1950."

The Court: Do you want to put "as directed"?

Mr. Robertson: No, I don't know that we admit "as directed" as yet.

Mr. Robertson: The only interrogatories the Court has not now ruled on are 14, 15 and 16.

The Court: And they were interrogatories which were presented at the last hearing?

Mr. Mullen: Presented on November 2nd.

Mr. Bryan: I don't have the numbers of them, but they are covered in the answers filed on the 14th.

The Court: Do you want me to enter this right page 11 } now and get it behind us?

Mr. Robertson: I think it would be a good thing.

The Court: What do you want to do; all counsel mark it "Seen"?

Mr. Mullen: Yes.

The Court: All right, I am entering this as of today.

Mr. Robertson: Are you ready now on 14, 15 and 16?

Mr. Mullen: I want to take up 16 first, United Mine Workers. It is the longest one. The first question is:

"Furnish a copy of the minutes of all meetings of the International Executive Board—"

The Court: These must be numbered wrong: "In what capacity—"

Mr. Mullen: No, they are all numbered wrong.

Mr. Harris: What is the filing date?

The Court: October 12th.

Mr. Mullen: As I recall, these were presented on October 2nd. There must be some other interrogatories.

The Court: Have we acted on these?  
page 12 } Mr. Mullen: No, sir, that is what we are here today to act on.

The Court: These have been acted on, but have been numbered wrong.

Mr. Robertson: I will read them out and number them correctly later on.

The Court: The ones we had before were 11, 12 and 13. We had them a moment ago. We had better get them straight.

Mr. Moore: Here are 11, 12 and 13.

The Court: They were the ones that were added to the order.

Mr. Robertson: One is marked filed October 18th and one on the 12th.

(Discussion as to correcting numbers of interrogatories previously filed.)

The Court: Have you found the originals of 14, 15 and 16?

Mr. Moore: Yes, sir.

The Court: Now you want to take up 16 first?

Mr. Mullen: Yes.

"Furnish copies of all minutes of the International Executive Board by the United Mine Workers of America in which action was taken in connection with organizing District 50, United Mine Workers of America, sometimes called District

50, and furnish a copy of the minutes of all meet-  
page 13 } ings of said International Executive Board held  
between the date of the organization of District 50  
and October 28, 1948."

That calls for some fourteen years of minutes; in other words, minutes here at the disposal of the Court, plus a large number of additional minutes. We object to it on the following grounds:

(a) This interrogatory violates the Fourth Amendment to the Constitution of the United States for the reason that it constitutes an unreasonable search into the papers and effects of the defendant. Those minutes cannot have any possible bearing on this case; they go back far beyond the time of it. There is nothing in there relating to this case. They have complete information in the answers already filed, in the Charter of District 50 and in the Rules of District 50 and in the Constitution of United Mine Workers. The Charter says that District 50 was organized as a provisional district on order of the International Executive Board subject to the approval of the International Convention, and in the Constitution of the International Convention it was made a district.

Now that gives them all the information they want as to the creation of District 50, United Mine Workers of America.

Those minutes contain the private business, not only of the United Mine Workers, but also many concerns.  
 page 14 } It is carrying out a fishing expedition to an absurd length. We have argued that quite fully before Your Honor. I think nothing is better established than that fishing expeditions cannot be approved. There must be a showing where the information desired is material to the case. The furnishing of that information would be a burden.

Our second ground of objection is that the interrogatories are oppressive and unreasonable in that they ask for an enormous number of documents, all of which precede in point of time the date of October 28, 1948, which is the first date referred to in the Notice of Motion for Judgment by the plaintiff.

. . . . .

There can be no possible excuse for going back,  
 page 15 } we think, of the time the matter complained of occurred, but certainly beyond the dates of the contracts they have put in evidence with their motion. To do so is to impose an oppressive and unreasonable burden on the defendants in this case.

Our third objection is that the interrogatory constitutes an invasion of the right of privacy of this defendant and all persons with whom it did business during the long period of time between the organization of District 50, United Mine Workers of America, and October 28, 1948, and the interrogatory calls for information that is irrelevant and immaterial to the issues in this cause.

Next, the defendant respectfully submits to this Court that this interrogatory is patently propounded to the defendant in order to create prejudice and to confuse the minds of the Jury. Bringing into Court masses of minutes going back over fourteen years can have no other effect than to confuse the Jury. The whole purpose is to prejudice the Jury and the whole purpose of all of these interrogatories to a large degree and the bringing in of United Mine Workers and of District 50 is solely for prejudice. If there was a tort committed, which we deny, then the United Construction Workers if a judgment is obtained against them, are amply able to pay it. There is no reason to go beyond the United Construction Workers and it is done solely for prejudice in  
 page 16 } the belief there is a feeling in this country against the United Mine Workers and its President.

Mr. Bryan: I know of my own knowledge that they are

Mr. Robertson: You say you think there is—did you say we are trying to create one or there is already one?

Mr. Mullen: What?

Mr. Robertson: You say you think we are trying to create a prejudice against John L. Lewis, or one already is existing? I didn't understand your statement.

Mr. Mullen: I say in your view there was the prejudice.

Mr. Robertson: You mean there is already one or we are trying to create one?

Mr. Mullen: You are trying to create one before the Jury.

Mr. Robertson: I just want to get your opinion. What I am trying to smoke out is whether you think there is already one and you must be specifically protected.

Mr. Mullen: I think you think so.

Mr. Allen: Mr. Mullen, did I understand you a moment ago to say any judgment we might obtain—I will assume you did not assume we might obtain a substantial one—would be good if alone against the United Construction Workers?

Mr. Mullen: Sure; it would be paid.

page 17 } Mr. Allen: If you can guarantee that, we might get somewhere.

Mr. Robertson: No, I don't think we would, as far as I am concerned.

Mr. Mullen: Said interrogatory constitutes a fishing expedition and is violative of the statutes and laws of the State of Virginia, in addition to the Fourth Amendment to the Constitution of the United States.

Next, that said interrogatory calls for an impossible task for the reason that the time between service of said interrogatories and the date of the trial is not sufficient time in which to gather together all the documents of which copies are demanded in this interrogatory and obtain copies thereof. That embraces somewhat more than that question because through all of this you will find an enormous number of documents called for and in the interrogatories addressed to the United Construction Workers and District 50 they call for, among other things, 402 newspapers.

They are our objections to this question No. 1.

Mr. Robertson: Do you think it would be well to answer each one as we go along or do you want to wait until you finish them?

The Court: I think it would be well to pass on each as we go along.

Mr. Mullen: I think so.

page 18 } Mr. Robertson: If Your Honor please, I can be very brief in what I have to say; I don't know what these other gentlemen will have to say.

Let's go back to the issues in this case and the scope of this thing has taken a wide field, but I think when you get down to the actual heart of the case it is fundamentally simple. We allege that these three different defendants are three component parts of the same organization, the United Mine Workers, or agencies of it and the problem is to pin the alleged tort of the agents or component parts onto the parent organization and the whole problem here is, one, to establish the relationship of the component parts to the principal so that you may know whether or not all three defendants and, if not, which of them, are responsible for the tort alleged in this action, and the next is to establish the commission of the tort, the wrong. Now anything that throws light on what subject is a legitimate field of inquiry.

Now, if Your Honor please, I will take these things up in the order of the first question. We are here in good faith, in dead earnestness prosecuting a suit which to us is a matter of business life or death. The Laburnum Construction Company had built up a business relationship with the third largest commercial coal company in America which promised to run for years throughout the mine fields of page 19 } Kentucky and West Virginia, and our claim is that that relationship was maliciously, illegally and wantonly destroyed by all three of these defendants. Now it is up to us to show the commission of the tort and to show the inter-relationship of these three defendants.

Now this thing—suppose it does cover a period of years. We can't say positively; they know whether it is true or not. We don't think there has been a terrible number of meetings of the Executive Board because we think it is the creature and the tool and the servant of the President of the United Mine Workers and only comes together at his call and at his pleasure and does not meet very frequently because he would rather exercise a despotic individual authority. Now that is our belief and we are entitled to find out whether that is true or not, and if it is true we are entitled to have the Jury know it and the very purpose of these interrogatories is to clear that up before we get to the trial, and what part of it is relevant or irrelevant the Court has said in each one of these preliminary trial conferences, that it is going to reserve its ruling or defer its ruling upon the admissibility and the relevancy of the evidence until we are in the progress of the trial and the Court has a better opportunity to determine as to what rulings it should make.

I say in view of that problem and in view of page 20 } that information and the materiality of it—for instance if those minutes show the transfer of dues

and funds and so-called taxes from one defendant to the other, the measure of authority of one defendant over the other, the working in collaboration and in concert and in unity of one defendant with the other, what could be more relevant to the issue in this case and wherein can the search for that truth be an unreasonable search; and the argument here is not new. It is made every time these cases come up and in the W. A. Chesterman case several years ago which Mr. Marks for our office handled for the V. C. Company they made them bring a boxcar full of documents down to have them searched over a period of months.

As a private business, I don't know of any rule of law, Your Honor, that one litigant can come in and say, "I want to see those records for the purpose that I have stated", and the person who doesn't want to do so says "You can't do that; it is private. I can't let you see it because it is somebody else's business." You don't have to accept any such *ipse dixit* as that. The Court can compel those things to come before him and determine which ones are private business and let them go out and complete the answer to that interrogatory within reasonable limits.

Oppressive and unreasonable. We allege here that they have made it impossible for this company to do construction work out there in the coal fields of Kentucky and page 21 } West Virginia. They have run them out; they have eliminated that field from them. We come now and say if we try to show the relationship between these people, that we say in good faith they have done this tort, we think that is not oppressive and unreasonable. I might cite cases from the Federal Courts and the State Courts following the statutory law of Kentucky and procedure law of Virginia and show they approve it. I have just mentioned the Virginia Chemical Company case. The admissibility of that evidence is not now before the Court because the Court is not going to rule on it until, in the course of the trial. What we are asking the Court now is to make them show their hand. It is knowledge peculiarly in their bosom and keeping which we cannot get anywhere else. We ask the Court to say, "Show your hand and then the Court in all fairness and justice, even at this preliminary stage, will eliminate everything that obviously should not have any place here, if there be such, and the Court has been doing that in answer to all of these interrogatories."

Invasion of the right of privacy. I don't want to say any more about that. You come and ask me to produce one of my business records and I say, "You can't have them because

it is private property. You want me to tell something that I did with somebody else and the Court will excuse me." Did you ever hear any such proposition as that? Are we going to let their *ipsi dixit* close the door like that? page 22 } Create a prejudice. We are not trying to create any prejudice. We are trying to uncover these facts that we have a right to uncover and if they create any prejudice, if it is admissible under the rules of law, let the chips fall where they may. We are not creating any prejudice against them. We are in here now in order that the Court may determine the scope this thing may take. We are not facing a Jury here now when the Court is trying to determine in a preliminary way the general scope of the thing which may go to the Jury.

The United Construction Workers are able to pay any judgment. I think they are, but that doesn't limit our right to get a judgment against all three defendants if we can and collect it out of one or all of them

A fishing expedition. Well, call it that if you want to. The limits of this inquiry are largely within the discretion of the Court, as I see it. These facts are within their knowledge and cannot be gotten anywhere else and we say we have a right to get them in order to prove our case, and that is purpose of the interrogatories.

Talk about an impossible task. It is not an impossible task. It does not cover any great span of years. I would be mistaken if it covers any tremendous number of meetings.

page 23 } Suppose it does. There is, however, a million dollars here at stake in this case and we think it deserves the best effort and all the time necessary to establish a just result that either the plaintiff or the defendants can put on.

I don't know what these other gentlemen want to say.

Mr. Allen: May it please Your Honor, I shall undertake not to repeat what Mr. Robertson has so well said, but to supplement it.

It must be remembered that the only reason for the admission of this evidence is the position the defendant has taken that the United Mine Workers are in no way responsible for what was done out there in Kentucky to our client by, they say, the United Construction Workers. We have a right to every particle of evidence in existence in the files of the United Mine Workers to show that defense is not valid and to prove this is a tort.

American Jurisprudence says in cases of torts:

"One who commands, directs, advises, encourages, procures, instigates, promotes controls, aids or abets a wrongful act by another has been regarded as being responsible as the one who commits the act, so as to impose liability on the former to the same extent as if he had performed the act himself. The liability in such cases is joint and several."

Then the American Law Institute in the restatement of the law of torts at Volume 4, Sec. 876, states it this way.

page 24 } "Declaring that for harm to a third person from the tortious conduct of another, a person is liable if he orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or knows that the other's conduct constitutes a breach of duty and gives encouragement to the other so to conduct himself."

Now that is the general law. There is an old Virginia case that never has been overruled—I believe it is called the *Daingerfield v. Thompson*, which even goes further and says in addition to the words by winks or nods or any conduct whatever encourages or induces another in the commission of a tort.

Now in view of that principle of torts involved here, we are entitled to go into the files of these gentlemen for any and everything that they have done in their close connection with the United Construction Workers or District 50. It may be a hardship on them, but they have brought it upon themselves by the defense which they have made, admitting all the time that the United Construction Workers, or District 50 is an arm, whatever that may mean, of United Mine Workers.

I am wondering if they would deny our right to examine their files and determine which of these minutes we think page 25 } admissible and then ask for the production of those. In view of the close connection which is admitted here and the denial of the responsibility for what United Construction Workers has done, we certainly have a right to go into their files, it doesn't make any difference how laborious it may be. If they don't want us to look over their files to determine which of those minutes have potential value in this case then give us a copy of all of them. If they want to avoid that labor, let us sit down and read them and determine which, if any, are pertinent. We certainly have that right. This is not a criminal case. They cannot plead any violation of the provision against unlawful search and seizure. We simply want information that is applicable

in a civil case that, so far as we know, is connected with no criminality in any way, shape or form. I don't see why we are not entitled to it. This is an important case, a large amount of money involved. What we allege has been done to us is a situation that is almost too bad to describe and no amount of work on their part, if it be necessary, will justify the refusal of information which shows the connection which they deny exists.

Mr. Bryan: If Your Honor please, I would like to say a few words in this connection.

As both Mr. Robertson and Mr. Allen have pointed out, it is the position of the plaintiff in this case that these defendants are three component parts of one organization page 26 } zation or each is a member and agent of the other.

That agency in our opinion is something which must be proved in order to establish liability on the United Mine Workers of America for the tort of its branches, United Construction Workers and District 50. That agency relationship has been denied by the defendants. Now what can we do to prove that the agency relationship exists.

The Supreme Court of Virginia has held many times, and I refer now particularly to the case of *Bloxom v. Rose*, 151 Va.—the Court said this:

“It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish agency in any given case. This is a question which must be determined in view of the facts in each particular case. Whatever form of proof is relied upon, however, must have a tendency to prove agency and must be sufficient to establish it by a preponderance of the evidence. It may be said in general terms, however, that whatever evidence has a tendency to prove agency is admissible, even though it be not full and satisfactory, as it is the province of the Jury to pass upon it.”

It happens in this case that much of the evidence which would have a tendency to prove this agency relationship is in the possession and control of the defendants and is not available to us. The laws of this State take care of a situation like that. The Code provides, in the Code of 1950, Sec. 8:320, that by means of interrogatories we can call for evidence—any evidence which we think will prove our case or page 27 } tend to prove our case and which is in the possession of the defendants which we could call for on a bill of discovery. That is the type of evidence that we have called for here.

I would like to give you a little bit of the background behind this. The defendants have taken the position this calls for evidence going back over a long period of years that could not possibly be relevant. The United Mine Workers of America was organized many years ago, back in the nineties, for the purpose of representing employees in connection with the mining and production of coal. For many years it was affiliated with the American Federation of labor. William Green, who is now the President of the American Federation of Labor, used to be the President of District 6 of United Mine Workers of America. After that Mr. Green became the manager of the United Mine Workers Journal and then became the secretary and treasurer of the United Mine Workers of America and he served in that capacity for many years. After Samuel Gompers died in 1925, Mr. Green, who was then the eighth vice-president, I believe, of the American Federation of Labor, became the President of the A. F. of L. The United Mine Workers of America and the American Federation of Labor worked in harmony for years and years.

After 1932 when President Roosevelt was elected page 28 } the National Recovery Act was passed. Under that it appears that labor organizations were given certain rights which they either didn't have or didn't exercise before and there was a tremendous growth in the organization of unions in this country. At that time some of the unions affiliated with the American Federation of Labor thought it would be better to undertake to organize employees on an industrial basis rather than on the crafts labor basis, such as had been the practice of the American Federation of Labor for many years. That suggestion was opposed bitterly by some of the members of the American Federation of Labor, which resulted in the eight vice-presidents of the American Federation of Labor grouping together and forming an organization known as the Committee for Industrial Organization. Mr. John L. Lewis, the President of the United Mine Workers of America became Chairman of that committee which afterwards developed into the union called the Congress of Industrial Organization.

At about the same time when this split occurred between the United Mine Workers of America and the American Federation of Labor, the United Mine Workers determined to have another district union which would represent employees in the coke and by-products field, and it thereupon organized this union known as District 50. District 50 has been used as the instrumentality of the United Mine Workers of America to organize employees in fields other than the mining and production of coal.

page 29 } Thereafter, the Congress of Industrial Organization decided in 1939—Mr. Lewis was President of that organization at that time—that it would undertake to organize employees in the construction industry on an industrial basis and it arranged for the organization of the United Construction Workers. Mr. Denny Lewis, or Mr. A. D. Lewis, John L. Lewis' brother, became the Chairman of the organizing committee of the United Construction Workers.

In 1942 a quarrel developed between the Congress of Industrial Organization—in the meantime Mr. Lewis had resigned as President of that union and been succeeded by Mr. Phil Murray, who was also a United Mine Worker—a quarrel developed between the Congress of Industrial Organization and United Mine Workers over what the United Mine Workers of America claimed to be attempts on the part of the Congress of Industrial Organization to raid District 50 unions. That was the bone of contention.

As the result, the Congress of Industrial Organization and the United Mine Workers split. After that the American Federation of Labor and the United Mine Workers of America re-affiliated again; I think it was about in 1946, not too long afterwards. Then another quarrel developed and again that District 50, because that seemed to be the union where the jurisdictions clashed, and the United Mine Workers split up.

District 50 is considered to be; in fact, in the publications I have looked at it is stated to be the largest single district at the present time of the United Mine Workers of America. It is what is known as a provisional district which is subject to the complete control and regulation of United Mine Workers of America. The chairman of its organizing committee was appointed by Mr. Lewis—John L. Lewis—with the approval of the Industrial Executive Board. He is an employee of the United Mine Workers of America and paid by the United Mine Workers of America. Miss Katherine Lewis, who is Mr. Lewis' daughter, was also appointed by Mr. John L. Lewis with the approval of the International Executive Board. She is an employee of United Mine Workers of America and is paid by that organization—

Mr. Mullen: I don't like to interrupt, but there is no evidence in this case of what he is saying and here are the interrogatories answering all of those questions with the answers to the questions before the Court today.

Mr. Allen: We expect to produce evidence of that and that is the background of the necessity of getting these documents.

Mr. Robertson: It is already here in these publications.

Mr. Bryan: I have looked at copies of the page 31 } United Mine Workers Journal dating back as far as I could go, which was about 1896; they were scattered copies at that time. What I have been saying is reported in those issues. That is where my information comes from. It is their official publication.

We think it is very relevant and very material to show, not only that District 50 was organized, but why it was organized, how that organization came about. The International Executive Board of the United Mine Workers of America was responsible for that.

In 1941 after District 50 had been organized, originally it had as President a man named Nelson. In 1941 the entire organization was reorganized. They had a chairman of the organizing committee, they had a special Organizing Committee, great efforts were put out to increase the membership of District 50, and there are repeated articles in the United Mine Workers Journal that everything these officers and agents had done met with the entire approval of the International Executive Board. In truth, it is just simply an arm or branch of the United Mine Workers of America, subject to its complete domination and control, just as much as if you had a servant working under you carrying out every direction you made.

We are not satisfied simply to rely on the statements in the answers which have already been filed that page 32 } these organizations are affiliated together. That may not be enough to support what we have alleged, but there is ample proof if it is made available to us to show what we allege. We are satisfied that it is there and under the laws of this State we are entitled to it and we have asked for it.

Mr. Allen: May I add one word because I don't believe we will have anything further to say?

The Court: You all say all you have to say because Mr. Mullen has the close.

Mr. Allen: I think it is important, if Your Honor please, to realize that this District 50 has nationwide jurisdiction, both geographic and industrial. In other words, its jurisdiction, both geographical and industrial, is as extensive as that of the United Mine Workers itself and it was organized by John L. Lewis after his break with the C. I. O. for the express purpose of competing with the A. F. of L. in the organization of workers. This District 50 has its office in the very same building, the United Mine Workers Building in Washington, 900 15th Street, where the United Mine Workers have their offices and John L. Lewis' brother is at the

head of it and Katherine Lewis, I believe, his sister, is treasurer, and that is how close they are together and that shows the necessity of getting documentary evidence of their co-activities.

Mr. Bryan: I would like to say one more thing page 33 } and that is about the United Construction Workers.

As I pointed out, that was organized as a separate union by the Congress of Industrial Organization. In 1942 when the United Mine Workers of American and the C. I. O. split, the United Construction Workers left the C. I. O. and requested affiliation with District 50. That was accomplished under an agreement dated sometime in June or July, 1942. I think that is right; I have seen the agreement in these publications. I don't have a copy of it with me.

At the present time District 50 and the United Construction Workers have the same top officers in Mr. A. D. Lewis and Miss Katherine Lewis and Mr. O. B. Allen, Comptroller. The Regional Directors apparently are Regional Directors for both District 50 and United Construction Workers in every case. We think that the territorial limits of each region are identical; they apparently cover the same industries. In the United Construction Workers News and the District 50 News there is a column called "The Victory Parade" which purports to set out agreements made by those organizations for the purpose of representing employees of various companies. You will find that in some cases a barber shop will recognize District 50 as a bargaining agent and in some cases a barber shop will recognize the United Construction Workers as representative of the barbers. The same thing applies to stores, to groceries, even funeral homes

There is a multitude of businesses that are covered. page 34 }

We just came back from Pikesville, Kentucky, where we took the depositions of some of the representatives of the United Construction Workers and District 50. One of the people whom we examined was Mr. Hunter—A. C. Hunter, Regional Director of District 50 and of United Construction Workers, of Region 58 of both organizations. We asked Mr. Hunter, "Will you please explain to us the difference between District 50 and the United Construction Workers?" Mr. Hunter said, "I don't know." We said, "You can't tell that?" He said, "No, I don't believe anybody knows." Actually, I think they are the same organization traveling under two different names; that is all.

All of that is information which we believe is relevant and we believe we can get information on all of that from the

minutes of the International Executive Board which controls lock, stock and barrel both organizations.

Mr. Mullen: If Your Honor please, Mr. Robertson is mistaken about there not being many minutes. They hold regular meetings and those that cover only a short period which have been brought down here and which were in Court—Your Honor saw the package that hick (indicating). Those meetings are not simply cut and dried meetings like Mr. Robertson has said.

The argument that Mr. Allen made that they page 35 } are entitled to go into all of our files is directly in the face of the decision of the United States Supreme Court which I cited to Your Honor before the Federal Trade Commission—

The Court: Is that the Kentucky case?

Mr. Mullen: No—laid down the general principle that you cannot order any such production of papers for the general effort to find something which they cannot point out, and the Virginia Statute says when the Court is satisfied that the exhibits are relevant—that is the point, and in the cases they cited in the memorandum they heretofore filed in every one of those cases it is said it must be shown that the evidence called for is material.

So that his argument is directly in the face of not only the Supreme Court of the United States, but a great mass of State cases throughout the nation, and this constitutes under those cases a fishing expedition which they have no right to engage in.

Their argument is and has been that they want all the information they are calling for to prove agency or to prove that the three are all component parts of one unit. I have repeatedly stated here that the International Union, the United Mine Workers of America, is a union having jurisdiction in the United States and Canada, that for jurisdictional purposes it is divided into thirty districts, one of which is

District 50, and that United Construction Workers page 36 } is a division of District 50, and the Constitution of the United Mine Workers, which they have, and the rules of District 50 and United Construction Workers make perfectly plain what the relation is. They now have the charter of District 50 which shows it was organized by order of the International Executive Board in September, 1936, which organization was then provisional subject to the approval of the regular Constitutional Convention of the United Mine Workers of America. It was embodied in the Constitution of the United Mine Workers of America where it was provided that District 50 was organized. They also

have the Charter of the United Construction Workers which expressly states that it is a division of District 50, United Mine Workers of America, and in the answer to Question 9 in the interrogatories addressed to the United Mine Workers it is specifically stated what the relation is.

Mr. Harris: Suppose we read the Judge that question, if you don't mind—Question No. 9. I think it will emphasize this argument better.

Mr. Mullen: This is the question:

"Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that among other objects it was the object of United Mine Workers of America to do the following: To unite in one organization, regardless of creed, color or nationality, or all page 37 } workers eligible for membership employed in and around coal mines, coal washers, coal processing plants, coke ovens and such other industries as may be chosen or approved by the International Executive Board.

"If so, state the following: During what period or periods did said constitution so provide?"

The answer to that is:

"Yes, during all the time inquired about."

"(b) With respect to the one organization mentioned in the request quoted above were the members of District 50 at anytime between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, a part of this one organization and, if so, during what period or periods?"

The answer to that is:

"Yes, at all times inquired about the members of District 50 were a part of the United Mine Workers of America, but retained their identity, membership, rights and privileges at all times as members of District 50, or as provided in the Charter of District 50 and Article XX of the Constitution of the United Mine Workers of America.

"(c) With respect to the one organization mentioned in the language quoted above, were the members of the United Construction Workers at anytime between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949,

a part of this one organization and, if so, during what period or periods?"

The answer to that is:

"Yes, at all times inquired about the members page 38 } of the United Construction Workers were a part of the United Mine Workers of America, but retained their identity, membership, rights and privileges at all times as members of the United Construction Workers, Division of District 50, all as provided in the Charter of the United Construction Workers and the rules of District 50 and Article XX of the Constitution of the United Mine Workers of America."

I have said again and again the question of agency was not involved. You have the answer in the Charter, you have the answer in the Constitution and the rules—

Mr. Robertson: May I interrupt one minute? Do you deny any agency?

Mr. Mullen: It isn't involved.

Mr. Robertson: I can't understand you. That is the whole heart of our case. How can you say it is not involved? Do you admit it or deny it? If you admit it, it must be involved, but how can you say it is not involved when it is the whole foundation of our case? I didn't mean to interrupt you.

Mr. Mullen: We deny agency, yes, because the question of agency doesn't exist.

Mr. Robertson: Then we will have to go to it.

Mr. Mullen: I can't be an agent for myself.

Mr. Robertson: How can you say it doesn't exist when it is actually set out in the motion and that is the page 39 } basis of our case?

Mr. Mullen: You stated here today you had been trying to find out and were anxious to find out whether there was the relationship of agency between them or whether the relationship was that of all parts of one constituent organization, and we have answered it: They are parts of one constituent organization.

Mr. Robertson: And you deny the existence of agency and we assert it, and that is the main issue in the case.

Mr. Mullen: But, Your Honor, they have their answer there in the Charter of the United Mine Workers of America.

"The United Mine Workers of America hereby establishes a provisional District No. 50, under the conditions herein set forth, to be known as Gas and By-Product Coke Workers, and

to have jurisdiction over workmen employed in and about plants processing coal within the United States and Canada; and for the establishment of such conditional district, this Charter is issued to James Nelson, President, James Nelson, Acting Secretary-Treasurer, their successors in office and associates in membership.

"The said district, and all sub-districts and local unions established therein, shall be subject to the jurisdiction of the International Organization United Mine Workers of America and may adopt constitutions and by-laws not in conflict with the Constitution of the United Mine Workers of America and this Charter of affiliation.

"Said district, its members and subordinate branches, shall acquire no rights in the fund, or to participate in the election or conventions of the United Mine Workers of America, but shall have their own autonomy with respect to their elections, conventions and wage negotiations.

"The district and its members shall pay the International Organization United Mine Workers of America dues and assessments, as provided in the International Constitution, and shall receive the support and guidance of the International Organization in matters of policy, administration, organization and wage negotiations, as its International Executive Board may approve.

"All questions of interpretation arising under this Charter shall be determined by the tribunals set up in the Constitution of the United Mine Workers of America, and this Charter of affiliation shall be submitted for approval to the next regular constitutional convention of the United Mine Workers of America.

"By order of the International Executive Board.

"Dated this 1st day of September, 1936.

(Signed) JOHN L. LEWIS, President.

United Mine Workers of America

page 41 }

(Signed) THOMAS KENNEDY,

Secretary-Treasurer,

United Mine Workers of America."

There is the Charter. The relation of one of these organizations to the other is clearly set forth in that and in the specific answers we have put in here and that is no basis for their asking for these further minutes because we have answered what they have claimed all along was the basis of their inquiry, namely, to find out whether it was the relationship of agency between the United Construction Workers and Dis-

trict 50 and the United Mine Workers or whether they were one or parts of one union.

Mr. Allen: Mr. Mullen, I didn't quite understand some of your statements a moment ago. I would just like to ask you one question to see if I understand the position you take.

You say that there is no question of agency involved, as I understood you, because you couldn't be an agent for yourself, meaning, I suppose, that each one of these organizations is a component part of one organization. Now if that is what you mean, do you go further and mean that being so, one part of the organization—one of the component parts of the organization may do something in the prosecution of the rights of the workers without responsibility on the other part?

Mr. Mullen: I haven't made any statement on page 42 } that point; I am not going to. I think that is only a part of a very large question which cannot be answered yes or no.

Mr. Allen: Of course, your charter may say one thing and your actions make you agent anyway.

The Court: Gentlemen, the Court will require the defendant to answer the first part of Question 1 in Further Interrogatories 16, which reads as follows:

"Furnish a copy of the minutes of all meetings of the International Executive Board of United Mine Workers of America in which action was taken in connection with organizing District 50, United Mine Workers of America, hereinafter sometimes called District 50."

As at present advised, the Court declines to require the defendant to answer the second part of the question which reads as follows:

"and furnish a copy of the minutes of all meetings of said International Executive Board held between the date of the organization of District 50 and October 28, 1948."

Mr. Robertson: I just want to ask one question. How are you going to tell whether they have complied with the order of the Court, or not?

The Court: That is something we will have to cross later. I think the gentlemen will deal with the Court fairly and are going to answer the question as far as they can.

Mr. Robertson: I have no doubt about that, but I have very decided doubt that some of the gentlemen page 43 } they represent will do so.

Mr. Mullen: Mr. Robertson has no basis for that statement.

Mr. Robertson: Yes, the statement of Mr. Tom Rainey in Pikeville, Kentucky and Mr. Hunter and some others.

Mr. Mullen: You have the fullest answer you need in all of these interrogatories.

Mr. Robertson: I challenge that statement.

The Court: If the Court requires the defendants to produce the minutes, I am satisfied that Colonel Harris and the firm of Williams and Mullen are going to cooperate.

Mr. Robertson: I realize that. I am not casting any reflection on them, Your Honor.

Mr. Mullen: The next question is:

"Who were the members of the Policy Committee or Conference Policy Committee of United Mine Workers of America between the date of the organization of District 50 and August 4, 1949, and who have been the members of such committee since August 4, 1949; when and by whom was each of these persons appointed or elected a member of such committee; and during what period or periods did each serve as a member of such committee?"

And the third question is:

"For what purpose or purposes was the Policy Committee or Conference Policy Committee of United Mine Workers of America organized, and since the date of the organization of District 50 what have been the powers of such committee?"

page 44 } And the fourth question is:

"Furnish a copy of the minutes of all meetings of the Policy Committee or Conference Policy Committee of United Mine Workers of America held between the date of the organization of District 50 and August 4, 1949, and also held since August 4, 1949."

Mr. Allen: Just a minute. Just before we get into a discussion of that I think we should except to Your Honor's ruling in refusing to require the defendant to furnish—

Mr. Robertson: I think that is understood.

The Court: I understand you except to the Court's action in refusing the last part of the question and the defendants except to the granting of the first part.

Mr. Robertson: The way we have understood it, everybody excepts to all rulings of the Court.

The Court: All adverse rulings. Is that the understanding?

Mr. Mullen: Yes.

Mr. Allen: And the grounds are those stated in the oral argument here before Your Honor.

Mr. Robertson: No, we have gone further than that; that the door is wide open for everybody to reserve every right, whether specified or not.

Mr. Allen: The Court of Appeals says that won't do.

Even though you have that understanding, you page 45 } can't assert a ground you have not stated.

Mr. Robertson: I don't say in the Court of Appeals; I said to elaborate on them and to amplify them before this Court hereafter.

Mr. Allen: Still, the Court of Appeals says the Judge must have the benefit of them.

Mr. Robertson: I think in fairness to these gentlemen, I think I should state what my understanding is, that everybody here is reserving to the utmost all of their legal rights to every adverse ruling of the Court and at any time while this case is before this Court they can specify their reasons and elaborate on them just as much as they desire to do. That would mean before we get to the end of this trial this Court has got every argument in detail that all sides can make and that is in the record for the Court of Appeals. That has been my understanding all the way through.

Mr. Mullen: That is my understanding of it.

Mr. Allen: The point I was making was this. It did not concern the understanding so much, but so that nobody may find themselves in a hole when they get through, the Court of Appeals has said that though we have an agreement with Your Honor and with all counsel that we will just go along and except and we can state our exceptions after the case

is all over, those objections have to be stated to page 46 } Your Honor before you lose control of the litigation. The Court says you must have the information. That is the point I was making.

The Court: Are you gentlemen satisfied with the way we are proceeding?

Mr. Robertson: I am satisfied, Your Honor.

Mr. Mullen: I am satisfied.

Mr. Harris: I think we are protected, Judge. I think the reservation of finality of rulings that Your Honor made sometime back on some of the questions and what we are doing now under the stipulation Mr. Robertson has stated—I think we are protected.

The Court: That is a matter for you gentlemen to be concerned with.

Mr. Harris: I haven't read the case Mr. Allen mentioned and if you give me the citation I will check it up.

Mr. Robertson: It will all be in the record before we leave here because we have to make a complete argument to Judge Snead before Judge Snead can rule and there it is in black and white in the record.

Mr. Mullen: We have all stated very fully our objections in the argument on the interrogatories. Now the question coming up the second time on the question of the right to introduce, the relevancy of the evidence—

page 47 } The Court: At the trial.

. . . . .

page 48 }

. . . . .

Mr. Mullen: Now I read those questions. The Policy Committee is a committee that meets on the question of the contract between the United Mine Workers and the mining employers.

Mr. Robertson: Repeat that again because in all my study I have never been able to find out what the Policy Committee is and this is the first moment we have heard you say it.

Mr. Mullen: It is a committee called into session to determine on the question of the contracts that the United Mine Workers make with employers and on the question of whether they will strike to enforce it, and so forth.

It would be utterly impossible to comply with this. There are 300 members of it. They are elected from three hundred different unions. No record is kept in the home office of who goes to each meeting. They come there, having been elected; they vary constantly. There would be no way of doing that except to write to three thousand districts and ask them to go back fourteen years for each man and find out who was on the Policy Committee, who they elected, when they elected him, and so forth. It has nothing to do with this case. It is a United Mine Workers Committee engaged in backing up the officers in their controversies with the mine owners.

page 49 } Mr. Bryan: What is the purpose of the Policy Committee?

Mr. Mullen: It is to confer with the officers of the company on the question of the contracts to be made with the mine owners, as to the question of rates and so forth.

Mr. Bryan: Does it have any power?

Mr. Mullen: Advisory.

Mr. Bryan: Advisory, only? Is District 50 represented on the Policy Committee?

Mr. Mullen: I don't think so. I don't know.

Mr. Bryan: You are not sure?

Mr. Mullen: I don't think so. That certainly has nothing to do with it and it would take an interminable time to get that; couldn't get it in time for the trial of this case.

Mr. Bryan: It might very well be the question as drafted is not right in view of what you say, but I have found repeated references to the Policy Committee or Conference Policy Committee—I don't know which the correct name is—

Mr. Mullen: Conference, I think.

Mr. Bryan: —as to actions taken by that committee. I have assumed it was a rather large committee. I know positively that action has been taken by the Policy Committee has some authority with reference to the affairs of District 50 and I believe that District 50 is represented on the Policy Committee. I believe that the Policy Committee has some authority with reference to the affairs of District 50 and the United Construction Workers.

This is just another example, Judge, of what we are up against where all of the information really is in the possession of the defendants. It wouldn't be a very hard job for us to find ourselves going into trial without the information in advance and without the means of proving satisfactorily what we want to show. If the defendants can force us into that sort of position, it would be very advantageous to them. It is a shame I think we have to go into this multitude of questions the way we have, but this is just not the usual case.

The Court: Do you have any objection to answering 3?

Mr. Mullen: "For what purpose or purposes was the Policy Committee or Conference Policy Committee of United Mine Workers of America organized, and since the date of the organization of District 50 what have been the powers of such committee?"

Mr. Harris: I don't think we really object to that, Judge.

Mr. Bryan: Could you answer Question 2 if it page 51 } were revised to state generally what is the Policy Committee or Conference Policy Committee and whether or not District 50 or United Construction Workers have been represented on that committee? That would release you of the necessity—

The Court: That would be a general question. I believe that would be a fair question.

Mr. Mullen: I have no objection to that.

The Court: Get it worded like you want it, Mr. Bryan.

Mr. Bryan: I would word it this way—

Mr. Harris: I suggest you are combining 2 and 3 in the way you are talking.

Mr. Bryan: No, I will leave 3 the way it is and have No. 2 read like this:

The Court: Suppose we recess for five minutes and you can word it and consider combining 3 with it.

(A recess of five minutes was taken.)

Mr. Bryan: I haven't written it all out, but I think I know what to say. I would make the question read thus:

"When and upon what authority was the Policy Committee or Conference Policy Committee of United Mine Workers of America first organized? State generally the position of the Policy Committee or Conference Policy Committee. Has District 50 or United Construction Workers been  
page 52 } represented on this Policy Committee or Conference Policy Committee?"

The Court: Will that take into consideration—

Mr. Bryan: Just a second, sir. I might put another question:

"Is there any difference between the Policy Committee or Conference Policy Committee? If so, state what is the difference."

Mr. Harris: I don't see any harm in that.

Mr. Mullen: No, I have no objection to that.

The Court: Then you want Question 3, too?

Mr. Bryan: Yes.

Mr. Mullen: We will answer 3 also.

The Court: 2 as amended, and answer 3. Now 4 is next.

Mr. Pollard: Your Honor, I would like to ask about this third amendment to Question 2:

"Has District 50 or United Construction Workers been represented on this Policy Committee or Conference Policy Committee?"

How about a time as to that representation? Do you mean ever?

Mr. Harris: I think that is all right. Have you got the question pretty accurately written out?

Mr. Pollard: Yes, sir, I have it.

Mr. Harris: Because I didn't try to write it.

The Court: Now 4: "Furnish a copy of the page 53 } minutes of all meetings of the Policy Committee or Conference Policy Committee of United Mine Workers of America held between the date of the organization of District 50 and August 4, 1949, and also held since August 4, 1949."

Mr. Mullen: In the first place, I don't think there are any; and if so, they were sketchy.

Mr. Robertson: Maybe we can save time on that.

Mr. Bryan: I think we might say this:

"Furnish a copy of the minutes of all meetings of this committee pertaining to District 50 or United Construction Workers."

We are not interested in rates set for coal, and so forth.

Mr. Harris: That is rather broader, I think, than Mr. Bryan really intends. District 50 has dealings with lots of different industries and it might be a question with reference to some wholly unrelated industry that had come up and in not way related to the construction industry.

Mr. Robertson: We want to show the exercise of the power.

Mr. Bryan: That is a very important point.

Mr. Allen: And control.

Mr. Bryan: It is not only the fact that the United Mine Workers of America have the right to control and regulate District 50 and United Construction Workers, but we think it is very essential to show the manner in which that page 54 } control has been exercised.

The Court: How did your question read as re-phrased?

Mr. Bryan: The question as reframed would be this way:

"Furnish a copy of the minutes of all meetings of the Policy Committee or Conference Policy Committee of the United Mine Workers of America held between the date of organization of this District 50 and August 4, 1949, and also held since August 4, 1949, insofar as those minutes pertain to District 50 or United Construction Workers."

Mr. Mullen: If you limit that to United Construction Workers, probably that would be all right.

The Court: What about that?

Mr. Robertson: That boils it down to the two defendants; exclude everything else.

Mr. Bryan: After all, United Construction Workers has

been admitted in the answers to the interrogatories as a division of District 50, but the principal representatives and officers that took part in the trouble in Breathitt County, Kentucky, were officers and representatives of both United Construction Workers and District 50.

Mr. Harris: Mr. Mullen, do you see any particular objection to that as reframed?

Mr. Mullen: No, I don't because I don't think there are any minutes.

Mr. Robertson: You have no objection to 5, have page 55 } you?

Mr. Harris: We don't see the materiality of it, but there is no reason to get into a row over it, Judge.

The Court: All right, you will answer 5. How about 6; any question about No. 6?

Mr. Mullen: This goes back again over fourteen years. I don't want to raise any particular objection. We objected to it generally.

Mr. Robertson: That couldn't be very much. If it comes up it would be very little.

Mr. Mullen: They were made a provisional district under their charter and then that was ratified by the Constitutional Convention, but I know there hasn't been any such request as this.

The Court: All right, suppose you answer 6. How about 7?

Mr. Robertson: You have no objection to 7, have you?

Mr. Mullen: We don't know anything about that.

Mr. Robertson: You could find out real easy.

Mr. Bryan: If they can't answer it, we can prove it another way.

The Court: All right, answer 7.

Mr. Harris: We don't know and he doesn't page 56 } insist I believe.

Mr. Bryan: No, we would like for you to answer if you can, but if you want to take a trip to West Virginia and take some depositions—

Mr. Robertson: I don't want to go out there any more.

The Court: Answer it if you can. That is the best you can do.

Mr. Robertson: You don't object to 8, do you?

Mr. Mullen: I don't reckon we want to object to 8.

Mr. Harris: That is all right.

Mr. Mullen: And that would cover No. 9.

Mr. Robertson: There can't be any objection to 9; that is easy.

Mr. Mullen: I say that leaves 9. When you say furnish

a copy of the minutes of the meetings of the International Executive Board taking action on each such request you mean the resolutions in the minutes taking action; you don't mean in the whole minutes?

Mr. Robertson: Just the part pertaining to it. There might be a recital of fact and then the resolution.

Mr. Mullen: All right.

Mr. Bryan: Before we leave that question I would like to get something clear in my own mind. Is it the position of the defendants that District 50 and United Construction Workers are autonomous unions?

Mr. Harris: I can't answer that question. You have asked and we are going to give you the answer in writing whether they are, or not.

Mr. Mullen: The Charter states it is autonomous on certain points. I read it here today.

Mr. Robertson: I don't know what autonomous means.

Mr. Harris: I don't, either.

Mr. Robertson: I don't know what it means when the Constitution says you have got to elect your members of the International Executive Board and your answer says some of them are appointed. I think that means the fine Italian hand, but I am afraid to say so because you will get mad.

Mr. Harris: I haven't been angry to the slightest degree since I came to Virginia.

Mr. Robertson: What is the date on which we will get these answers?

The Court: What about 14 and 15? What set do you want to take next?

Mr. Mullen: No. 15.

Mr. Robertson: You don't object to any of those, do you?

Mr. Robertson: You don't object to any of those, do you? page 58 } Mr. Harris: Is 15 United Construction Workers or District 50?

Mr. Mullen: District 50.

Mr. Robertson: All of your objections are substantially the same, aren't they?

Mr. Mullen: Not necessarily. The first one is:

"Furnish a copy of the issue of 'The District 50 News', the official publication of District 50, published under date of October 20, 1941, and known as Volume I, No. 1 (also known as Volume IV, No. 42), and furnish a copy of all subsequent issues of said The District 50 News to and including the issue

published under date of April 15, 1948, and known as Volume 7, No. 11."

And the second question is:

"Furnish a copy of the issue of 'The News', the official publication of District 50 and United Construction Workers, United Mine Workers of America, published under date of May 5, 1948, and known as Volume I, No. 1, and furnish a copy of all the subsequent issues of said The News to and including the issue published under date of October 20, 1950, and known as Volume III, No. 20."

I might say at the same time that they called for in the next interrogatory addressed to United Construction Workers:

"Furnish a copy of the issue of 'United Construction Workers News', the official publication of United Construction Workers, published under date of August 1, 1940, page 59 } and known as Volume I, No. 1, and furnish a copy of all subsequent issues of said United Construction Workers News to and including the issue published under date of April 20, 1948, and known as Volume IX, No. 8."

That calls for 402 papers to be furnished. In the first place, we don't know that we have them. They have got to be dug down in old dusty files to be found. If we have a file—we know we had it back to a certain date—if we have a file of all of those papers, we are willing to make them available to them to read and take out anything they want to. We don't think 402 newspapers should come in here to encumber this record. If they find any items in there that they think are pertinent, then they can offer them in evidence and the Court can pass on them, but to furnish 402 papers is unreasonably burdensome, and we make the same objection as I made in the beginning to introducing the minutes of the Executive Board in the argument heretofore under the United Construction Workers, United Mine Workers, but they say they are hunting for information.

The Court: Is that satisfactory, to put the papers at your disposal?

Mr. Bryan: Where will you put them at our disposal?

Mr. Mullen: We prefer to do it in Washington, if we have them—the only permanent file they kept.  
page 60 } Mr. Bryan: I have spent days in Washington, Your Honor, at the Congressional Library and also

at the Library of the Department of Labor. They have very complete files; they have in bound volumes these official publications of the defendants. There are three publications involved. First, is the United Mine Workers Journal. After District 50 was organized a page in the United Mine Workers Journal was dedicated to District 50 under a headline called District 50 News.

Thereafter, in about 1940 or '41, District 50 commenced to publish its own publication known as District 50 News. At about the same time, I think in 1940, the United Construction Industrial Organization, commenced to publish its official paper known as the United Construction Workers News. After United Construction Workers and District 50 became affiliated, District 50 being taken into—I mean United Construction Workers being taken into District 50 as a division of District 50, United Construction Workers continued to publish its own paper known as the United Construction Workers News. That continued down to 1948 when the two papers, I presume for economic purposes, were consolidated into one known as The News.

There are many articles in those papers which have a direct bearing on the control which has been exercised page 61 } by United Mine Workers of America over these two subordinate branches and a bearing on the manner in which that control has been exercised. We cannot withdraw those papers from the library. It is possible to have them photostated, but that would be an enormous expense. There are many portions of the papers that have absolutely nothing to do with this case and wouldn't be in evidence, but there are many articles in the papers which are relevant and material.

The Court: As I understand from counsel for the defendants, they are willing to put all the papers they have that you have requested at your disposal to look at and if there is anything you think is relevant, they will consent that you offer it in evidence.

Mr. Bryan: Will you bring them here to Richmond?

Mr. Harris: But we don't waive our objection to it at the time it is offered.

Mr. Robertson: Of course not.

The Court: But the manner in which it is offered you raise no objection?

Mr. Harris: I think we can do that.

The Court: In other words, you can introduce it in evidence—offer it in evidence.

Mr. Robertson: Suppose he would go to Washington—you would make these papers available to him, he would go to

Washington, examine them, think a part was page 62 } relevant and have a typewritten copy of it made with a reference to the volume and number—you, of course, could satisfy yourself if you wanted to that was a correct copy—then you would let that copy be introduced?

The Court: As I understand, they won't object to the manner in which it is introduced, but reserve the right to object to it—

Mr. Robertson: As to the substantive material.

Mr. Harris: As we technically call it, we won't object to it on the ground no proper foundation had been laid as to the accuracy of the exhibit, but any question as to the admissibility we would reserve.

The Court: But if they were included in the interrogatories, I take it they have a right to offer the interrogatories and you would have a right to object to the admissibility. I think that ought to be clarified.

Mr. Bryan: Will the same apply to the United Mine Workers Journal? That is not covered in this particular interrogatory.

Mr. Mullen: That hasn't been called for.

Mr. Harris: You are getting us into an uncharted sea if you ask for something the interrogatories don't cover.

Mr. Robertson: It is an official publication.

Mr. Bryan: We can go back and make another one, if you want to, but the same principle applies.

page 63 } Mr. Harris: I don't think with as long a record as we are going to have we ought to start on oral interrogatories from the other side.

Mr. Robertson: All right, we have a man here to take them down. I am trying my best not to have any more interrogatories or depositions.

The Court: I understood as far as you knew this would be the end of the interrogatories.

Mr. Robertson: Yes, sir.

Mr. Mullen: Of course, we could object to the interrogatories calling for those on the ground that it has been disclosed that he has access to the source of information called for and interrogatories are intended to be produced where that is the only way they can get the information. Now it has been disclosed that those records are in the library where they can read them, but we hadn't made that point. We are willing to have them at your disposal and if you find any item that is pertinent if he wants to make a longhand or typewritten copy and give us a chance to compare it and introduce it, I see no objection to that.

Mr. Robertson: Of any of the publications produced we do so in time for you to check them and you preserve all your rights. If he does all the work, I don't think you would object to it.

Mr. Harris: Mr. Mullen, maybe some of those page 64 } after we consider it in Washington we could get sent to your office.

Mr. Mullen: We had difficulty finding even the limited number you called for before and we know all of these earlier ones way back there if in existence are buried in dust and everything else.

Mr. Robertson: Suppose he locates this thing up in the Department of Labor and gives you the reference. You know if they are in the Department of Labor, they are correct.

Mr. Mullen: All right, give us a copy of the reference so we can compare it or if we haven't got them we will go to the Department of Labor and compare them.

Mr. Bryan: There are some we will probably want to have photostatic copies made of, but I would like to hold that to a minimum as far as possible.

The Court: Then I understand these gentlemen will co-operate with you in that respect.

Mr. Bryan: Who could we see in Washington? The editor?

Mr. Harris: I think Mr. Hought.

Mr. Robertson: Most newspapers are bound up in volumes for certain periods and if they are available and sent down here, it would be very much easier for everybody.

Mr. Mullen: We will see what we can do about that.

Mr. Harris: Just to make things a little hard page 65 } on the other side we are not interested, Judge.

Mr. Robertson: Sir?

Mr. Harris: Just to make things hard on the other side, we are not interested.

Mr. Allen: I am thinking of the mechanics of this thing and to keep this record down and to keep as much volume out of it so far as the actual physical documents are concerned. If these gentlemen—I am just making this as a suggestion—if these gentlemen would agree for us to see these various papers; say, for instance, take Question No. 2 of Interrogatory 15, furnish a copy of the issue of the News, and so forth—somebody from the office of some of counsel for the plaintiff or Mr. Bryan could go there to the Department of Labor or to the newspaper office or the office of the editor of these papers and read the article they want introduced in evidence, giving a description of it, right into one of these Audograph machines which they use down in your court in taking testi-

mony of a witness, and then just play it to the Jury, it would be perfectly plain.

Mr. Robertson: I think we ought to consider the cost we are put to on these various interrogatories.

Mr. Harris: I can't agree to that, anyhow.

Mr. Allen: You might let me get through.

Mr. Harris: You have said enough for me to object.

Mr. Allen: No, I am coming to what you said.  
page 66 } Then we can bring that machine down here and have everything that we have read into it transcribed and show a copy to them and let them check exactly what we are going to offer in evidence and it would save bringing all those papers down. They will have it, they can compare it with the papers. We could get the copies in that way into court better.

Mr. Mullen: I don't care how you get the copies.

The Court: Just so it is a true copy.

Mr. Harris: I do object to him saying anybody from our side going down to the Department of Labor and help pick them out.

Mr. Allen: No, I didn't say that. I said we could go to the office of your editor or the Department of Labor and get correct copies of the articles we wanted and read them into the machine.

The Court: The articles you are interested in, bring the machine to Richmond, have it transcribed, give a copy to counsel for the defendants and let them check with the originals in Washington to see whether or not—

Mr. Robertson: You will wind up with a whole lot of expense and three times as long a record as if you went up there with Mr. Williams and had him write them out.

The Court: As I understand, you gentlemen are not concerned how we get them transcribed, but whether they are accurate?

page 67 } Mr. Harris: That is right.

The Court: That is a matter for counsel to work out.

Mr. Bryan: You will have the copies of the papers here at the trial available?

Mr. Harris: I don't see how we can overcome that. Whatever the Court tells us to have, we will have.

Mr. Bryan: We would want the Jury to see some of them.

Mr. Harris: We will object to showing them the whole newspaper.

The Court: Why not look at the papers and see whether there is anything in there you would want?

Mr. Bryan: I have seen them and there is.

The Court: We will cross that bridge when we come to it.

Mr. Bryan: We have no way to show that until we get them here.

The Court: They will make them available to you, I understand.

. . . . .

page 68 }

. . . . .

Mr. Mullen: And there is no objection to 3 and no objection to 4.

Mr. Harris: This is on 15?

Mr. Mullen: Yes. 14 we can dispose of in a few seconds.

Mr. Allen: That is the same thing.

Mr. Mullen: Yes, we were discussing the newspapers a moment ago.

Mr. Robertson: So the same as 15 for 14?

page 69 } The Court: The same agreement and ruling on 14 as 15, is that correct?

Mr. Harris: 3 is where that applies, isn't it?

The Court: Furnish a copy of the United Construction Workers News, and so forth.

Mr. Robertson: Judge, the other two things I have on my notes here for today—

The Court: Have we finished with these interrogatories?

Mr. Harris: I defer to Mr. Mullen. I think we have finished, but I haven't got the documents.

Mr. Mullen: I think that is all right.

The Court: Now we are through with the interrogatories. Before we get to the next item on your agenda, steps will be taken to embody what has been done here in an appropriate order?

Mr. Robertson: I will undertake to prepare that.

The Court: To bring us up to date.

Mr. Robertson: The only two other things I have for argument today, and in view of what the Court said I don't think you are ready to act on one. First, what is the date for the answer to these interrogatories?

The Court: What would be a reasonable date in your opinion to answer these interrogatories, 14, 15 and 16?

page 70 } Mr. Harris: I am trying to figure. It is somewhat difficult, Judge, for me to speak for those lawyers up there that have to check because they

have other court engagements that have tied them up. It is not our disposition to delay it.

Mr. Robertson: What do you think about the 15th of December?

Mr. Mullen: I was going to suggest the 20th. That would be a little more than a month.

The Court: Make it the 20th of December.

Mr. Robertson: I would like to ask one more thing: I don't know whether they want to do it. Do you think it wise to try and get one other date for one further pre-trial conference to get out of the way any other preliminaries we can before the trial date?

The Court: If you gentlemen think that is necessary.

Mr. Robertson: I have nothing else in mind, but I think it would safeguard everybody and the Court.

The Court: How would December 11th suit you gentlemen?

Mr. Harris: I am tied up in a trial on that date.

Mr. Mullen: My idea on that—we would know more after we have worked on this case and I would think early in January along about the 6th or 7th would be better for that.

Mr. Robertson: I think that is all right. I think page 71 } it ought to be early enough if anything comes up that requires further action on anybody's time, you have enough time to do it.

Mr. Mullen: I don't know what there is to come up.

Mr. Harris: Couldn't there be a little flexibility in that? I have another case suing the same defendants for the same amount of money to defend in the Federal Court in Birmingham and have got a pre-trial hearing set and I don't know what that Judge is going to do. Down there the Federal Court pays no attention to a State Court any more than if they weren't in existence. You can be in a trial of a case in a State Court and it is no excuse for not showing up in the Federal Court.

The Court: Do you have any idea of when that pre-trial conference will be heard?

Mr. Harris: I think in the next ten days. That is the reason I would suggest it be in January; all of us would know whether there was anything to bring up.

Mr. Robertson: Why not fix a tentative date in the first week in January?

(A discussion off the record, as to date, which was finally fixed as Saturday morning, January 6, at nine-thirty at the City Hall.)

page 72 } Mr. Robertson: The other two things I have got here—one, the ruling of the Court about the minutes of the United Mine Workers which have heretofore been submitted to the Court—one was the consolidation of the causes and I understand you want a memorandum on that, and the other was the disposition of the ruling of the Court on the minutes of the United Mine Workers which have been submitted to the Court.

The Court: The Court hasn't had an opportunity to call for them. I will have to get a break to read them and I assume if I want them that I can get them.

Mr. Mullen: Any time. They are locked up in the lock box at the bank.

Mr. Robertson: If it will be any assistance I will be glad to read them.

Mr. Mullen: We don't require that sort of assistance.

Mr. Bryan: Some of the answers they have made to the interrogatories I don't believe are satisfactory.

Mr. Harris: Can't we take them up on the 20th?

Mr. Robertson: That may be too late. Why not take them up now?

Mr. Bryan: As you know, there are many questions and many answers and I have been making an analysis of them but there are some that strike you right in the face that I think would be very important and whether the answer is due to a misunderstanding of the question or the Court's ruling on the question or what it is I don't know, but it just doesn't make sense and I think that ought to be taken up preliminarily now if we can do so.

Mr. Mullen: You took the position that when we had objection to your answers the time to take that up was at the time of the trial and we weren't allowed to argue that.

Mr. Bryan: It is a very different situation I think in our particular case. You will have an opportunity to prove what you want, but in our particular case if we don't get this straight in advance and the United Mine Workers of America doesn't have people down here available to answer the questions, then we just won't have any proof.

Mr. Mullen: You think we are not going to have witnesses?

Mr. Robertson: You said you weren't going to obligate yourself to have anybody here.

Mr. Mullen: Certainly not obligated to you.

Mr. Robertson: That is why I think we have got to get them finished.

Mr. Mullen: We are not going to let the case go by default. We will have plenty of witnesses here.

Mr. Robertson: I don't want any gifts from Greeks.

Mr. Bryan: Look at out at Pikeville; we were page 74 } asking questions of Mr. Hunter and Mr. Hunter had a very funny memory, he just didn't know—"I don't know; you will have to go to Washington." That is what they all tell you.

Mr. Robertson: I don't see why we can't go with them right now to the extent Mr. Bryan is ready for them. I don't want any more interrogatories if I can help it, I don't want any more depositions if I can help it, I don't want any more pre-trial conferences if I can help it, and the further we go along today the nearer we finish the thing.

Mr. Harris: I didn't want to have to interrupt Mr. Robertson, but I want to say in behalf of Mr. Hunter that I didn't observe any convenience of memory. He wasn't instructed to forget anything; he was put on up there to tell whatever he knew. There may be a difference of opinion between—

Mr. Robertson: I want to say in fairness to Colonel Harris I certainly don't think Mr. Hunter needed any instructions.

Mr. Harris: That is a difference of opinion we will argue to the Jury.

Mr. Mullen: We are filling up the record now with things that are not in the case.

The Court: It is agreeable to me to be back at two-thirty.

Mr. Robertson: Let's get rid of them as far as page 75 } we can.

Mr. Harris: I would like to finish today.

The Court: Let's go on until ten minutes to one and then recess; I have some matters I have got to attend to that will take me half an hour after lunch.

Mr. Mullen: The questions have been answered as fully as we know how. I don't see where we would get anywhere.

Mr. Harris: I have no answer of District 50 or United Construction Workers; I have the answer of United Mine Workers. Do you mind taking up United Mine Workers first because that is the only one I have a copy of?

Mr. Bryan: I don't have them in that order, Colonel; they skip. I am only going to take up a few questions because that is all I am in a position to take up at the moment. The first question, looking at Interrogatory No. 4—

The Court: The United Mine Workers of America?

Mr. Bryan: Yes, sir.

The Court: I haven't the question.

Mr. Robertson: Which question?

Mr. Bryan: 19 on page 6.

Mr. Robertson: Do you want me to read the question?

The Court: Yes.

Mr. Robertson: "19. Who were the members page 76 } of the International Executive Board of United Mine Workers of America between the dates October 28, 1948, and August 4, 1949, and who have been members of said International Executive Board since August 4, 1949; when and by whom were each of these persons appointed or elected a member of said Executive Board; during what period or periods between the dates October 28, 1949, and August 4, 1949, also since August 4 1949, did each serve as a member of said International Executive Board; what districts or subdistricts or branches or subordinate branches of the United Mine Workers of America did they respectively represent on said International Executive Board; and what were the locations of their respective offices?"

Mr. Bryan: The answer as submitted appears to be complete in that it lists the names of the Board members, it shows the districts that they represent; lists their addresses and shows the dates on which they were appointed or elected. The answer is defective in that it does not show by whom they were appointed or elected. In our opinion, that is a very material point. We do not have information yet as to why some of these people were appointed and some were elected. Before we are through we expect to find out more about that. I think each one of these people who were shown as having been appointed was appointed by the International President with the approval of the International Executive page 77 } Board. The answer does not say so, however.

The Court: Did the question ask for that?

Mr. Bryan: Yes, sir, the question says when and by whom was each of these persons elected or appointed a member of the International Executive Board. They were supposed to answer that and they haven't answered it. In the case of the members who were elected, I suppose they were elected by their respective districts. However, we don't know that. They may have been elected by the Board or may have been elected by the convention or may have been elected in some other way. All of that goes to the matter of the control exercised by the International Union and the Board over these districts.

The Court: In other words, you want to know by whom they were elected or appointed?

Mr. Bryan: Yes, sir, and they did not furnish that information and we think it is quite important.

The Court: Let me see what these gentlemen have to say about that.

Mr. Harris: It is a little more work for the International.

The Court: It does appear to the Court that counsel over-

looked stating in the answer to this question by whom these gentlemen were appointed or elected.

Mr. Mullen: We thought when we said elected or page 78 } appointed they would know the elections are by the districts. The Constitution provides elections shall be by districts. When there are no elections by districts, then they are appointed by the Executive Officers.

Mr. Robertson: That is just what we are trying to find out. We read the Constitution about elections and it just looks like to us they flouted the Constitution.

Mr. Bryan: All of that relates to another important question.

The Court: I don't know that it is necessary to go into that. The question is the sufficiency of the answer to the question.

Mr. Harris: As I understand, we have to answer it and we don't take any exception to Your Honor's ruling.

The Court: In other words, you will file an additional answer to this question stating by whom these gentlemen were appointed or elected. That ought to dispose of that question.

Mr. Harris: We will give you all we have. It may be some of it we haven't got.

The Court: What is the next question?

Mr. Bryan: The next question will be Question 2 in Interrogatories 4.

Mr. Robertson: I will read the question:

"Furnish a copy of the charter, constitution rules, laws, and by-laws of the United Mine Workers of America page 79 } in effect between the dates October 28, 1948, and August 4, 1949, together with a copy of all changes and revisions made in the same since August 4, 1949."

The Court: We are still concerned with the answer of the United Mine Workers of America to the interrogatories?

Mr. Bryan: Yes, sir. I believe these gentlemen have tried to answer that properly. They furnished what purports to be a copy of the constitution of the United Mine Workers adopted at Cincinnati, Ohio, October 11, 1948, and effective November 1, 1948. They also furnished a copy of the constitution adopted at Cincinnati on September 19, 1944. The first constitution mentioned; that is, the one adopted October 11, 1948, is in a little booklet form and it appears this booklet form is defective; there is a skip from page 72 to 83.

Mr. Harris: I stated in Kentucky that was an inadvertence

and we would give him another one. I haven't been back to Washington since.

Mr. Bryan: The booklet appears to be complete on the face, but when you look through it portions of it are missing.

The Court: The Court will ask counsel to furnish a proper copy.

Mr. Mullen: What pages are missing?

page 80 } Mr. Bryan: Page 72, the portion about District 50 is missing.

Mr. Mullen: Page 72 and then what you have is 82?

Mr. Bryan: What is your next page?

Mr. Mullen: The next page is page 73.

Mr. Bryan: This book has page 83 as the next number.

Mr. Mullen: You evidently got a defective book. They jumped over to the burial service portion, thought that was all you needed.

The Court: What is your next question?

Mr. Harris: That is just one constitution I am to get for you, I understand.

Mr. Robertson: Let me have one, too.

Mr. Harris: You have a defective one, too?

Mr. Robertson: No, I haven't any.

Mr. Bryan: I next refer to Question and Answer 23, Interrogatory No. 4, United Mine Workers.

Mr. Robertson: That is quite a long one:

"Did the constitution of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 3, 1949, provide among other things as follows:

page 81 } "Charters of districts, sub-districts and local unions may be revoked by the International President, who shall have authority to create a provisional government for the subordinate branch whose charter has been revoked. This action of the International President shall be subject to review by the International Executive Board upon appeal by any officers deposed or any members affected thereby. Until such review is had and unless said order of revocation is set aside, all members, officers and branches within the territory affected by the order of revocation shall respect and conform to said order. An appeal may be had from the decision of the Executive Board upon such order of revocation to the next international convention."

Mr. Mullen: Without reading all that in the record can't

you state what your objection is to the answer? The question and answer are just too long.

Mr. Robertson: No, I can't do that and give the Court the context.

"During what period or periods did said constitution so provide?"

Mr. Bryan: The answer is: "Yes, at all times inquired about."

Mr. Robertson: Here is the next part of the question:

"During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did said International President have the authority or right to revoke the charter or certificate of affiliation of District 50 in accordance with and subject to the provision page 82 } visions of the language quoted above?"

Mr. Bryan: The answer to that question is: "At no time during the period inquired about."

In that connection over in connection with Question and Answer 2 United Mine Workers of America said that the constitution adopted at Cincinnati, Ohio, October 11, 1948, was in full force and effect and that no changes had been made in it since its adoption. Then in connection with Answer 23 they admitted that that portion of the constitution had been in effect at all times inquired about. Then when they were asked whether or not the President in accordance with and subject to the provisions of that portion of the Constitution had the authority or right to revoke the charter of District 50 the answer comes out: "At no time during the period referred to."

Do they mean that he did not have the right during that period of time because there was no cause for the exercise of the right or do they mean that there was some other ruling or interpretation perhaps by John L. Lewis which would change that portion of the constitution as it relates to District 50 and would do away with the right of charter revocation? I can't tell whether it is a play on words or whether there has been some ruling or interpretation which has changed the constitution. If that is the case, it would appear their answer to Question 2 is wrong.

page 83 } Mr. Harris: It is up to him to argue to the Jury that our answers are inconsistent, if the Court please. We are not going to agree with his interpretation.

tation of everything that he brings into the case. We have answered the question.

Mr. Mullen: Answered directly and specifically, stating during what period did he have the right and we stated at no time during the period inquired about.

Mr. Bryan: We will have to have another interrogatory then.

Mr. Harris: We can't help that. The threat doesn't help you.

The Court: That is your interpretation of the answer?

Mr. Harris: Yes, sir, we gave the best answer we knew how. We were asked at what time he had that authority and we say he didn't have it.

Mr. Mullen: As to why he didn't have it we are not asked to explain why he didn't have the authority. We answered he didn't.

Mr. Bryan: The language of the constitution appears to be perfectly plain.

The Court: That is a question you could argue before the Jury, couldn't you? You have asked them this specific question and they have answered it the way they feel it should be answered.

page 84 } Mr. Bryan: I will have to ask some more questions then.

The Court: You might remember this in regard to these interrogatories, that you can't do but so much. If you want to try this case in January, you must get everything in as soon as you can because if you ask questions the Court is going to give them time to answer them.

Mr. Bryan: This is just a sample and there are a number of samples throughout these answers just like this. They might be regarded as evasive. They don't come out and make a full, frank answer. They know what we are asking for and they don't answer it.

Mr. Mullen: What do you want us to answer more than the plain facts?

Mr. Harris: I object that we didn't make a full answer. In order that this Court might know, we had a meeting in Washington at which Mr. Mullen and I were both present and we went into the question of answers to interrogatories and our instructions were to answer wherever we could. Isn't that correct?

Mr. Mullen: Absolutely, and they were answered fully. I can't see anything that can be objected to in that answer or anything that is not perfectly clear. He asked during what period did the International President have the au-

thority and right to revoke the charter; that is, page 85 } between certain dates, and we answered at no time during the period inquired about. I don't think anything could be plainer. We are not called upon to say why or wherefore; we stated the facts.

The Court: I don't think that the Court should require amplification of that question and answer. That is their interpretation of the question and that was: "At no time" Now, of course, your interpretation, in view of the charter, may be different.

Mr. Bryan: The charter says the charter of districts, sub-districts or local unions may be revoked by the International President. We say, did he have that authority or right? They say no, and yet we show that language is in there.

Mr. Harris: That is a Jury argument.

The Court: Can't you point it out to the Jury that they are inconsistent, that by a reading of the charter it shows he does have that right and now in answer to this question they interpret it that he doesn't have that right? Isn't that a question of interpretation? You put a different interpretation on it and maybe the Jury will.

Mr. Bryan: It just didn't seem like a correct answer on the face of it.

Mr. Moore: Mr. Bryan just thinks one of the two is wrong; it is no question of interpretation. Either he has page 86 } got it or hasn't got it, and if they gave it to him and it never was changed, he has got it, and then to say he hasn't got it—

The Court: I see what Mr. Bryan is talking about, but if these gentlemen interpret it differently I don't know that I can make them say yes. What about it, Mr. Robertson?

Mr. Robertson: All right, you asked me a frank question. I don't think you can, either.

The Court: I don't see that I can make them say yes when they say no.

Mr. Robertson: They haven't fooled me any and haven't told a damn thing and we know what their argument is going to be.

Mr. Mullen: If you read the constitution, you could find the answer.

Mr. Robertson: I expect you will claim your answer is in Section 20 of the constitution.

Mr. Mullen: Yes, Section 20 covers it. It was a charter created by the Convention and therefore the International President couldn't do it.

Mr. Harris: I am glad I am not playing poker with you gentlemen.

Mr. Mullen: I know why it is a correct answer.

The Court: I think it is a question you may argue.

Mr. Mullen: We can meet that all right. What page 87 } next?

Mr. Bryan: Exactly the same question applies to 23(c) and 23(d). I think the answer is inadequate and patently wrong.

Mr. Harris: That is our hard luck if we are wrong. We have answered.

Mr. Mullen: Specifically and definitely to the point.

The Court: The same ruling on (c) and (d).

Mr. Bryan: Look at Question and Answer 1 in Interrogatory 2, United Construction Workers.

The Court: We are through with Interrogatory 4 for the time being?

Mr. Bryan: Yes, sir. I haven't got these in regular order.

Mr. Robertson: I will read the question—

The Court: Can't you just give the Interrogatory and the number? I am wondering if we can't save transcribing all of these questions because they are already in the record.

Mr. Robertson: Yes. This is No. 2, Question 1.

(Mr. Robertson read the question.)

Mr. Bryan: This is the answer:

“United Construction Workers, affiliated with United Mine Workers of America, (properly stated, United Construction Workers, division of District 50, United Mine page 88 } Workers of America) was organized independent of United Mine Workers of America and requested and received affiliation as a division of District 50, United Mine Workers of America, during or about the month of June, 1942. United Construction Workers, the defendant herein, has never had an organizing committee.”

You will note that the question asked when and upon what authority was United Construction Workers of America first organized. That question was directed to United Construction Workers and the answer just doesn't say. We know that United Construction Workers was organized by the Congress of Industrial Organization we think in about 1939. That is the proper answer, but it wasn't given.

Mr. Mullen: I don't think they are the facts. There was a split and a group came and asked for this charter under the name of United Construction Workers. The United Con-

struction Workers originally under the C. I. O. still exists. So your answer isn't correct.

Mr. Bryan: The United Construction Workers as an organization was originally organized we believe in 1939 by the Congress of Industrial Organization and when the C. I. O. and the A. F. of L. split the United Construction Workers became a part of the United Mine Workers of America. This is definitely an offshoot of the first organization.

Mr. Mullen: But not the only organization. The C. I. O. organization is still in existence. These people  
page 89 } left it and came down and said, "Here is a group of us that want to operate with the United Mine Workers."

Mr. Bryan: The answer just says the United Construction Workers was organized independent of United Mine Workers of America and requested and received affiliation as a division of District 50.

Mr. Mullen: Exactly.

Mr. Bryan: We asked when it was organized and upon what authority. That answer is left out. Down further they say: "United Construction Workers, a defendant herein, has never had an Organizing Committee."

Mr. Mullen: That is absolutely true.

Mr. Bryan: Mr. A. D. Lewis was Chairman of the Organizing Committee of United Construction Workers.

Mr. Mullen: That isn't correct. This is correct here. It never had an Organizing Committee. It was organized and came and asked for affiliation.

Mr. Bryan: The official publication shows the name of the Organizing Committee and shows who they were.

Mr. Mullen: Of District 50?

Mr. Bryan: United Construction Workers News shows it of the United Construction Workers.

Mr. Mullen: Well, if it does, I don't know.

Mr. Bryan: That is just simply another example.

The Court: What can the Court do about that  
page 90 } when you gentlemen have different views? I haven't heard the evidence; I don't know.

Mr. Mullen: I think we are discussing things to be argued before the Jury.

Mr. Robertson: They still haven't answered it. The question was when and by whom. That just doesn't answer it. They have a right to answer—

The Court: When and upon what authority.

Mr. Robertson: And they haven't said it. That is what we are complaining about.

The Court: What about that, Mr. Mullen?

Mr. Mullen: A group of men got together, organized and applied for a charter. It wasn't any authority.

Mr. Robertson: You haven't answered it.

Mr. Mullen: It was no authority; it was under charter.

The Court: I think you gentlemen can amplify your answer to Question 1 and state when and upon what authority.

Mr. Harris: It is Question No. 2?

The Court: Question 1 in Interrogatories 2.

. . . . .

page 91 } The Court: All right, Mr. Bryan, what is your next question?

Mr. Bryan: The next relates to Question and Answer 51 in Interrogatory 4.

Mr. Harris: United Mine Workers or United Construction Workers?

Mr. Bryan: United Mine Workers.

(Mr. Robertson read the question.)

Mr. Bryan: Your answer is: "In addition to the Chairman, the members of the Organized Committee are as follows: John Ghizzoni, John P. Brisarello, Martin F. Brennan, Hugh White and George Titler, each of whom was appointed by the International President in accordance with the constitution of the International Union, with the approval of the International Executive Board, prior to the dates inquired about and has served in the capacity of a member of the Organizing Committee during the times inquired about."

We would like to know when those people were appointed. They just said prior to the dates inquired about. Can you give those dates, Mr. Mullen?

Mr. Mullen: I don't know. It seems to me, however, that is a sufficient answer; it was prior to the date you inquired about.

Mr. Robertson: Of course, that is not telling when.

page 92 } Mr. Bryan: There are any number of questions in here that have the same thing, where we asked when such-and-such happened.

Mr. Harris: If we can get it, we will give it. I don't know whether we can or not.

Mr. Bryan: It just generally says prior to the date inquired about.

The Court: The Court rules the defendants should answer when the appointments were made; give the dates. What is the next one?

Mr. Bryan: Interrogatory 3, Question No. 9.

(Mr. Robertson read the question.)

Mr. Harris: Who is that addressed to ?

Mr. Robertson: District 50.

Mr. Bryan: It is the same objection to the answer.

The Court: The Court rules the dates of appointments should be given as set forth in the question. What is the next one?

Mr. Bryan: Question and Answer 18, Interrogatory 4.

Mr. Harris: I don't have them by that number.

Mr. Bryan: That is to the United Mine Workers.

(Mr. Robertson read the question.)

Mr. Bryan: The answer to that question is the same answer as given in answer 17 above. It is a rather page 93 } long answer; I don't know that it is necessary to read it all out. In connection with the answer, however, it appears that the International Officers include one president, one vice-president, one secretary-treasurer, three tellers and three auditors. While information was given about the president, the vice-president and the secretary-treasurer, the answer is silent with reference to the tellers and the auditors. Can you tell us who they were?

Mr. Mullen: I don't know who they were. I think somewhere else in here the information is given.

Mr. Harris: We have got it. We will give it to you.

Mr. Robertson: We also want when and by whom, each was elected.

Mr. Bryan: That is right.

Mr. Harris: Those are not by any chance the questions that were modified by the Court, are they?

Mr. Bryan: No, sir.

Mr. Harris: We don't want to waive any modification of the Court.

The Court: It is agreed that additional answers will be filed?

Mr. Harris: Yes, sir, on Question 18 to give the names of the tellers and auditors and by whom and when elected.

Mr. Robertson: Of course, this will be done by page 94 } the 20th of December, too?

Mr. Harris: I have got up at the head of the page "For answer by December 20th" and I just assume that would apply to all of them.

The Court: I assume that would be a reasonable time.

Mr. Bryan: Look at Question and Answer 66, Interrogatories 4; that is addressed to the United Mine Workers.

(Mr. Robertson read the question.)

Mr. Bryan: The answer is: We have no knowledge with respect to the extent of work the plaintiff may claim to have had for Pond Creek Pocahontas Company or Spring Fork Developing Company. However, Breathitt County, Kentucky, was serviced during the times inquired about by Region 58.

Is Breathitt County in Region 58 or not?

Mr. Mullen: That is a correct answer.

Mr. Robertson: You haven't answered it. It is either in or out.

Mr. Mullen: We have said Breathitt County was serviced during the time inquired about by Region 58.

Mr. Robertson: That isn't an answer. We want to know whether it is in or out.

Mr. Mullen: You will find another answer here page 95 } as to persons included in Region 58, certain counties in Kentucky and West Virginia, included in which was Breathitt County.

Mr. Robertson: And another place where it didn't include it. We want to know whether it is in or out. We are talking about this question now.

Mr. Harris: The next questions 67 and 68 are like you say—let's see what the counties are.

Mr. Bryan: That was the next question I was coming to. Will you name the counties?

Mr. Mullen: I think that is a sufficient answer.

Mr. Bryan: I don't.

Mr. Mullen: That is the county you are interested in.

Mr. Bryan: The Court has indicated it would confine certain inquiries to Region 58 and we just want to know what Region 58 comprises. We undertook to find out from Mr. Hunter by asking him some questions, but didn't get a satisfactory answer.

The Court: It wouldn't be much trouble to give the list of counties, would it?

Mr. Harris: If we know, we will give it.

The Court: Suppose you gentlemen enlarge on the answer and give the counties.

Mr. Robertson: That also applies to 67?

The Court: Yes, 66 and 67. What is the next one?

Mr. Harris: Enlarge and give the names of the page 96 } counties and say whether in Region 58?

Mr. Bryan: That is right. Next is Question and Answer 9(e), Interrogatories 4.

(Mr. Robertson read the question.)

Mr. Bryan: The answer is: "Since October 28, 1948, there have been no designations or approvals of 'other industries'."

We didn't ask which ones had been approved since October 28, 1948. We wanted to know which industries between those periods were the approved and designated other industries.

Mr. Harris: I submit we gave a fair and proper interpretation to the question framed.

The Court: Read the question again.

(The question was read.)

Mr. Harris: We took that to mean he wanted to know what industries had been designated and approved after those dates, and there had not been any.

Mr. Robertson: I don't think that is what the language said.

Mr. Harris: That is the way we interpreted it.

The Court: I believe they are asking for the names of industries in here.

Mr. Robertson: That was the idea. I know the page 97 } railroad workers are one and the dairy workers are one. You can take the various industries and occupations organized by District 50 and the United Construction Workers and they are just multitudinous.

The Court: It says what were the designated and approved other industries between the dates of August 28, 1948, and August 4, 1949. I take that to mean naming the various industries.

Mr. Mullen: The answer would be there are no industries designated other than the United States and Canada as a whole.

Mr. Robertson: If that is the answer, that is what we are entitled to.

Mr. Mullen: However, I am not undertaking to answer it. I know I heard discussion of it.

The Court: The Court will request counsel to amend that Answer 9 (e).

Mr. Harris: The way these are mixed up and not followed

in sequence, if I get one wrong—I am trying to get them right.

Mr. Bryan: Question and Answer No. 55, Interrogatories 2, United Construction Workers.

(Mr. Robertson read the question.)

Mr. Bryan: The answer is: "There have been no specified claimed jurisdictions by the United Construction Workers."

Article 2 of United Construction Workers, Section 1, provides—we got this from one of the boys of the United Paper Workers—"To organize on an industrial basis without discrimination on account of creed, color, nationality or classification of employment or workers employed in and around industries within its jurisdiction."

Mr. Harris: If they have not been specified, they haven't been specified.

Mr. Bryan: Do they claim all industries?

Mr. Harris: That wasn't what you asked. You asked what had been specified.

Mr. Mullen: That is a correct answer as it stands.

Mr. Bryan: I don't think so. It says: "What work, occupations and industries were claimed by United Construction Workers to be within its jurisdiction between the dates October 28, 1948, and August 4, 1949; and what work, occupations and industries have been claimed by United Construction Workers to be within its jurisdiction since August 4, 1949?"

Mr. Harris: And we say none were specified.

Mr. Bryan: Is it that you don't claim any?

Mr. Mullen: No. There is no limitation, as I told you just now.

page 99 } Mr. Robertson: Then that would be the answer.

Mr. Bryan: You claim 26.

Mr. Harris: When we say there was no limitation, none specified, that is the answer.

Mr. Moore: Have you got any limitation in here?

Mr. Mullen: No, but it says none specified.

The Court: You might add to it: "No limitation".

Mr. Harris: I assume these gentlemen on the other side know that certain railroad unions are not available to anybody under the Railway Labor Act.

Mr. Bryan: What do you mean?

Mr. Harris: We don't make any effort to organize railroad workers.

Mr. Bryan: You have a railroad workers division of District 50.

Mr. Robertson: And Mr. Carroll was very highly complimented for his work on the Long Island Railroad Company.

Mr. Harris: That is all news to me.

The Court: What is the next one?

Mr. Bryan: Question and Answer No. 54, Interrogatories 3, District 50.

(Mr. Robertson read the question.)

Mr. Bryan: "Answering the question as modified by direction of the Court this defendant says:

page 100 } "With respect to both District 50, United Mine Workers of America, and United Construction Workers, there were no specified claimed jurisdictions during the times inquired about."

I don't recall any modification of that.

Mr. Robertson: Yes, there was a misprint in it and I read it as corrected. I suppose it will be the same ruling there, the same answer.

Mr. Harris: I think the question is slightly different. Read the question again.

(The question was read.)

Mr. Harris: I submit that is a fair answer. We say they did not claim any jurisdiction.

Mr. Robertson: It is exactly the same proposition as the other one.

Mr. Harris: No, it isn't.

Mr. Mullen: We can't change the facts just to suit you.

Mr. Bryan: Does District 50 claim jurisdiction over certain industries and, if so, what are they? That is all we asked for and you haven't said.

Mr. Harris: I have stated the facts. I can't change the facts for you.

Mr. Robertson: No, but you can answer the question.

Mr. Harris: I tried to.

page 101 } Mr. Bryan: The truth is they don't want to say District 50 and United Construction Workers and, in a sense, United Mine Workers all claim jurisdiction over the same thing.

Mr. Harris: You know, you are the first lawyer I ever saw that always knew what he wanted to say.

Mr. Bryan: Well, I think I know this one.

Mr. Robertson: I think he has better studied it than any man you ever saw.

The Court: Those side remarks I don't think help.

Mr. Mullen: I discussed this question very fully with them. There was no claimed jurisdiction; it has just grown.

The Court: They say there were no specified claimed jurisdictions.

Mr. Robertson: Do they mean they claim everything without limitation like I think they do, like the other question? If they are willing to answer the other one, why aren't they willing to answer this one?

Mr. Bryan: Here is Article 2 of District 50, Section 1: "To organize on an industrial basis without discrimination on account of race, creed, color, nationality, sex or classification of employment all persons engaged in and around the industries and occupations within its jurisdiction." page 102 }

The use of the word "jurisdiction" in connection with labor unions has two meanings. Sometimes it means jurisdictional area, a certain territory or area over which the union asserts or claims jurisdiction, but it also means certain trades and occupations over which a union claims jurisdiction. That is what they are talking about here, I think: "Within its jurisdiction".

Mr. Mullen: You have said yourself that District 50 was a catch-all. There has been no limitation put on it, no specified territory.

Mr. Robertson: Then they claim unlimited jurisdiction. That is what we think it meant. If that is what they meant—

Mr. Harris: No, we can't let you frame our answer. We take the question and if our construction of the question is reasonable, that decides the question subject to the ruling of the Court.

The Court: Then the Court understands the following words "there were no specified claimed jurisdictions" to mean that there were no limitations?

Mr. Mullen: No limitations.

Mr. Robertson: Then I think they ought to say so.

The Court: Suppose you add that to their page 103 }

answer, then. What is the next one?

Mr. Bryan: Look at Question 54 in interrogatories 2.

Mr. Harris: That is United Construction Workers?

Mr. Bryan: Yes, sir.

(Mr. Robertson read the question.)

Mr. Bryan: The answer is "No formal claims of jurisdiction for any particular work were ever made by Local 778A within the knowledge of this defendant." As I said a minute ago, the word "jurisdiction" has two different meanings. Sometimes it means area and sometimes it means work claimed by a union. For example, the carpenters' union does not claim jurisdiction over plumbing work or electrical work, and the electrical union does not claim jurisdiction over masonry. In asking this question we just asked did the United Construction Workers Local 778A claim jurisdiction over the work the plaintiff was doing in Breathitt County and we got this answer: "No formal claim of jurisdiction."

We didn't ask anything about formal claim. We want to know whether they claim it.

Mr. Harris: Of course, we can't read the minds of these members of the Local. There is no way we could possibly say what any particular man thought and if they made no formal claim that is the only kind of claim we know anything about. We are not mind-readers down in that country.

Mr. Bryan: We are calling on the defendant  
page 104 } to answer. Either it did or didn't. If it didn't,  
it can say so.

Mr. Mullen: We don't have to answer the question the way you want us to answer it. There are a lot of things in here you don't like.

Mr. Robertson: Mr. Hunter testified in Kentucky that 778A was a sort of—you might say a dummy—that isn't the right word, but a local set-up to be in existence—for instance, I think you have to have ten men to form a local and they would keep this shell there and if they signed up one man they would put him in 778A and keep it going until they built up ten or fifteen men and put them out in another local, but that was a receptacle to dump them in as they signed up any less number than necessary for a permanent local union. Now if I am wrong in what I said to you I invite correction, but that was a receptacle kept there to catch these fellows that signed up until they could reorganize them into something else. If that was a method of their organization there, they must know it. It is their duty to know what they were claiming and that is in substance what I understood Mr. Hunter to testify on this last trip when we were out in Kentucky.

Mr. Harris: I think my recollection is substantially the same as yours as to what Mr. Hunter swore to,  
page 105 } but I don't think that is relevant to the point in  
dispute between us. If the Local 778A didn't  
make any claims, we wouldn't know of any claims.

Mr. Robertson: If that is a local of the United Construc-

tion Workers, if the United Construction Workers is the larger organization and this is one of its subordinate units which it sets up for a stated purpose, when they set it up they are compelled to know what they set it up for.

Mr. Harris: You didn't ask us what it was set up for.

Mr. Robertson: No, we asked what you are claiming. I am giving the background in the light of Hunter's testimony and you say you set it up for a stated purpose, but say you can't tell what its basis was. That doesn't make sense.

Mr. Mullen: Mr. Robertson's statement of the testimony given out there shows this is a correct answer. This is a union, as he says, in order to have a place to place anybody that comes along in any kind of business they try to organize. There is no limitation on the claim or on the jurisdiction that they will undertake to exercise and that is the way they handle it.

Mr. Robertson: If there is no limitation, then they claim this work of Laburnum out there. If there wasn't any limitation on it, then they claim it and should say so.

page 106 } Mr. Harris: I don't think they can force us to try to make an answer to suit them that doesn't state the facts.

Mr. Robertson: We are not trying to do that. We are trying to make them answer the question without dodging it.

The Court: What the Court is concerned with is whether or not they can give a better answer than this.

Mr. Robertson: I think Mr. Mullen has already given it. He said it was universal. If it was universal, they claimed jurisdiction over Breathitt County.

Mr. Mullen: I didn't say that. I said this statement showed that was—in the first place, that "A" means it is a provisional union, provisional in that provision was made where they got less than ten men in any particular industry they want to take in they could handle them temporarily through that union.

Mr. Robertson: Then it covers everything on the earth. It is set up as a catch-all for everything, isn't it, and if so, then its jurisdiction is universal, including Breathitt County, Kentucky.

Mr. Bryan: We are not trying to tell Colonel Harris or Mr. Mullen how they should answer the question, but we simply feel that the answer submitted is not responsive.

This claiming of jurisdiction—United Mine  
page 107 } Workers claims jurisdiction over coal miners, the  
United Brotherhood of Carpenters claims jurisdiction over carpenters and we want to know if these people claim jurisdiction over the work we were doing.

The Court: In other words, you want an answer yes or no.

Mr. Bryan: If they don't know, say they don't know.

Mr. Mullen: We can't give them that kind of answer.

Mr. Bryan: We might have used the word "assert" instead of claimed. The meaning is the same, I think.

The Court: Can't this question be answered yes or no, or the defendant is not advised.

Mr. Mullen: We could just answer it is not advised.

Mr. Robertson: I don't think they can just duck it that way.

The Court: Suppose they don't know; I can't make them say.

Mr. Robertson: I am just trying to get away from quibbling. To my way of thinking, Mr. Mullen has already given the answer. He said it was this catch-all and it was without limitation, and if I am set up there to receive representatives of every industry on earth, then I claim jurisdiction over every industry. He has given the answer, but is  
page 108 } not committed to it.

The Court: Is that substantially the evidence developed in Kentucky?

Mr. Bryan: I think so.

The Court: Haven't you got that in the record?

Mr. Robertson: We got it from their witness and got it in an equivocal form here and are trying to get it in an unequivocal form.

The Court: I think you are entitled to it if they can answer it. I think it should be answered yes or no, if possible. If they say they can't answer it yes or no, I don't know of any way to compel them to say yes or no.

Mr. Mullen: I want to say the question they are talking about I think the answer is correct as made. However, we will look into it.

The Court: What is the next one?

Mr. Bryan: No. 57, Interrogatories 2, United Construction Workers.

(Mr. Robertson read the question.)

Mr. Bryan: The answer is: "The records of membership are supposed to be kept, and it is assumed that they were kept at the headquarters of Local Union 778A. This defendant has written requesting the information sought in this question and same will be attached hereto and marked as 'Exhibit 7' if and when received."

page 109 } Mr. Robertson: They can't just bow out that way. It is their agent; it is up to them to get it.

Mr. Bryan: Mr. Hunter testified he was administrator of-  
ficer of the union. Maybe there is no record; it might be a  
dummy.

Mr. Robertson: Suppose Your Honor was my agent and  
the Court ordered me to do something and I said, "I will  
write to Judge Snead and tell him to send it in. If he sends it  
in, I will file it, but if he doesn't, why go and jump in the  
lake."

Mr. Harris: We did not, of course, insinuate anybody  
take a swim. We had to file our answers within a specified  
time and we worked I think prodigiously to get them in and  
we didn't have the information.

Mr. Robertson: We still haven't gotten it at this late  
date.

The Court: You gentlemen proceed as expeditiously as  
possible to get that information.

Mr. Harris: Yes, sir.

Mr. Mullen: Most of it isn't in existence, I happen to know.

The Court: What is the next one?

Mr. Bryan: Interrogatories 2, Question 39.

Mr. Harris: That would be U. C. W. again?

Mr. Bryan: Yes, sir.

page 110 } (Mr. Robertson read the question.)

Mr. Bryan: The answer is: "None".

Mr. Mullen: That ends it.

Mr. Bryan: I would like to call Your Honor's attention  
to this. In Question 36 of Interrogatories No. 2 the United  
Construction Workers was asked in what capacity or ca-  
pacities was Thomas Davis employed by United Construction  
Workers between those dates and in what capacity or ca-  
pacities was he employed by United Construction Workers  
since August 4, 1949. The answer says, "During all the times  
inquired about Mr. Thomas Davis was employed by the United  
Construction Workers by its director and assigned as Re-  
gional Director of Region 31 of United Construction Workers  
and District 31, United Mine Workers of America, and was  
assigned also as Assistant to the Chairman of the Organizing  
Committee of District 50, United Mine Workers of America,  
and assistant to the Director of the United Construction  
Workers. It appears from other answers which have been  
filed by the defendant that a Regional Director is required  
to file reports once a week with the National Director of  
United Construction Workers or the Chairman of the Or-  
ganizing Committee of District 50."

In the case of Mr. David Hunter various reports were fur-

nished. In the case of William O. Hart various reports were furnished, although they related to Mr. Hart's page 111 } activities up near Clarksburg, West Virginia.

Mr. Harris: Judge, we can't furnish a report if he didn't make any.

The Court: I don't see how you can either. Even though he is required to do it, if he didn't make any report, as you gentlemen say he didn't make any, I don't see how he can furnish it.

Mr. Mullen: That answer wouldn't be there if they weren't the facts.

Mr. Bryan: I raised the question because I thought perhaps in answering that question you limited the thing to Region 58 of United Construction Workers or District 50.

Mr. Harris: What is that?

Mr. Bryan: I raised the point because I had the idea in answering the question you might have had in mind limiting the inquiry simply to Region 58 of United Construction Workers. Mr. Davis is Regional Director of Region 31 and also in charge of a lot of regions, as I understand it, including Region 58. It is not specified that he hadn't filed any reports.

Mr. Mullen: Colonel Harris, these questions have been gone over by three or four people in Washington?

Mr. Harris: Oh, yes.

Mr. Mullen: They have been over them with us. This is the final form they gave to us and the answer is page 112 } "None". I think that ends any discussion on it.

Mr. Harris: I think you are right. If our witness says that none were furnished, then that is the end of it.

The Court: The question does not limit it to Region 58.

Mr. Bryan: I know it doesn't limit it to Region 58, but there was so much discussion about limiting other questions to Region 58 I thought these gentlemen in taking the matter up with the people in Washington had told them this question was also limited to Region 58 and that prompted the answer "None".

The Court: Are you gentlemen advised as to that situation?

Mr. Harris: No, Judge. I am going to ask them about it.

The Court: Ask them if that applies to the others.

Mr. Bryan: Your Honor, that is all the questions I have in mind at this time.

The Court: All right, Gentlemen. I believe that is all for today, isn't it?

Mr. Mullen: Those few objections to 400 questions shows we have tried to answer them.

Mr. Bryan: I don't say they are all the objections because we haven't finished analyzing them yet.

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page 1 }

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Transcript of a pre-trial conference before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, on December 11, 1950.

Appearances: Mr. Archibald G. Robertson, Mr. T. Justin Moore, Jr., Counsel for plaintiff.

Mr. James Mullen, Mr. Crampton Harris, Mr. Robert N. Pollard, Jr., Counsel for defendant.

page 2 }

. . . . .

Mr. Mullen: If Your Honor pleases, I believe, as Fred told you in making the appointment, we have only a single questions to take up. It is Question 57 of the original interrogatories to the United Construction Workers. The question is:

"Who were the members of United Construction Workers Local Union 778A on July 14, 1949; and when was each of those persons initiated to membership in United Construction Workers; and what persons became members of said Local Union 778A between the dates July 14, 1949, and August 4, 1949; and when was each of those persons initiated to membership in said United Construction Workers?"

We find, Your Honor, that there were on July 14th two hundred members of Local 778A. To make those names public would open the door to reprisal by employers who are opposed to the union. Even under the National Labor Relations Act in determining whether a union represents the employees of any employer they do not and are not required and cannot be required to disclose the names of the members of the union. All the voting is secret for the very reason I have mentioned. In litigation involving unions it has been a rule not to re-

quire that the names of the members of the union be made public.

That is the situation here. There are, we know, page 3 } some of the employers of some of these men who are opposed to unions, are fighting unions, and to disclose the names so that they could be seen by anyone would open them to reprisal, open them to possible loss of jobs, and so forth.

Now that is a matter we want to ask that we be not required to give the names. Those men have no relation—a great majority of them have no relation to this business. We had signed up during that period members of the Laburnum Corporation—employees of the Laburnum Corporation. If they want a list of those, that is a different matter, but if others who have no connection with this matter we submit, Your Honor, we should not be required to make their names public and subject them to possible reprisal or loss of their jobs. That is the question we have.

Mr. Robertson: Now, if Your Honor please, we think that point is absolutely without any merit. In the first place, they have no standing in Court or out of Court so far as the Taft-Hartley Act is concerned or the Wagner Act or any Federal statute. Coming back to the Taft-Hartley Act, of course when they refuse to file the anti-communist oath they are outlawed under that act.

Now the whole argument is predicated on the supposition that some unidentified people not parties to this action may do an illegal act hereafter if we get the information we have asked. Of course, the Court will not assume that page 4 } somebody is going to break the law and I don't know what law he is talking about breaking.

Now we have got a right to have the information we want for this reason. They have told us—I think this is a fair statement—when I talked to them, it might not be this witness or that witness, but that they will be here with a cloud of witnesses. We are entitled to the information that we ask both in the preparation of our case for affirmative proof of our case and also so that when they come here with whatever witnesses they bring we are entitled to that information in advance in order that we may show their bias or lack of bias, and we are entitled to it at this time so we may take such action as we deem proper within the law between now and the trial date to strengthen our case in whatever way we deem proper.

Now take this situation—I haven't even made this point before. Every single place that we have been to take any testimony—I think I am saying this correctly—David Harter

and Hobbs and sometimes other people have shown up and I have no legal right to say it but I have the factual right to say it, it has constituted a continuing and absolute and malicious threat to our witnesses. I can here right now or have Your Honor out in a back room in an office in Kentucky and I can sit there and look you in the eye with an expression on my face and an attitude of manner that is such a threat as if I wrote a letter like President Truman and yet I have no right even to raise that point, and they have no right to raise any such point.

We are entitled to everything we asked in that question. I am going to ask Mr. Bryan to address himself to that.

Mr. Bryan: I might start by saying, Your Honor, that in the interrogatories propounded to the plaintiff by the three defendants the plaintiff was requested to furnish the names and addresses of every employee employed by the plaintiff at the job site at Breathitt County, not just on July 26th, the date on which this mob came to the job site and drove the plaintiff's employees away, but over a period of time extending back as far as I think July 10th or July 14th—I don't have those interrogatories with my papers at the moment. The Court instructed us to answer that question. We felt it wasn't fair because just as Mr. Robertson has pointed out, the United Mine Workers, District 50 and United Construction Workers out in that territory exercise such an overwhelming and overpowering influence that many people in that neighborhood are terrified. They are afraid to incur the displeasure of those three powerful unions. They think if they do, they will be placed in a position where they will be unable to obtain employment and may perhaps find it necessary to leave their homes in the eastern part of Kentucky where they have lived for many years. We thought to disclose that information wouldn't be fair to our own people and shouldn't be done. The Court instructed us to answer it and we did it.

Now, in connection with this incident and trouble in Kentucky various picket signs were put up. I call them picket signs; they might also be called placards. As far as we know, there wasn't any man walking around with a sign on his back whom you would ordinarily refer to as a picket. However, these defendants did cause to be put at or near the job site these placards announcing the fact that the plaintiff was unfair or there was a so-called strike or a labor disturbance.

Some of these placards have United Mine Workers of America; others have Local Union No. 778, or District 50 or United Construction Workers. I am speaking from memory at the moment. It is better to look at the signs, but we don't

have them here. But I know Local Union No. 778A was on some of the placards.

We have attempted to find out what Local Union 778A really is. It appears from the information we have obtained from records in other cases involving these defendants and also from the testimony of Mr. David Hunter when his deposition was taken in Pikeville last month that Local Union 778A is a dummy organization. Mr. Hunter said he was the administrative officer of Local Union 778A. It appears that this local union is a sort of clearing house into which various employees are put by these defendants until such time as charters can be issued for other local unions to be established.

We have asked who were the members of Local Union 778A because we think if any of our employees are members of either United Construction Workers or District 50 or United Mine Workers of America they were members of that local union. We question seriously whether any of our employees were members of any of those organizations. In fact, we don't think they were because we have in our possession cards signed by all of these—not all of our employees, but certain employees, and being the main ones in contention, making application to become members of local unions affiliated with the American Federation of Labor and those cards were signed very near the date that this trouble occurred.

We think that we are entitled to this information and what Mr. Mullen is talking about now must be somewhat of an afterthought because in the answer prepared by United Construction Workers to our interrogatories propounded to that organization, Interrogatories No. 2, United Construction Workers said this in answer to Question 57:

“The records of membership are supposed to be kept and it is assumed that they were kept at the headquarters of Local Union 778A. This defendant has written requesting the information sought in this question and the same will be attached hereto and marked as Exhibit 7 if and when received.”

I doubt if they have got a record of the membership of Local Union 778A. I don't believe they know who the members were. I don't believe Mr. Hunter knows. If they don't know, let them say so.

Mr. Mullen: We have a list of them and know who they are. There are over two hundred.

Mr. Robertson: Then they are estopped to make the point here.

Mr. Mullen: Some of the men are objecting to having the names made public.

Mr. Bryan: They said they will furnish the information if they get it and now they say they have got it.

Mr. Mullen: If Your Honor please, the very statement of Mr. Bryan shows the difference. We asked in our interrogatories, not who all their employees were, but solely who were the men employed on that job out there. We limited it to them; didn't ask about any other job, what other unions they belonged to or anything of that kind. We are perfectly willing to furnish them the names of the men who were their employees who applied for membership in this page 9 } union. We don't think who are the members of the union who are the employees of XYZ is in any way relevant to this case. We put it on the ground of relevancy; it wouldn't prove anything for them any more than any other union roster and it can do harm to those who are innocent bystanders. Some who knew we were making up this list have objected to their names being made public. They are not involved in this trouble in any way, shape or form.

As I say, we limited our request for information as to their employees solely to those who were working out there on the job, men whom they say we drove off the job, and to have the names of these others can help them in no way. We will give them the names of their men and that we figure is the limit we should be required to go.

Mr. Robertson: Now, if Your Honor please, of course you have ruled time and time again here that you are going to defer any ruling on the relevancy of testimony until the trial proceeds and, therefore, this is not the appropriate time to raise that question and we are not bound by the *ipse dixit* of counsel for these defendants as to what they have told him and what he thinks is relevant and what isn't relevant; that is a matter of adjudication.

Now to give you one phase of this thing—this I think already in the record in these depositions we have taken out in Kentucky since the last time we were here—page 10 } suppose Your Honor is a member of the A. F. of L. and you go out in that territory and you want to go to work and they say, "Well, this is United Mine Workers' territory; we don't recognize the A. F. of L. and you can't go to work here unless you sign up with us and pay your dues and initiation fee," and they go to your contractor for whom you want to work and tell him the same thing and it is quite a usual thing for the contractor to say: "All right, I am going to work twenty-five men here; the initiation fee is so many dollars, the monthly dues are so much. I will just pay you

that much and we will go ahead," and then it is quite the customary thing there for a fellow that is already a member of the A. F. of L. to say, "All right, I will sign up and pay my initiation fee and pay my dues," and they say, "All right, we will leave you alone and you can go to work,"

We are going to have that in the record and we are entitled now to know which of these men here signed up with this United Construction Workers for that reason in addition to all other reasons, I am not criticizing counsel because I don't think counsel are controlling the client; I think the client is controlling the case for the defendant, but I think we might come here through responsible counsel and say they have written for that information and they will put it in here in the form of an exhibit when it comes and then counsel tell

you this morning they have got the list, but now page 11 } say they don't want to divulge it because some of the people think probably they might be called here as a witness and they don't like it and therefore might refuse to testify, and we have had a number—we will show you this—we have had some refuse to testify because they were scared to testify. We have had one who refused to testify because we declined to pay him \$1,000 before he testified. So we are entitled to get this information in the record.

Mr. Mullen: If Your Honor please, we didn't realize at first the injury it would do to other people not involved in this controversy,

Mr. Robertson: And I don't realize it or concede it now,

Mr. Mullen: Your statement doesn't make any difference.

Mr. Robertson: I think Mr. Bryan has something further to say,

The Court: I am going to let Mr. Mullen close, so suppose you go ahead,

Mr. Bryan: I just want to point this out, that these defendants hold themselves out as being high, outstanding, up-right organization. I don't know why Mr. Mullen should take the position it is a person subjecting himself to some indignity, scorn or ridicule because it became publicly known he was a member. If that is the case, put that in the record to show some indication of the type of organization it is.

The Court: Have you gentlemen anything further to say before I give Mr. Mullen an opportunity to close?

Mr. Robertson: No.

Mr. Mullen: I think it is a matter of common knowledge that there are employers who when they learn that men in their employ are members of the union they don't want their people unionized; they discriminate against them, they dis-

charge them. Frequent cases of that come up; we see it in the papers, find it in the record of actual cases.

We didn't realize, didn't have in mind at the time this question was brought up the damage that might be done, the injury that might be done to people in no way connected with this controversy. We do not expect to go out and bring in people from companies who were not involved in this transaction in any way, shape or form. We don't know who they are, don't see they could have anything to say that would have any bearing whatever on this.

So far as the presence of Mr. Hunter and others out in Kentucky and West Virginia, we are dependent on them when we go out there for transportation, we are dependent on them for local knowledge. Of course, we have some of them present. They are not there to threaten their witnesses; they are there to give us information and take us around from place to place.

Mr. Robertson: Of course, you haven't been out there and looked at them like I have.

Mr. Mullen: I have been in three sets of depositions taken there.

Mr. Robertson: You were sitting in the city; you haven't been out in the bushes.

Mr. Mullen: I was lucky, perhaps. If it had any bearing on this case, the names of these people, that would be a different matter, but it is certain by no stretch of the imagination can these outsiders have anything to do with this case or have any information or anything that is relevant to it, and we ask Your Honor not to subject them to the possible reprisals, but to limit the question to those who were employees of Laburnum, just as we limited our interrogatories to those who were employees of Laburnum, on that particular job. They have a right to know which of their men signed up with us. We have a right to know who were the men employed on the job. Beyond that, I don't think either one of us have a right to go. I submit that to Your Honor.

The Court: Well, Gentlemen, I think the question should be answered and the Court at the trial will pass on the relevancy of the matter.

Mr. Mullen: Very well, Your Honor. We reserve the exception.

The Court: That is understood. Does that conclude the matter?

Mr. Bryan: The last time we had a conference here we discussed the answers—some of the answers made to the interrogatories propounded to these defendants. At that time I had not had an opportunity to go over all the questions

and answers, and still haven't, but there is one that has come to my attention that I would like to bring up now. It relates to Local Union 778A, Question and Answer No. 30 in Interrogatories No. 4, addressed to the United Mine Workers of America. Here was the question:

"Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows:

"Should any local union be dissatisfied with the decision of any of the governing branches (unless prohibited by joint agreement) it shall have the right of appeal to the branch next in authority until a final decision is reached as provided in Section 3 of Article III and, if so, state the following:

"(a) During what period or periods did said constitution so provide?"

The answer to that is all right. It says this:

"At all times during the period inquired about."

page 15 } "(b) With respect to the 'governing branches' mentioned in the language quoted above what governing branch had authority over United Construction Workers, Local 778A, between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949. Name these governing branches, commencing with the branch having the least authority and then proceeding step by step to the branch having the highest authority."

The Court: I don't see that.

Mr. Bryan: It is down here as a sort of note and it is continued over to the next page.

The Court: I see.

Mr. Bryan: That question was answered in this manner:

"The chain of authority in reference to interpretation of governing branches as inquired about in this sub-section is affirmatively answered in Sections 3 and 4 of Article VI and Section 3 of Article III of the constitution."

We disagree with that. At least, it doesn't furnish the information we want. We asked them to name the governing branches, commencing with the branch having the least authority and then proceeding step by step to the branch having

the highest authority. By looking at Sections 3 and 4 of Article VI of the constitution of the United Mine Workers and at Section 3 of Article III of the same constitution you can't tell with any accuracy what the next governing page 16 } branches are that have authority. It appears that the highest is perhaps the International Convention. Down from that we don't know. We think it is the United Mine Workers of America, but it might be the International Executive Board of United Mine Workers of America or it might be some other body in the United Mine Workers of America. Then you come to below that, what would have? Is it District 50? We think it is. What part does the Organizing Committee of District 50 play? Is that considered to be a governing branch? Is there any other sub-district or district between District 50 and United Construction Workers? We don't know. We can't tell from the provisions in the constitution referred to in this answer.

Mr. Robertson: We just asked them to name the branches.

Mr. Bryan: The provision in the constitution is clear, I think, but we can't tell from the language in the constitution the exact governing branches which have authority over Local Union 778A and the exact chain of authority. That is the information we were anxious to obtain and we think it is highly relevant, has a direct bearing on our allegations of an agency relationship. The answer as given is not responsive and we would like to have it revised.

Mr. Robertson: If Your Honor please, let me just give you an illustration of that. We have spent literally page 17 } days studying these things.

Suppose that the local union—we will take 778A and suppose somebody is dissatisfied with that, or any other union. You say, "Well, where do you appeal from there?"—I am talking about United Construction Workers—"Where do you appeal from there? Do you go up to your regional officer? Do you go to District 50? Then after you go to District 50 of United Construction Workers where do you go from there?"

We think you go from there to the top of the United Mine Workers, but you can't read that constitution and tell. We know that District 50—you see there are two different District 50s; District 50 of United Mine Workers and District 50 of United Construction Workers, and all divided into different regions.

Now here is a fellow in a local union of United Construction Workers; he thinks he has been illegally treated and wants to go as high as he can. Does he go from the local to the regional office, from the regional office to District 50 and from there up into United Mine Workers or what happens to him? Sup-

pose he is a member of the United Mine Workers local; which way does he go up? Just like you see the courts of the Commonwealth are made up of the Supreme Court and such courts as the General Assembly may constitute. That is all right. Then I come along and I say I start out with the Justice of the Peace and I want to go as high as I can and you page 18 } name me the procedure through which I go. That is what we are asking here.

Mr. Mullen: If Your Honor please, I think the answer covers the question. The right of appeal is covered by the constitution and it is stated who has the right of appeal and the order in which it goes. I haven't the answer to the interrogatory here, but I think in another one it is specifically stated exactly—I think you asked the question who had the jurisdiction over so-and-so and state the branches on up. I think it was stated specifically in that case.

District 50 has nothing to do with United Construction Workers; they don't appeal to United Construction Workers from District 50. It is all stated very specifically. You go from the local union to the governing body of United Construction Workers and from there to the International Executive Board and from there, if necessary, to the International Convention. That is all set out again and again in all three of them.

Mr. Robertson: If they have got the information, what on earth is their objection to giving it? I call the Court's attention to this: I think that goes right to the heart of our case and we can't indulge in the hope of developing that on cross examination of their witnesses. We have got to be prepared to prove our case in chief and if it is as simple and page 19 } can be stated—whether it is simple or obtuse, if we can't find it out from the way they answer it, why can't they answer it in a plain, straightforward way so anybody can understand it?

Mr. Bryan: In the interrogatories propounded to the United Mine Workers, being Interrogatories 4, they were requested to furnish a copy of the charter or certificate of affiliation granted to United Construction Workers. That was furnished as an exhibit with the answers filed by United Mine Workers, which says that United Mine Workers of America doth grant this charter to A. D. Lewis, Chairman, and Gardiner Wales, Comptroller, United Construction Workers division and their successors in office, to constitute a local union to be known as UCWD, District 50, for the purpose of effecting thorough organization of the workers in this industry.

Mr. Mullen just said that District 50 had nothing to do with United Construction Workers, yet it appears that the head administrative officers and national directors of both organizations are one and the same man, Mr. A. D. Lewis, brother of Mr. John L. Lewis, and that the comptroller of both organizations is the same man, Mr. O. B. Allen, both of whom were appointed by the President of the United Mine Workers of America with the approval of the International Executive

Board. It further appears that in every case a page 20 } regional director of United Construction Workers is also a regional director of District 50. It appears that the industries each organization seeks to organize are substantially the same. Really it is one organization traveling under two different names. Why, I don't know.

Mr. Mullen: To coordinate organization.

Mr. Bryan: One of the things we were anxious to find out and asked in these questions was the position of these defendants as to the authority of District 50 over United Construction Workers. You certainly can't tell that from reading this constitution nor anything in it. You can argue what you think that means, but we would like to know what the defendants think it means.

This language means something. They refer to governing branches; that is the language in the constitution. A governing branch means a branch which has the power to perhaps, in fact, exercise control over some other branch, a subordinate branch. That, as Mr. Robertson said, goes to the heart of our case. The constitution apparently contemplates a chain of authority, one branch of the entire organization having authority and control over another branch of the organization. Now in the case of Local Union 778A, which is one branch, which apparently took part in connection with this labor trouble because its name was on a placard at the job site—we

want to know the name of each governing branch page 21 } having authority over Local Union 778A.

Mr. Robertson: Judge, I don't want to prolong the argument, but Mr. Mullen interposed there this was to coordinate the temporary units. Suppose you start out at the local unit and go up to District 50. District 50 of the United Mine Workers has its national headquarters in Washington with A. D. Lewis the top executive officer; District 50 of United Construction Workers has its national headquarters in Washington with A. D. Lewis the top executive officer. There you are. Two branches put on an equal level. Where do you go from there and how do you get there? That is what we want to know. There they are out like two branches of a tree; we think they come together up above there.

Mr. Bryan: We are not sure they are on an equal level. If United Construction Workers is a division of District 50, it is some indication they are not on an even level.

Mr. Robertson: I was just following out the illustration.

Mr. Mullen: We have repeatedly said there is no question of agency here. They are all part of one organization. We asked that specifically in the interrogatories. The union is the International United Mine Workers of America divided into districts, one of which is District 50. Equal page 22 } with District 50 is United Construction Workers.

Below them are the local unions. You have the same organization throughout business, chain stores, have it in the Government. I don't see where it is hard to understand.

Mr. Bryan: Do I understand you to admit for the record that there is an agency relationship between the United Mine Workers and United Construction Workers sufficient to hold the United Mine Workers liable for acts of United Construction Workers under the doctrine of *respondet superior*?

Mr. Mullen: There is no agency relationship.

Mr. Bryan: You said a minute ago there was.

Mr. Mullen: No, I said there was no agency.

The Court: No, you misunderstood him. He said no agency.

Mr. Mullen: Look at the answers we gave you before. They are specific.

Mr. Robertson: You are getting off the track. We asked you to name the steps. We want you to name them.

The Court: We understand what you want, Mr. Robertson.

Mr. Mullen: I will answer the question as I see fit. I am reading from the United Construction Workers rules:

"Any officer or member of a local union charged with an offense against the organization shall be tried by the local union Executive Board."

page 23 } "The decision of the local union shall be final unless loss of membership of the accused is involved, in which event an appeal may be taken to the International Executive Board within five days after the decision. Pending such appeal the decision of the local union shall be enforced unless the same is temporarily stayed by the National Director or the International Executive Board."

From the International Executive Board he can go to the International Convention. There is a clear statement of the course which any dispute takes. I don't think it is anything obtuse about that. That are named in the rules.

Mr. Bryan: Do you object to naming them specifically?  
Mr. Mullen: I named them just now.

Mr. Robertson: Then we ask that you name them in the answer to the interrogatory.

The Court: Do you object to filing a supplemental answer or stipulating what has been said here, that that may be added to it?

Mr. Mullen: Judge, ordinarily I don't object to a thing like that, but this has gone beyond any reason. They are carping criticisms of answers to questions we think are answered fully. When we brought up one objection to their questions they didn't want to have Your Honor pass on it but wanted to put it off. I want to give notice now on January 6, when we come up we are going to ask the Court to pass also on our objections to your questions inasmuch as you have insisted page 24 { upon taking up your objections to our answers and having them answered before the trial.

Mr. Robertson: We are not asking you to answer them before the trial; we are asking the Court to adhere to the procedure which has been formulated here before, to rule as far as the Court can in pre-trial conference on the questions the Court will require to be answered or modified or refuse to require them to be answered and reserve the rulings on the relevancy until we get into the trial.

Mr. Mullen: You mean the Court passed on what you said there without passing on the relevancy?

Mr. Robertson: It has been doing it ever since we have been coming up here.

Mr. Mullen: If you have the right to ask those questions and ask that we now be required to reframe our answers, we have an equal right as to your interrogatories and not be put off to the time of trial. We want to bring that up.

Mr. Robertson: You can't bring up anything you want, I guess.

The Court: Gentlemen, the Court refuses to require the defendant to amplify that answer.  
page 25 { Mr. Moore: How about consolidation, Your Honor?

The Court: Gentlemen, I am about ready to pass on the consolidation. The Court is of opinion that it would cause confusion and may cause delay and that it would be best to try this case separately and if you all will prepare a proper order—

Mr. Robertson: I will put that in this order I am working on.

The Court: There was also a motion to amend and non-suit.

Mr. Robertson: In view of the Court's ruling I don't know whether or not you gentlemen are going to press your motion to amend or non-suit.

Mr. Mullen: I wouldn't know. I will have to leave that to Fred.

The Court: Mr. Robert Pollard, if you will talk to Mr. Fred Pollard about that, it may be in view of the Court's ruling he will want to abandon it.

Mr. Mullen: I imagine he would. Of course, we note the exception.

Mr. Bryan: There is one other matter pending. In the interrogatories which the defendants propounded to the plaintiff we were asked as to whether the plaintiff—whether application had ever been made by certain labor organizations to become certified as the bargaining agent for the page 26 { employees of the plaintiff. That question was answered. Then the question was asked whether the National Labor Relations Board had ever, in fact, certified these labor organizations as bargaining agents for the plaintiff's employees. That question was answered. We asked the identical question back of each one of the defendants. I don't know the numbers of these interrogatories, but I suppose you remember the questions.

Mr. Mullen: I remember the questions and remember they were discussed very fully and the Court ruled on them.

Mr. Bryan: At the time the Court said it would not require the defendants to answer those questions, why then the answers which the plaintiff made to like questions of the defendants might be expunged.

Mr. Mullen: I beg your pardon; the Court ruled you had to answer them.

Mr. Bryan: But no final action has been taken on it. We would like to have those answers answered by the defendants; we think they are relevant.

Mr. Mullen: Your Honor, Fred argued that question. They are not pertinent so far as the defendant is concerned in the case of the plaintiff unless certain things had been done—I don't know the details of it. I don't handle our labor relations matters, but he explained it very fully and Your page 27 { Honor ruled on it and saw why there was a difference and why the question should be answered by them and not by the defendant. Now if the matter is going to be argued again, I would like for Fred to do so.

The Court: The argument pro and con was recorded in the record, was it not?

Mr. Mullen: Yes.

The Court: It may be best under the circumstances to continue this until January 6th and have the record written up and we will read the record back and see what discussion took place.

Mr. Bryan: I am not sure whether we were having minutes taken of those meetings or not.

Mr. Mullen: I am just wondering myself.

Mr. Bryan: That was one of the first meetings.

The Court: If it is not in the record the Court will have to hear you.

Mr. Robertson: I think I have enough pencil notes to recall it to everybody's memory.

The Court: Mr. Fred Pollard was one of the principal counsel in the case and I think it only fair that he be here to participate in it.

Mr. Bryan: I just want to bring it up because it ought to be disposed of.

The Court: All right, Gentlemen.

page 1 }

. . . . .

Transcript of a pre-trial conference in the above styled case before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, on January 6, 1951, at nine-thirty o'clock a. m., in chambers.

Appearances: Mr. Archibald G. Robertson, Mr. George E. Allen, Mr. T. Justin Moore, Jr., Counsel for complainant.

Mr. A. Hamilton Bryan, President of Laburnum Construction Company.

Mr. James Mullen, Mr. Crampton Harris, Mr. Robert N. Pollard, Jr., Counsel for defendants.

Mr. Welly K. Hopkins.

Mr. Harrison Combs.

page 2 } Mr. Robertson: If Your Honor please, as long as we are the plaintiff, I reckon we lead off in this conference.

The Court: All right.

Mr. Robertson: I am going to ask the Reporter to let the record show everybody that is here. Are you counsel in the case?

Mr. Hopkins: No, sir.

Mr. Robertson: Just as a spectator?

Mr. Mullen: They are down here with me helping in the case, but not going to appear in the trial.

Mr. Robertson: I just want the record to show why they happen to be here.

If Your Honor please, I made a notation here of several things which, according to my recollection, were to come up today. You remember a considerable time ago the Court ruled tentatively on granting a special jury and for us to bring the matter to the attention of the Court before the trial date.

The Court: Yes.

Mr. Robertson: Mr. Edwards, the Deputy Clerk, called me about it one day last week—this week—and I told him I would be here Saturday morning and I was going to take it up with your Honor then.

page 3 } The Court: All right. The Court is of the same opinion, will grant a special jury, but may assess the costs against the party asking for it.

Mr. Robertson: Mr. Fred Pollard has called me two or more times regarding how the case is to be reported and whether or not we wanted a daily transcript from the Alderson Reporting Company in Washington at a charge of thirty dollars per day plus \$2.00 per page for the original and three copies, plus 25 cents per page for any additional copies. I told him we would be willing to split it one third to us and two-thirds to them. I thought possibly if they had the original for the Court and one copy for each side it looked to me equitable by them getting the third copy and he said he said he was going to consider that and I suggested the whole thing go through Mr. Colton Williams as he was accustomed to dealing with them, it was in his jurisdiction, and Mr. Fred Pollard said he would talk to his clients and let me know.

Mr. Mullen: I see no reason why it should not be divided half and half. If we had to have separate stenographers, and all that, it would cost you at least 40 per cent of what this would be, maybe more. We see no reason why we should pay more than half of it.

Mr. Robertson: The only reason is that because every case I have been in—and there have been a number  
page 4 } where we had this kind of service—where there was more than one party they divided it on a pro rata basis, which would make it one and four. Mr. Fred Pollard said he didn't think that was fair. I then suggested two-thirds and one-third. He said he thought that was fair and he would recommend it.

Mr. Mullen: He talked it over with me and he had evidently changed his mind at the time he talked it over with me because he said he thought it should be half and half.

Mr. Robertson: Then he told me one thing and told you another thing.

Mr. Mullen: I said he changed his mind, which he had a right to do, of course, after considering it. I think it should be half and half.

Mr. Robertson: Very well, if you think that is fair, we will split it.

Mr. Mullen: I think it is fair.

Mr. Robertson: I think it unfair and unjust, but do it rather than quibble about any more non-essentials.

(Mr. Williams, the present Reporter, stated that he believed that the page rate was \$2.25 rather than \$2.00 as stated by Mr. Robertson.)

page 5 } The Court: What is next on the agenda?

Mr. Robertson: If Your Honor please, I would like to go back to that thing a minute. Will that entire transcript be charged to the losing party, or not?

The Court: I don't know.

Mr. Mullen: I don't think so. I don't think it is a Court cost. The Court doesn't have an official stenographer; this is private employment.

Mr. Robertson: It is ruled both ways in these cases.

The Court: I have never ruled on that point.

Mr. Robertson: Now, according to my recollection, the Court was going to announce at this conference its ruling on what portions of the minutes of the Executive Committee which were turned over to the Court the Court was going to allow, if any.

The Court: All right. Gentlemen, I have reviewed the minutes, which are voluminous, as you know—it was quite a task reading all of those minutes—and the Court has concluded not to grant Question No. 125 as asked for in the Interrogatories addressed to the defendant United Mine Workers of America, but will require the defendant United Mine Workers of America to answer the following question in

page 6 } lieu of Question No. 125 as originally addressed to the defendant United Mine Workers of America:

“Furnish a copy of the minutes which include specific reference to District 50, United Mine Workers of America, or United Construction Workers, affiliated with United Mine Workers of America, of all meetings of the International Board of United Mine Workers of America held between the

dates October 28, 1948, and August 4, 1949, and also since August 4, 1949."

Mr. Robertson: Could we agree here on the date when they will be furnished?

The Court: I don't think it is going to take too long, Mr. Mullen. I would suggest it could be done very easily within a week.

Mr. Mullen: As I understand, we are not to turn the minutes over to them, but we are—

The Court: Furnish copies.

Mr. Mullen: Certified copies of any pertaining to District 50 and to United Construction Workers?

The Court: Yes. I would say within one week from today.

Mr. Bryan: Will you give the dates again?

The Court: The same dates you had: October 28, 1948, to August 4, 1949, and also since August 4, 1949.

page 7 } Mr. Robertson: Now are you ready to go on to the next thing?

The Court: Yes.

Mr. Robertson: You remember I stated I would undertake to prepare the order on these Interrogatories, bringing it down through our last pre-trial conference. I prepared such an order and Mr. Moore, Jr., and I have compared it for accuracy and I think it is substantially correct. I wanted Mr. Bryan to check it before I submitted it to the other side. He has not had an opportunity to do that and therefore he hasn't checked it for accuracy. That is why I have not submitted it to counsel for the other side. I suggest we leave a copy with the Court and with other counsel. I assume you will not want to enter it today before you have had an opportunity to check it for accuracy. As far as I know, it is accurate. How many copies do you want, Mr. Mullen?

Mr. Mullen: I will take three, if you have plenty of them.

Mr. Robertson: All right. Now that is all I have on my list.

Mr. Mullen: Judge, when we were here the last time you asked if we wanted to take a non-suit in the case  
page 8 } brought here.

The Court: Yes.

Mr. Mullen: I don't think Fred has ever told you—

Mr. Robertson: I can't hear you.

Mr. Mullen: The Judge asked if we wanted to take a non-suit. Yes, we want to do that. We had to elect between the

one here and the one in the Federal Court. We will elect to take it here.

The Court: If you do that, you had better prepare an order.

Mr. Pollard: We will do that.

The Court: All right.

Mr. Mullen: If Your Honor please, Mr. Lewis has been summoned as a witness in this case—

Mr. Allen: By whom?

Mr. Mullen: By you—your side.

The Court: By the plaintiff.

Mr. Mullen: He was summoned for the 11th. When the case went over at our request we raised no question that the summons did not apply now; we raise no question about that.

Mr. Robertson: That is very generous. He sent word he would be here.

Mr. Mullen: Mr. Lewis is a very busy man. He is at this particular time really at the command of the executive officers of the United States Government. He is one of four labor leaders who, with a group of business men—Mr. Sloan, Chairman of General Motors; Mr. Fairless, of United States Steel; Mr. McCormick, of International Harvester; Mr. Brown, of Johns-Manville; William Green, Philip Murray, John L. Lewis and Mr. Hayes, President of the International Association—they have to meet all around the United States. In addition to that, he has to carry on this work of over 600,000 miners.

As an individual, he has no objection to testifying. What I wanted to see was if we couldn't stipulate as to what he would testify to be cause he is not a free agent at this time; he is being used in connection with preparation of the defense work and he is at their beck and call. There is nothing he could testify that has not already been covered in the Interrogatories. He knows nothing about this case whatever; never heard of it until suit was brought. I would like—and I think under pre-trial practice such matters are supposed to be entertained—I would like to ask counsel what they expect to prove by him to see if we can stipulate it.

Mr. Robertson: We won't agree to stipulate anything, if Your Honor please, and we will not state at this time what we expect to prove through Mr. Lewis. I would like to say this, that we tried literally for weeks and I think I am correct when I say months, to get personal service on Mr. Lewis at his home in Alexandria and couldn't get it. Finally, the officer nailed the summons on his door and my information is that he met Mr. Lewis on the street the following day and he acknowledged he had gotten

it and said he would be here. Now I don't see where Mr. Lewis is above—of course, I have expressed the opinion in these conferences he wouldn't be here, and I don't know why he is entitled to any more consideration than any other humble citizen just because he occupies a seat of the mighty.

I am perfectly willing to have it understood if Mr. Lewis will come on call of say a day's notice, or whatever the Court thinks is reasonable notice, but I don't see why Mr. Lewis should be permitted just to bow himself out.

Mr. Mullen: If Your Honor please, may I ask Mr. Hopkins as to Mr. Lewis—the way he is tied up?

The Court: Certainly.

Mr. Hopkins: I will be glad, Your Honor, to state the situation in reference to Mr. Lewis as we know it.

In the first instance, I think it could well be repeated he has no knowledge of the facts in this case either before, during nor subsequent to the incidents that seem to have given rise to this alleged cause of action. All that he knows about

it would be subsequent to the institution of the  
page 11 } litigation and that would be by hearsay in an administrative capacity, only. He could testify to no facts at all concerning this occurrence. Whatever matters are known to him would be those, and those alone, that are covered in the answers to the various interrogatories that have been propounded to the defendants here.

His position is such that his presence in Washington and other places is requisite, not only to the appropriate and proper administration of the organization that he heads, but to the individual members who constitute that organization, scattered in many jurisdictions. So his commitments administratively and his duties require as close attention as is possible to give, but in addition to that, as Mr. Mullen has stated to you, sir, his commitments not only to Government but to various leaders in industry are manifold, are constant, and are of uncertain date and duration.

That is evidenced I think, in the reference Mr. Mullen made to the fact that on last Wednesday evening he was committed and did attend, according to my personal knowledge and now proclaimed by the press, a meeting in New York at the Union League Club called at the behest of certain leaders in industry for the avowed purpose of public policy, that meeting being called under the auspices of Mr. Alfred P. Sloan, of General Motors, attended by Mr. Eric Johnson of the  
page 12 } moving picture industry, Mr. Wilson, of General Electric, Mr. McCormick of International Harvester, and Mr. Fowler, I believe, of the DuPont interests, and

others, for the avowed purpose of undertaking to obtain agreements that would run to the welfare of the public policy of this country in these times that is obvious to all of us requires attention.

That epitomizes some of the commitments he has. In addition to that, Your Honor, from day to day there is a constant flux and turn of events in Washington that require Mr. Lewis' attention, both personally and his advice, in reference to matters governmental pertaining to the freezing of wages, the setting of prices, the institution and putting into effect of various governmental agencies controlling the internal affairs of domestic economy of this country, and from time to time, sometimes in public, very often in person, he is requested to attend such conferences, and very often on short call. He undertakes to respond and to give his time and talent as opportunity allows.

Now certain gentlemen may figure that his advice is not well taken, but I say to you, sir, that it is much sought and is well heeded in many high places. He has no desire to evade any mandate of this Court or any legal writ that has been served upon him, neither has he ever avoided the service or acceptance of any writ—any legal writ of any page 13 } Court. He does not desire to do that now. We merely assert that if he had knowledge of facts or was a pertinent witness here of matters that were not otherwise covered we would not be here today making this statement that I am now making to Your Honor because obviously if it were pertinent and not provable by any other source he would be willing, both personally and professionally, to come and give such evidence as this Court might see fit to accept, but such not being the case, as we know it here, but his commitments and his duties being otherwise, we respectfully submit justifies Mr. Mullen and counsel for the defendants to make respectful inquiry of plaintiff's counsel, through the Court, as to what they do expect to prove through this witness, what he can and would testify other than that which is already available to them in the answers to these various interrogatories.

That being so, we respectfully request and I would, sir, in support of Mr. Mullen, ask these gentlemen what is it they expect to prove over and above that which is available to them. If they can so state, and will so state, and if it is within the bounds of reason, I take it we would, speaking for the defendants here, undertake to arrive at that stipulation, and that is not only for the convenience of the witness Lewis, it is for the convenience of this Court. It runs to the pro-

page 14 } priety of orderly procedure I am sure, as Your Honor recognizes, to shorten the trial, and it is for those reasons, and those reasons alone, not for delay and evasion, that we appear here today and make this request.

I think that epitomizes our position, Mr. Mullen.

Mr. Robertson: Now I don't know whether that speech wound up with a rhetorical question or an actual question, but you have the right to close and I want to be heard and I promise not to make any such speech as Your Honor has heard.

We have gotten far afield from the record. So I think I am justified in saying there are many people in the ordinary walks of life who think Mr. Lewis regards himself as above the law and it is common talk around Richmond that he will never be here to this trial because he wouldn't want to come. Now he is not above the law and, representing just a garden variety Virginia plaintiff, we don't think he has got any right, through his counsel or anybody else, to bow himself out in any such high-handed way as he is now trying to do. Who says his testimony here is not needed? Is he to judge that or the Court? Is his counsel to tell the Court that, or his counsel to tell counsel that, and say that he knows nothing about it?

I don't care whether he knows the facts or not. I dare say there is not a living man in America that knows page 15 } as much as he does about the entire relationship of these three defendants because he dominates and strides above all of them, if I may follow the press and some of the Court decisions, and to say he is so important that he can't attend a Court of this Commonwealth when he lives up here at Alexandria, when he is within two hours and a half automobile attendance from here, when he is within forty-five minutes airplane time, when he can be reached constantly by telephone, I think is as high-handed a proposition as I ever heard. We want him here available to us for cross examination as a hostile witness regarding the entire relations of these three defendants. That is all I have to say no matter what anybody else says.

Mr. Allen: I concur in exactly what you say. I might add this. With the greatest respect for this Court and every other Court of this Commonwealth, notwithstanding the late provision for pre-trial conference, it is a matter for counsel to stipulate or not stipulate on a subject and the Court has no power or authority under our practice to compel counsel to stipulate against their judgment. We would do it if we could in justification to our client, but if we did not feel that

way about it, then we just don't think we ought to be required by the Court to stipulate.

Mr. Robertson: Let me add this, and I promise not to say anything more. I have no desire to make Mr. Lewis come here and sit through a trial that may last several weeks. I am perfectly willing to agree Mr. Lewis may on any reasonable notice come and be put on the stand and testify and leave, like we do under our practice all the time, but I am not willing to be put in the position where he is such a big shot he finds it inconvenient to come to this Court or he is so indispensable to our national economy that the whole thing will founder if he spends several hours in Richmond.

Mr. Mullen: If Your Honor please, we did not ask that his testimony not be taken. We asked them simply to see if we could agree to stipulate for the reasons that have been very fully stated here. Of course, Mr. Robertson has made a great many slurring remarks about Mr. Lewis during these conferences. He has no basis for them whatever. Nor does Mr. Lewis want to evade anything that is proper.

If they won't stipulate, of course, I know Your Honor can't force them to stipulate. It is a matter put up to them, I thought with courtesy to all, in a hope we could agree. Of course, we haven't been able to stipulate anything. I have made several propositions to stipulate and they have all been turned down.

I might say this, that really the man they want, I imagine, is the real administrative International officer, who would be much more familiar with the organization and with the matters they have asked about in these interrogatories than would Mr. Lewis and I was wondering if they would let him be substituted—Mr. Kennedy. He is the administrative officer.

Mr. Robertson: He wouldn't carry the weight Mr. Lewis would. You know that as well as I do.

Mr. Mullen: Yes, he would.

The Court: He is Vice-President, Tom Kennedy, isn't he?

Mr. Mullen: Yes.

Mr. Bryan: Do you agree to have Mr. Tom Kennedy here?

Mr. Mullen: I think Mr. Kennedy is going to be here.

Mr. Robertson: That wasn't the question. Will you agree to have him here?

Mr. Mullen: Do you want to trade Mr. Lewis for Mr. Kennedy?

Mr. Robertson: No.

Mr. Harris: Let's decide one question at a time, then.

The Court: Do you all care to comment on that?

Mr. Robertson: We won't agree. We just asked that question to show where all this cooperation was coming from the other side.

Mr. Bryan: I don't see how it is possible to stipulate in advance exactly what will be asked Mr.

Lewis. It will largely depend on the way the trial develops. It has been our experience from time to time that you will ask a witness a question about the inter-relationship between these defendants and the witness will simply say; "I don't know; you will have to find that out from Washington." The only way to avoid that situation is to have one of the top ranking officials or to have the top ranking official present.

The Court: Gentlemen, if counsel won't agree to stipulate I don't see it is anything the Court can do. If you all care to stipulate, it is satisfactory with the Court.

Mr. Mullen: What I would like to do would be to be able to fix a day that Mr. Lewis could be here so he could make his other engagements. I don't know how long this case is going to last. It is going to take maybe two weeks just to read their depositions and interrogatories and have objections made because there are already hundreds of pages of depositions and nearly every question has an objection to it. If we could fix a time and say we would have Mr. Lewis here—the case opens on the 22nd; have him here on Monday the 29th—

Mr. Robertson: We can't do that, Your Honor. For instance, I think Mr. Mullen is all wrong in his statement as how long it is going to take to read these depositions and these interrogatories and answers.

The Court: May I ask how many pages of depositions there are? I haven't looked at them.

Mr. Robertson: I haven't counted them; I should say three or four hundred, and I think that phase of the case, unless they string it out, is going to move much faster than Mr. Mullen said. I am unwilling just to take a guess at it and agree to that. I will gladly agree to give them reasonable notice.

The Court: How about two days' notice, Mr. Mullen?

Mr. Mullen: That would be satisfactory.

Mr. Robertson: That is all right.

Mr. Hopkins: At least that much, if we can.

The Court: I will see how the trial is running and when we get into the trial we can then better tell.

Mr. Mullen: If you give us two days, that will be all right.

The Court: He can testify and depart.

Mr. Mullen: I have just referred to the summons; I assume this takes the place of his coming here on the 22nd?

Mr. Robertson: Yes, that is right.

The Court: That is agreed among counsel.

page 20 } Mr. Mullen: The second matter I think well to  
bring up is this. We have quite a number of witnesses to bring here. I think to put on their case in chief is going to be pretty long, as Mr. Robertson says. I know it took me several days to read what is already here. When it is read and commented on by you in the trial it will take a long time. We don't want the expense of having those men sitting here or disrupting their work. What we would like to see if Your Honor will not agree that when they put on their case in chief we will then have an adjournment for one day so we can bring our people here.

Mr. Robertson: We will agree to that.

The Court: All right.

Mr. Mullen: Now, if Your Honor please, we want to file some amended grounds of defense and would like to have a date fixed by which we can do it.

Mr. Robertson: If you have got them ready we would like to see them now.

Mr. Mullen: I do not. We didn't discuss it until—

Mr. Robertson: You are not putting us on notice for a request for a continuance, are you?

Mr. Mullen: No.

page 21 } The Court: The Court is very pleased with the  
cooperation received from counsel on both sides in expediting this matter.

Mr. Mullen: I don't mind telling you they are purely technical.

Mr. Robertson: What are they?

Mr. Mullen: Some reference to certain sections of the United States Constitution.

Mr. Robertson: They don't worry me.

The Court: Will you file them by Wednesday of next week?

Mr. Harris: Judge, what we plan to do, Mr. Combs has a brief on that subject; I catch the plane back to Alabama in the morning and we had planned for him to send me my brief and I will draft them and send them to counsel. Now he is sending it by air mail and I won't get it until Tuesday.

Mr. Robertson: Will you send me a copy of it at the same time so we can be preparing ourselves on it?

Mr. Harris: They will be tentative until Mr. Mullen approves it. I will send you a copy of it; I don't mind you seeing it.

The Court: What is the earliest time you can get it?

Mr. Mullen: We would like to have until next Friday or Saturday.

page 22 } The Court: How about Friday?

Mr. Mullen: We will do that.

Mr. Robertson: Of course, we are not agreeing they can file them. They can lodge them subject to all proper objections by the plaintiff and then the Court will rule whether they will be filed or not. I am not waiving any rights.

Mr. Mullen: I think any time prior to trial you can file amended grounds of defense if it doesn't take you by surprise.

The Court: It is in the discretion of the Court.

Mr. Robertson: It is largely in the discretion of the Court and we simply want to see what they do.

The Court: In other words, you reserve the right to object to the filing; may object or may not.

Mr. Robertson: I think I can cover my position, that I don't agree to anything that I don't say I expressly agree to.

Mr. Mullen: In other words, you reserve the right to object to the filing?

Mr. Robertson: Yes.

Mr. Harris: Judge, those defenses will not be merely on the Constitution, but also on any applicable Federal law. There are some Federal questions we want to raise under the Norris-LaGuardia Act and under the Taft-Hartley page 23 } Act and the Clayton Act, with some of the decisions that may be of importance.

Mr. Robertson: I would like—may save you some work—to call your attention to this fact, that it has been agreed of record in these pre-trial conferences that this case is governed so far as the substantive law is concerned by the law of Kentucky and so far as the procedural law is concerned, by the law of Virginia, and the stenographic record of these pre-trial conferences will show that fact. I mean it may save you some hours work if you bear that in mind.

Mr. Mullen: I don't understand that precludes us from raising any Federal question—

Mr. Robertson: I don't either.

Mr. Mullen: —and having it a part of the record. In fact, I think in several cases in the conferences we have raised such Federal questions.

Mr. Robertson: When are you going to get us the grounds of defense?

The Court: On or before Friday. Friday is the 12th. Can you gentlemen think of anything you can stipulate to shorten this trial any and save time?

Mr. Bryan: I have one question, Your Honor. We are having photo copies made of certain portions of the United Mine Workers Journal and other journals which page 24 } we think will help to prove our case. Will there be any question raised, Mr. Mullen, as to the accuracy of those copies?

Mr. Mullen: Not if we are given opportunity to compare them.

The Court: I thought that was agreed.

Mr. Allen: That was stipulated at a former hearing.

Mr. Mullen: Once more, I want to say right there those morgues, as they are called, of the newspapers have been in my office ever since we filed the answers and stated they were available for your inspection.

Mr. Bryan: That is the first I knew of that.

Mr. Mullen: The right is set out fully in the papers and that they were at my office and I wondered why you hadn't been there. That is why I brought it up.

Mr. Mullen: At the last hearing after they had objected—I gave notice at the last conference we had inasmuch as they had taken up our answers and asked the Court to say whether they were complete or incomplete, that I would do the same with regard to theirs. I have just a few objections to them and would like now to take them up. I furnished copies of those objections at the time it first came up.

page 25 } Mr. Robertson: If Your Honor please, I don't object to Mr. Mullen stating any objection that he has got—as many, as often and as long as he wants to, but I understand and have understood and I think the Court has said here over and over and over again that except within the broad scope of the answers that the Court has already directed to be made, that the Court was reserving its rulings on all objections by all parties as to the competency of any question or answer or other testimony until the progress of the trial and all these questions and answers that the Court has up to this time ruled must or must not be answered, that they are all subject to the final ruling of the Court in the trial, and if you change your mind that you rule it all out or all in.

The Court: If I gather what Mr. Mullen is about to say, he is attacking the sufficiency of the answers, the same as Mr. Bryan did.

Mr. Mullen: Exactly.

Mr. Robertson: All right, sir.

The Court: All right, Mr. Mullen; go ahead.

Mr. Robertson: Will you tell me which ones you refer to?

Mr. Mullen: I have furnished you all with copies.

Now our first objection is to Answer 1(d).

Mr. Robertson: Which interrogatory is that?  
page 26 } Mr. Mullen: Of course, you have your first answers and then further answers. This is the original one that you filed. Later on, it reaches the others.

The Court: How many do you have?

Mr. Mullen: It is very short.

Mr. Robertson: You are talking about the answers of Laburnum?

Mr. Mullen: To the interrogatories furnished.

Mr. Robertson: Is it headed this way: "Answer of Laburnum Construction Corporation to Summons of the Defendants to Interrogatories"?

Mr. Mullen: Correct.

Mr. Robertson: And it is 1(d)?

Mr. Mullen: 1(d) is the first one.

(Mr. Mullen read the question and answer.)

The first sentence answers the question; the rest of it is surplusage; doesn't refer to that contract. That contract was for a specific amount and nothing else and for a specific piece of work and they have gone outside of that and have put in some other argument.

The Court: Mr. Mullen, I think it was understood that the question of surplusage—that we would take that up at the trial. Is that my understanding?

Mr. Robertson: It is mine.

The Court: We went into one or two of these on page 27 } previous hearings and that was my recollection.

Mr. Allen: That is right.

Mr. Mullen: That is surplusage, if Your Honor wants to take it up later. The next is 1(f).

The Court: I believe that is the same—

Mr. Mullen: He again answers the question and adds a lot of surplusage by way of argument and additional matter in it.

The Court: All right.

Mr. Mullen: The same thing as to 1(h).

The Court: I see.

Mr. Mullen: The first sentence is the full answer to it; the rest of it is not. Next is 2(d).

The Court: It is surplusage marked in the column here.

Mr. Mullen: Yes, the first sentence answers the question; the rest of it is just trying to get in evidence they might not be able to get in any other way.

The Court: Then, if I can help you, the next one here is 2(f).

Mr. Robertson: I have a question mark after every one of those; they raised all of those questions before.

Mr. Allen: And you ruled just as you rule now.

Mr. Mullen: I beg your pardon; I haven't taken them up before. You have it because I furnished you with page 28 } a copy of my objections and we didn't go through them.

In 2(h) we have the same thing.

Now 8(a) is not responsive to the question.

(Mr. Mullen read the question and answer.)

That wasn't the question; we asked them if they were operating—

Mr. Robertson: It is the same old story of ruling on it when we get in the trial. Whether they were or weren't would be a question of law for the Court.

The Court: No, I think this is a little different from surplusage.

Mr. Robertson: All right, Your Honor.

Mr. Mullen: We were required to amend our answers.

The Court: In other words, you think that answer ought to be yes or no?

Mr. Mullen: Yes.

The Court: Do you want to address yourself to that?

Mr. Robertson: I am perfectly willing to answer it yes, we were.

The Court: It calls for a yes or no answer, as I read it.

Mr. Robertson: All right, the answer is yes, right now.

Mr. Mullen: You are going to answer that yes? page 29 } Mr. Robertson: Yes.

Mr. Mullen: Now 12(a) in the further answers.

(Mr. Mullen read the question and the answer.)

The question was who informed whom that the workmen were members of the local union of A. F. of L. Now in the course of it he says Mr. Bryan informed them, but just uses general terms as to others. Either he knows or doesn't know and he should so state in answer to that question. Our question was for specific names of those who told whom they were members of the A. F. of L. union.

Mr. Robertson: I think that has already come up in another phase of this litigation. I think that is an answer to the question. It pins the responsibility right square down on Bryan. It doesn't call the roll of our witnesses. I don't understand that we are required to do that and I understand it came up here, according to my recollection, in the other pre-trial conferences, that we didn't want to do that, among other reasons, for the fact that the pressure—and I

speak by virtue of my personal knowledge of personal trips to the locality where this thing happened—we think that is necessary to protect these men against that and I don't know of any legal reason that he has a right to call for it in any more detail than here, certainly not before the time of the trial, and we have got that legal reason and that practical reason for not doing it.

page 30 } Mr. Mullen: We have been compelled to give the names of everybody you asked about, names of some 200 members of the local union of United Construction Workers.

Mr. Robertson: We gave you the names of all our workmen. You are having a witness conference out there in Kentucky today and you can question them.

Mr. Mullen: Why do you think we have it?

Mr. Robertson: I was just told so.

Mr. Mullen: I suppose you have some spies out there telling you everything that happens.

The Court: The Court is only concerned with the question here.

Mr. Robertson: I happen to know you have—not you but the defendants out there had theirs spying on us.

Mr. Mullen: I think if that is true—I don't know, but it would be kind of the kettle calling the pot black.

Mr. Robertson: It might be. Sometimes you have to fight fire with fire.

Mr. Mullen: This is important, who told whom your employees were members of the A. F. of L. union.

Mr. Robertson: I think if you will read the depositions you would find they are all answered in there. You haven't read them, have you?

page 31 } Mr. Mullen: I read part of them; I got sleepy

Mr. Robertson: Go ahead and read the other part and you will find it in there.

Mr. Mullen: That is all I have to say on that particular question.

The Court: Do you gentlemen have anything further to say?

Mr. Allen: Yes, let me say this. Our right to call for the membership in the union and locals and the officers of the union and things like that are different from the right to demand a list of witnesses. Under all the rules applicable in pre-trial conferences that we have now or every had in this country, no lawyer has been required to give the list of the names of his witnesses and it has been expressly ruled on in the Federal cases where the pre-trial conference has been in operation for ten or twelve years, that you can't make the other side give you the names and the addresses of its

witnesses, and that is just what he is calling for: The names of the persons who told whom.

Mr. Robertson: We don't want you to put the heat on them out there and make them fade out.

Mr. Mullen: We are dealing with interrogatories now and the interrogatories have been argued by you so you could get any information you wanted under them. You have argued

page 32 } that from time to time very fully and the ques-  
tion where you have alleged in your notice of mo-  
tion that whom was told by someone that these em-  
ployees were members of the local A. F. of L. union, we have  
a right in the interrogatories to ask who told whom that. That  
is an important question.

The Court: The Court will refuse to require the plaintiff to amplify that answer.

Mr. Harris: May we reserve an exception?

The Court: Of course.

Mr. Mullen: It is understood we are reserving all excep-  
tions.

The Court: To all adverse rulings, as I understand.

Mr. Mullen: Now question 13(a). That was asked as to the name of the Kentucky State Officer to whom the plaintiff is alleged to have appealed for assistance. They answered that and went on with a long argument which undertakes to bring in hearsay testimony, among other things.

(Mr. Mullen read the question and answer.)

We submit that is not an answer to that question.

The Court: Read the question again.

Mr. Mullen: The question is what is the name of the Ken-  
tucky State Police Officer to whom the plaintiff allegedly ap-  
pealed for assistance.

page 33 } Mr. Robertson: All that brings up the question  
whether or not it is surplusage.

The Court: He mentioned Howard, didn't he?

Mr. Mullen: Yes, but then tries to get in all that—

The Court: That is surplusage.

Mr. Mullen: They know they couldn't testify to that and they are trying to get it in indirectly.

The Court: I will pass on that along with the other ques-  
tions.

Mr. Mullen: The final one is 14(a) in the original answers.

(Mr. Mullen read the question and answer.)

Now I will come back to the question; they haven't an-  
swered it.

Mr. Robertson: No, if Your Honor please, that comes back down to surplusage. That tells the story. That story is repeated in their own depositions which you attended the taking of. That is our answer to that question. That is all the answer we have got. If it is not in there, it didn't occur.

Mr. Mullen: It is not responsive to the question at all.

Mr. Robertson: It certainly is. Like some of your answers, we didn't like the answers.

page 34 } Mr. Mullen: Let's take each one up and see:  
"What were the bids, if any, made by the plaintiff on such contracts?"

Mr. Robertson: Which contracts?

Mr. Mullen: Contracts for work which would have resulted in large profits to plaintiff; dealing with something speculative now.

Mr. Robertson: We have the Virginia decisions on that. It is not speculative and they made no bids other than those.

Mr. Mullen: I thought you said Kentucky law governed it.

Mr. Robertson: Under the Kentucky law, too.

Mr. Mullen: You haven't answered that question; "What were the bids, if any, made by the plaintiff on such contracts"?

Mr. Robertson: There weren't any except such as shown there.

The Court: Then it would be none, except as shown in the answer?

Mr. Mullen: The answer shows no bids. Your answer is you either made bids or didn't make bids.

Mr. Bryan: "At page 14 of the notice of motion for judgment it is alleged and further caused plaintiff to lose other contracts for work which would have resulted in large profits to plaintiff." I think that is the answer.

Mr. Mullen: I don't. Go further down. "What bids, if any, were made by the plaintiff on such contracts? On what basis were such bids made?"

Mr. Bryan: What other contracts?

Mr. Mullen: The contracts you claim you lost?

Mr. Robertson: That is our answer and the only answer we have.

Mr. Mullen: You haven't answered that.

Mr. Robertson: The Court can rule on it when we come to it. I can tell you no other bids except these.

The Court: May that be the answer to the question?

Mr. Bryan: What is that?

The Court: No other bids except those set forth in the answer.

Mr. Bryan: I would have to check my record to be sure that is absolutely correct.

The Court: Let the Court rule and this is the ruling of the Court, that the plaintiff answer that question.

Mr. Bryan: What question?

The Court: What were the bids, if any, made by the plaintiff on such contracts.

Mr. Mullen: If they did make any bids, on what basis were such bids made? He can answer that.

page 36 } Mr. Robertson: I told you, subject to correction, there was nothing else except as set out in that answer.

Mr. Mullen: I know that, but I want it on paper.

Mr. Robertson: I don't blame you.

The Court: The same ruling in regard to that question.

Mr. Mullen: "What contracts, if any, is it alleged defendants caused plaintiff to lose on which the plaintiff didn't bid?"

Mr. Robertson: Subject to correction, none except as shown in that answer.

The Court: Same ruling.

Mr. Mullen: That is all I have.

Mr. Robertson: When you make it look like we are quibbling I want to assure you we are not.

Mr. Mullen: I know you are not, but I want it in the evidence.

Mr. Bryan: I have one other thing. With further reference to these photo copies we were talking about I am not sure which copies you have in your office. We have had some copies made up probably you don't have in your office and can't be obtained anywhere except from either the Department of Labor Library or the Congressional Library.

Mr. Mullen: I have whatever is in existence.  
page 37 } I have the bound volumes of those magazines you all called for. Whether they are complete, I don't know. I think perhaps you will agree that they are not complete.

Mr. Bryan: The point I am trying to make is we have photo copies of some things that you probably don't have at your office. Will any question be raised as to the accuracy of those?

Mr. Mullen: If you furnish them to us, we will have them examined at the same source you got them from.

The Court: As I understood at the previous hearing, you would have photostatic copies made and you would turn them

over to Mr. Mullen and he would have them checked and, if accurate, there would be no objection.

Mr. Bryan: I just don't want to have any misunderstanding.

The Court: I think it would be well to get with Mr. Mullen the first of the week.

Mr. Bryan: It was suggested we have some reporter go to Washington and copy portions of the articles, but we didn't do that.

Mr. Mullen: We won't stand on photo copies. We will compare them, and we don't object to the accuracy—

The Court: But reserve the right to object to the admissibility?

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page 1 }

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Transcript of a pre-trial conference in the above styled case before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, on January 15, 1951.

Appearances: Mr. Archibald G. Robertson, Mr. George E. Allen, Mr. T. Justin Moore, Jr., Counsel for complainant.

Mr. A. Hamilton Bryan, President, of Laburnum Construction Company.

Mr. Fred G. Pollard, Mr. Robert N. Pollard, Jr., Counsel for defendants.

page 2 } Mr. Fred Pollard: Judge, at the hearing at which

I was not present on January 6th the defendants said they would like to amend their grounds of defense and the order of the Court was that it should be filed not later than the 12th of January, and it was filed by that time and copies were served on the plaintiff and the additional defenses are two short defenses which raise Federal questions, but which would not require any new evidence to be introduced by either party, and as I understand the rules of procedure as laid down by the Supreme Court of Virginia the grounds of defense can be amended in the discretion of the Court, and therefore we respectfully request Your Honor to enter an order permitting these defenses to be filed.

Mr. Robertson: If the Court please, the plaintiff opposes the filing of these additional defenses. The Court will recall it has been agreed of record by counsel for all parties that this case is controlled by the substantive law of Kentucky and the

procedural law of Virginia and this is an attempt at this late date to inject into the case Federal statutes that are not properly in this case to change the theory of their defense and to confuse the issues and we think it amounts to a misjoinder of defenses, and we oppose it for all the reasons I have stated.

The Court: Unless you have something further page 3 } to say, I will allow them to file the additional grounds of defense.

Mr. Robertson: We note the exception to protect the record.

Mr. Allen: I think we should also object upon the ground that, irrespective of what view that you take of the merits of the defenses, they come too late; the pleadings have long since been made up and this case is scheduled to begin trial on Monday and is scheduled to require three weeks and we think that the filing of grounds at this time comes too late, and we think also that there is nothing in any of the grounds that is applicable to the facts of this case, and, of course, we note an exception to Your Honor's ruling.

Mr. Fred Pollard: Judge, I understood you to say you would permit the defendants to file these grounds of defense, but you would not rule at this time as to whether or not the defendants could rely on these defenses at the trial. If you are not going to let us rely on them, I don't see your purpose in allowing us to file them.

The Court: The Court may allow you to rely on them at the trial. The Court is not advised as to what pattern this trial is going to take and will, of course, reserve its opinion—

Mr. Fred Pollard: Then you will not allow us to page 4 } amend the grounds of defense?

The Court: I am permitting you to amend the grounds of defense. That does not mean the Court may not during the trial rule they are not applicable to this case.

Mr. Robertson: It is nothing to rule on now; there is no evidence here.

Mr. Fred Pollard: You are allowing us to amend the grounds of defense?

The Court: Yes.

Mr. Fred Pollard: And all you are saying you don't know at this time whether or not it is a good defense?

The Court: That is true. I haven't passed on any of your defenses.

Mr. Fred Pollard: There is one part of the record at the pre-trial conference of January 6, 1951, I would like to bring to your attention. Beginning on page 22 Mr. Harris said:

“Mr. Harris: Judge, those defenses will not be merely on

the Constitution, but also on any applicable Federal law. There are some Federal questions we want to raise under the Norris-LaGuardia Act and under the Taft-Hartley Act and the Clayton Act, with some of the decisions that may be of importance.

"Mr. Robertson: I would like—may save you some work—to call your attention to this fact, that it has been page 5 } agreed of record in these pre-trial conferences that this case is governed so far as the substantive law is concerned by the law of Kentucky and so far as the procedural law is concerned, by the law of Virginia, and the stenographic record of these pre-trial conferences will show that fact. I mean it may save you some hours work if you bear that in mind.

"Mr. Mullen: I don't understand that precludes us from raising any Federal question—

"Mr. Robertson: I don't either.

"Mr. Mullen: —and having it a part of the record. In fact, I think in several cases in the conferences we have raised such Federal questions."

Mr. Robertson: Are you trying to argue I have conceded some point there because I haven't?

Mr. Fred Pollard: Judge, I just bring this to your attention that the record speaks for itself.

Mr. Robertson: They can raise it now; they raise it by asking the Court to allow them to file the grounds of defense and I think the record shows it, and I don't think it is proper to say we are trying to say you are getting away with anything.

Mr. Fred Pollard: I am not trying to get away with anything.

Mr. Allen: As I understand it, Your Honor, will page 6 } withhold your ruling thereon. It may develop upon the trial from circumstances that may be shown and technicalities that may arise and complexities, and so forth, that the pleading came late. As I understand, you are reserving all of those decisions, as has become the practice now almost invariably in the Federal courts and in some cases in the State courts. You are allowing them to file them. As to what you are going to do with them later on, whether they are going to be permitted to rely on them on any ground is another question.

The Court: That is my understanding.

Mr. Fred Pollard: Judge, that is a different understanding from the one I just asked you about.

The Court: If I understood you correctly, Mr. Allen, you stated that the Court was permitting the defendants to file the amended grounds of defense and during the trial the Court would reserve the right to pass on whether or not they could rely on these grounds of defense.

Mr. Robertson: That covers everything under the sun.

Mr. Fred Pollard: And it is also my understanding by relying on them that these two additional defenses are in the same position as the original seven defenses.

The Court: The Court has not passed on any of page 7 <sup>1</sup> the defenses relied upon by the defendants and I am advised that in the original grounds of defense there were seven defenses set out—

Mr. Fred Pollard: There are eight.

The Court: Now the Court is permitting the defendants to file an amended ground of defense which includes two additional grounds. That makes ten grounds in all and the Court has not passed upon whether or not any of the grounds are good, but will do so when the proper time comes during the trial.

(Discussion off the record.)

Mr. Bryan: I would like to take up this question in connection with the trial of the case. When the various depositions were taken the defendants always took the position that they were entitled to each have one representative present upon the trial, that there were three separate defendants. Of course, they are closely allied together—

Mr. Fred Pollard: That is a matter of proof.

Mr. Bryan: —in such a way it might be treated as one organization or one defendant. Now at the trial of this case I would very much like to have present in the courtroom a boy named Maynard Regan, who is the Chief Clerk. He will be a witness—

The Court: For whom?

Mr. Bryan: For Laburnum Construction Company, page 8 <sup>1</sup> the plaintiff, but he has done a lot of work in connection with helping with various papers and so forth and I would want somebody there in that capacity. He is the best man I have got for that. I think it would facilitate the trial and make it lots easier.

The Court: Do you gentlemen care to comment on that?

Mr. Fred Pollard: Yes, sir. We couldn't agree to that. Of course, we would be willing to limit ourselves to one representative if they would be willing to limit themselves to one.

The Court: The general practice is to allow one representative of each party to be present in court.

Mr. Allen: It is entirely within the discretion of Your Honor, as I understand the law, to determine whether under the peculiar circumstances this special assistant to Mr. Bryan should stay in court.

Mr. Robertson: We can adjourn and take time, if necessary, to get the papers together. I think it is a fair proposition, one representative to each side.

The Court: That is the general rule. If you gentlemen can agree otherwise, it is satisfactory to the Court.

Mr. Fred Pollard: Your Honor, I understand that each of the defendants is entitled to one representative.

page 9 { Mr. Bryan: You mean you expect to have three there?

Mr. Fred Pollard: I don't know what we expect to have. We insist we have the right to have three.

The Court: As presently advised, there are three defendants. I don't know what the evidence will prove, but there are three defendants as far as the record discloses and each defendant would be entitled to one representative.

Mr. Robertson: I submit without reference to either Mr. Bryan or Mr. Allen, that is the rule, I think. If they differ with me, I would like to have them speak.

Mr. Allen: I don't differ with Mr. Robertson on that, but I don't think this is the ordinary case. The record itself so far shows that the cooperation between these defendants and the connection is so close that it is almost one and the same.

Mr. Fred Pollard: Judge, I don't think it is proper for Mr. Allen to be up here arguing the case at this time.

Mr. Robertson: Judge, will you let me speak to my associates for a minute?

The Court: Yes.

(Mr. Robertson and his associates retired from chambers and then returned.)

page 10 { Mr. Bryan: I was just thinking about the mechanics of it; it would make it a whole lot easier to have somebody who knew about it.

Mr. Robertson: We are in accord; you will have three, we will have one.

Mr. Fred Pollard: Now I would like to bring this up. Inasmuch as there are three defendants, we would like to have the right—I don't know that we would do it—for each defendant to have its own counsel and, as such, each counsel would have the right to cross examine.

Mr. Robertson: If I was the Court I wouldn't rule on that until you get there. Whenever I thought the witness had been properly cross-examined, I would cut it off and when I thought he hadn't I would let it go on. After all, this is a garden variety of tort action.

Mr. Allen: But, Your Honor, we should certainly object to Mr. Robertson cross examining a witness that is put on by the United Construction Workers and then for Mr. Pollard to have the same right to cross examine that witness that we have. I don't think that that would be a fair way to conduct the trial.

Mr. Fred Pollard: If you want to drop two of the defendants, that is all right with us.

Mr. Allen: I think the Judge can pass on that when the time comes.

page 11 } Mr. Robertson: I think we are just setting up straw men to knock them down. When you get to the end of a fair cross examination and keep trying to go over old straw I think the Court will quit it and the counsel will suit it rather than irritate the Jury. I think we are making trouble out of nothing.

The Court: We all want to attempt to expedite the trial of this case.

Mr. Fred Pollard: I want to point out this. Say the cross examination of Mr. Bryan may take two days and may go into several hundred pages, I understand the law to be that only one attorney for the same party may cross examine. It may be we would like in planning our work for Mr. Mullen to cross examine on one phase, Mr. Harris on another and maybe I on another.

The Court: There would be no repetition?

Mr. Fred Pollard: No.

Mr. Robertson: I suggest you just defer your ruling on that and rule what is right when the situation arises.

The Court: That probably would be the advisable thing to do rather than rule at this moment, but Mr. Pollard has stated there would be no repetition, that your request may be that you cross examine on one point, Colonel Harris examine on another point and maybe Mr. Mullen would want to  
page 12 } cross examine on another point and there would be no repetition.

Mr. Fred Pollard: Yes, sir, there would be no repetition.

Mr. Bryan: You all represent all three defendants, don't you?

Mr. Moore: You are counsel of record for all three defendants.

Mr. Fred Pollard: So does Colonel Harris.

Mr. Moore: And it is so stated in the order of the Court.

The Court: I don't recall.

Mr. Robertson: Yes, sir, that is right; I told them to put it that way.

Mr. Fred Pollard: That is true, but each defendant is entitled to an attorney.

Mr. Allen: Not if he employed a firm of attorneys or two or three firms to represent that one client. We have run across that a lot of times.

Mr. Robertson: I still think you are making trouble over nothing.

Mr. Allen: I say to pass on it when the time comes.

The Court: You gentlemen may look into the matter and see if you have any authority and submit it to me at page 13 } that time. Anything that would be helpful to the Court will be appreciated.

Mr. Bryan: We don't want our witnesses harrassed by a series of cross examinations by a dozen lawyers.

The Court: Do you care to comment any further, Mr. Pollard?

Mr. Fred Pollard: No, sir. We would say in any cross examination we have no desire to create any repetition.

(Discussion off the record.)

Mr. Robertson: It is very obvious—you can see what is coming up there. I can't remember the case, but I think Mr. Allen knows all the cases, and Mr. Moore. I think there is a case in the Court of Appeals that approves the practice of where there are several defendants of allowing one strike, and I think they put it on the ground I stated: Suppose you had five hundred defendants, would you allow five hundred strikes?

Mr. Allen: I know the Court of Appeals never recognizes but two sides of a case because I have had that experience.

The Court: As presently advised I don't think you will have any additional strikes. The defendants will have the same number of strikes as the plaintiff. That certainly has been the practice as far as I know. In other words, here we will have twenty men, it being a special jury. You page 14 } draw sixteen of those twenty or vice-versa—I don't think it is error either way—and then the plaintiff strikes two and the defendants strike two. That leaves twelve in the box to try the case. Unless you all can show me that the Court is in error there, I think that is the proper procedure

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TRANSCRIPT OF PROCEEDINGS.

VOLUME I.

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Received and Filed Aug. 16, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

Virginia:

In the Circuit Court of the City of Richmond.

Laburnum Construction Corporation, Plaintiff

v.

United Construction Workers, Affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, Defendants

The above-entitled matter came on for hearing before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 22, 1951, at 10 a. m.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for defendants.

Also present: Robert N. Pollard, Jr.

page 2 }

PROCEEDINGS.

The Court: Is Plaintiff ready, gentlemen?

Mr. Robertson: Yes, Your Honor.

The Court: Is Defendant ready?

Mr. Pollard: Yes, sir. Your Honor, at the proper time we would like to have a witness who has been *subpoenad* here this morning recognized until Wednesday the 27th.

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page 5 }

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The Court: Gentlemen, the case you shall try today is one in which the Laburnum Construction Corporation is the Plaintiff, and the United Construction Workers, affiliated with the United Mine Workers of America, District 50, United Mine Workers of America and United Mine Workers of America are the Defendants. Your silence will indicate to the Court that your answer is no to each of the page 6 } questions propounded to you by the Court.

Are you an officer, director, stockholder or employee of any of the parties to this suit?

Are any of the parties in your employ?

Do you have any interest in this case?

Have you formed or expressed an opinion in regard to the issue in this case?

Are you sensible of any bias or prejudice to any of the parties in this lawsuit?

Do you know of any reason why you cannot give the Plaintiff and the Defendants a fair and impartial trial according to the law and the evidence of this case?

I take it, then, from your silence, that you and each of you stands indifferent to the outcome of this litigation. Any questions by counsel?

Mr. Robertson: None by Plaintiff.

Mr. Mullen: None by Defendant.

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page 15 }

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Mr. Fred G. Pollard: All right.

Judge, I think we ought to advise the Court of this before we go any further, and that is that Mr. Owens is an attorney and a member of the legal staff of the United Mine Workers, and anything that he knows about anything in these proceedings has come to his attention through the relationship of attorney-client.

Mr. Robertson: I would like to remind the Court that he has attended a number of these pre-trial conferences under a stipulation of record, and at each one he appeared as a spectator and not as counsel. We will cross that bridge when we come to it.

Mr. Mullen: We have also stated he was a member of the legal department, and has been working with us in page 16 } the case, and has been from the beginning.

Mr. Robertson: And was not counsel in the case.

Mr. Fred G. Pollard: That is right.

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(The jury was sworn by the Clerk.)

Mr. Robertson: I ask that the witnesses be excluded, except within the usual limits. We wish Mr. Bryan to stay in the courtroom.

The Clerk: All witnesses stand, please, and raise your right hand. All parties who are going to testify, stand up and raise your right hand.

Do you and each of you swear the testimony you are about to give in the case before the Court shall be the truth, the whole truth, and nothing but the truth, so help you God?

(The witnesses answered "I do.")

page 18 } The Clerk: Take a seat.

You gentlemen may leave the courtroom and come in as your names are called.

The Court: Except one representative of each party.

Mr. Robertson: In that connection, Your Honor, it is admitted in the pleadings here that District 50 is a part of the United Mine Workers of America, and that the United Construction Workers is a division of District 50. They are all parts of the same thing, and we think they are entitled to one representative.

Mr. Mullen: If Your Honor please, we feel that each defendant is entitled to a representative. We do not have in court anybody else. I mean, Mr. Owens is a member of the legal department of the United Mine Workers and has been working with us in this case all the time. He is not here as a witness on our part, but he is a part of the group of lawyers who have been working in this matter. I think he is a proper one to be summoned.

The Court: The Court rules tentatively that each defend-

ant has the privilege of having a representative present in the trial.

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page 19 } The Court: All right, Mr. Robertson.

Mr. Robertson: If Your Honor please, and gentlemen of the jury. This is a damage suit by the Laburnum Construction Corporation against three labor unions for \$500,000 because all three unions ran Laburnum off a construction job in Breathitt County, Kentucky.

Laburnum Construction Corporation is a Virginia corporation with its home office in Richmond. It was organized in 1937 by members of the family of Mr. John Stewart Bryan and their associates and the president of that corporation today is Alexander Hamilton Bryan, A. Hamilton Bryan. He is also the principal owner of the corporation to an extent and in a degree and manner such that any disaster to that corporation is a disaster to him personally and his own fortunes.

Laburnum Corporation is not a large corporation as companies go in this country today. It is closely held and is a small ownership. It specializes principally in industrial construction, and it has a fine record of performance. It has done a tremendous amount of work for the Government around Norfolk, Portsmouth, the Ducktown Mine Depot, around Washington, at Newport News. It has done a tremendous amount of work for the big companies over at Hopewell, the Dupont Company outside of Richmond, and for other companies in Cleveland, Chicago, in Alabama,

page 20 } West Virginia, and Kentucky.

For the last ten years it has averaged about \$2 million worth of construction a year and, as I said, the company's fortunes are largely dependent upon the integrity and standing and performance of the people who own it and represent it and through whom it acts.

It is thoroughly qualified to do any kind of general construction work.

Now, the three defendants here: One of them is the United Mine Workers of America, of which John L. Lewis is the President. The United Mine Workers of America covers the entire United States and Canada, and therefore it calls itself an international union. The Supreme or final authority in that union is in its international convention, which meets periodically. Between conventions the top authority resides in what is known as the international executive board, which would correspond roughly to a board of directors. One member of that board—and his name is going to keep coming up

and coming up and coming up in this case—is a man named Tom Rainey, who lives at Pikeville, Kentucky. The International Executive Board is made up of the principal officers of the corporation and of the principal officers of various districts. The United Mine Workers of America is divided into districts which comprise certain geographical area for convenience of administration, and there is a director page 21 } of each one of those districts. Then each district is divided up into regions. Then the top officer, as I have said, is John L. Lewis.

The United Mine Workers of America organized coal miners and other people who labor in industries incident to by-products of the coal mining industry, like some of the great chemical manufacturing companies. So much, for the time being. I might say that of these districts, the United Mine Workers has 31 districts, if the charters of any of them haven't been revoked, 31 districts, numbered from 1 to 31, so that they can divide up a geographical area and assign a district to it, like some districts in Pennsylvania, West Virginia, and Kentucky, some in Arkansas, some in Alabama. Then when they come along from 1 to 31 they jump to District 50. They leave a gap in there so that they can form some more districts later on if they want to and still keep up the numerical sequence.

Then when you jump over to District 50, which is a district just as much as any other district and is admittedly a part of the United Mine Workers and subject to the United Mine Workers, the parent organization, and that district includes all of the United States and Canada just the same as the parent company does, and the purpose of District 50 is to organize the unorganized into this District 50. It takes in every industry not taken in by the United Mine page 22 } Workers. It will organize carpenters, bricklayers, barbers, clerk's laundry men, anybody. It covers the whole field of American industry, and it is a part of the United Mine Workers. So when it comes to acting through its District 50, the United Mine Workers is in the field to organize all American industry everywhere, not just coal miners.

District 50 covers the United States and Canada, and it is divided into regions for purposes of convenience and administration, and one of those regions is region 58, which includes Breathitt County, Kentucky, which we are coming to talk about a little bit later.

Back in 1942 there was what is known as the United Construction Workers, which was hooked up with the CIO, and they had a row with the CIO and they pulled out and left the

CIO, and they came over to join up with the United Mine Workers of America. They said, all right, come on in with us and we will make you a division of District 50, because before you got here your function was also to organize the un-organized and to cover all American industry. So come on over and become a division of District 50, and then we will be sitting pretty because we can organize all American industry either through District 50 or through the United Construction Workers, as we see fit.

There you have your three defendants in this suit: The United Mine Workers, the over-all organization, page 23 } District 50, admittedly a district of it, and the United Construction Workers admittedly a division of District 50.

As you can see there, they are all interrelated and interwoven, and I am going to show you as I tell you more of the facts involved in this case that they act through each other and are banned up with each other so you cannot untangle and separate the one from the other.

In Kentucky and West Virginia there is a coal company known as the Island Creek Coal Company and it has a number of associates and affiliates. One of those other companies is the Pond Creek Pocahontas Company, and another one is the Spring Fork Development Company. The Island Creek Coal Company is the third biggest commercial coal company in America. It is the biggest commercial coal company in West Virginia, and I think in Kentucky. It, through its subsidiaries and associates, handles most of the coal that is shipped over the Chesapeake & Ohio Railroad. It is such a tremendous company and its operations and activities are so far-flung that it has constantly engaged in construction work, and that construction work is carried on under a master plan which is developed in phases over a period of time.

During the two-year period from 1947 into 1949 the Laburnum Construction Company had built up a business connection and association with the Island Creek Coal page 24 } Company which was of tremendous value to it.

It was based on a record of business integrity and performance and personal friendship between men such as Mr. Salvati, the President of the Island Creek Coal Company, and Mr. Francis, the Chairman of its Board of Directors.

During that two-year period Laburnum Construction Corporation, with Mr. Bryan as its president, had done a number of contracts for Island Creek and subsidiaries. I think some dozen, maybe a little more, maybe a little less. They had done it to the satisfaction, completely, of Island Creek and its associate companies.

In 1947, on April 15, Laburnum Construction Company entered into a contract with the Richmond Building and Construction Trades Council of the American Federation of Labor providing that Laburnum would employ A. F. of L. labor. In this territory and in these circumstances that was the natural labor affiliation for anybody who was going to work with labor and not buck labor.

Along in October, 1948, after Laburnum had done this good work over a period extending at that time well nigh two years, and I may say it had been profitable to Laburnum, it had averaged them net about at the rate of \$25,000 per year. The work of Island Creek and its other companies was increasing and expanding.

When you come to October, 1948, Island Creek  
page 25 } Coal Company determined to open up a mine in Breathitt County, Kentucky. I am going to describe that to you in a moment. I am going to describe it as a rough, rugged, violent country, so that Breathitt County is known in that section of Kentucky as Bloody Breathitt. I am going to show you some pictures and a sketch of this place in a moment. This place where they wanted to open up this new mine is roughly 100 miles southwest of Huntington, West Virginia. To get to it you go and get off the train at Huntington, you get yourself an automobile, you strike out through the mountains and the bushes southwestwardly from Huntington, you cross the big Sandy River into a place called Louisa, Kentucky. Louisa is a very small town. You go on from Louisa until you get to a town called Paintsville, a town of between three or four thousand people. You go on from Paintsville to Salyersville, the County Seat of Magoffin County. When you get there you have a town of about 12 or 15 hundred people. Then you keep on out into the hills and you pass a place called Royalton, which is two or three hundred people, and when these people got there the road got worse and more difficult as you kept going. Finally, you come to where they were going to open up this new mine, and they call it Evanston, Kentucky. They had to call it something, and I guess that is why they called it Evanston.

At the time they went in there to do the work  
page 26 } that I am going to tell you about in a moment the road was almost unpassable. There was no railroad, there was no telephone, there was no post office, there were no houses, there was nothing. When the Island Creek Coal Company and the Pond Creek Pocahontas Company opened up negotiations with Laburnum Company to open up that mine there the understanding and agreement was: This is a difficult job. It is in rough country. It is very hard to

get your machinery and equipment in there. As a matter of fact, they had to blast out a place to get level enough to make foundations for the tipples. There is not going to be very much profit in it. But as a part of the inducement to do that work and in recognition of past performance, we tell you now that when you have finished this work we are going on and give you additional work, and you can count on practically all of our work in that territory and in West Virginia under our master plan.

So, Laburnum signed up a contract dated October 28, 1948, for the construction of a coal preparation plant at Evanston, Kentucky, which is down at the foot of a mountain where a few creeks come together. Here is the kind of operation it was:

I forgot to state that the C. & O. Railroad was also building a railroad in there to handle the coal from this mine, but that hadn't gotten there.

page 27 } This coal tipples or, as they call it, a coal preparation plant—I guess all of *of* us have seen coal tipples. Of course they get the slate out of the coal, and they have the way now to wash it and steam it and get the dirt out of it and run it around and get it in good shape to ship it to the consumer. This particular operation was a strip mine up on the top of this hill. I will show you a picture of it in a moment. They would strip this coal off up at the top of the mountain, dump it into a conveyor, and the conveyor would carry it down to the tipples where it was processed and loaded into the cars.

The length of that conveyor was about 1,500 feet, and the height of it up in the air about 600 feet.

Laburnum went to work very shortly after the contract of October 28, 1948 was signed, and in order to get its labor and to comply with its agreement that it had made in Richmond, it went to get its labor at the nearest union of the A. F. of L. that asserted jurisdiction in that kind of work, which was the carpenters union at Paintsville, about 45 miles away from the job site.

They got whatever laborers they could get from there. The A. F. of L. sent them in some other men from other locals more distant, and then because they couldn't get others they employed some unorganized labor, too, with the knowledge and consent and to the satisfaction of the A. F. of L.

At that time there was no A. F. of L. labor  
page 28 } union at Salyersville. I know it is difficult to follow me here, but it will clear up, I think, as we go

along. Salyersville is only 25 miles from the job site. Paintsville is 45 miles from the job site. But the nearest place they could get the A. F. of L. labor was at Paintsville because there wasn't any union at that time at Salyersville, although after they started up they did form a local A. F. of L. union at Salyersville on May 9, 1949, but the one at Paintsville had already taken jurisdiction and kept jurisdiction.

As I say, Laburnum moved in and started work in this coal preparation plant shortly after the contract was signed on October 28, 1948. It got its labor from the local A. F. of L. union at Paintsville, and then on December 14, 1948, it signed up a contract with the local union in Paintsville carrying into effect in written form the practice that was already under way to the agreement of everybody.

You remember, these companies had told Mr. Bryan "If you will go in there and do this rough, difficult work at mine site No. 1, we will give you additional work." So, true to his commitment and carrying it out, the time came, I might say, when they were working in there, Laburnum had to build barracks for its men, had to put up a place for them to eat. There was nothing there at all. So the Pond Creek Pocahontas Company determined to build 25 dwellings page 29 } there for its men to live in, and pursuant to that over-all plan and over-all agreement it gave the contract to Laburnum to do it at cost plus 5 percent, and the tippie was cost plus 5 per cent.

Laburnum went to work on that job. Then pursuant to the over-all thing, they gave them a contract to build a telephone line 11 miles in to a place called Carver, Kentucky, which was the nearest place they could get a reliable telephone connection. Then they determined that the houses ought to have asbestos shingles on them to make them better and more weather-tight, and they gave Laburnum the contract for that. Then they determined that they would have to build a school there, and they gave Laburnum the contract for that.

Everything was coming along all right, everybody was satisfied, no trouble was anticipated, in there, until July 14, 1949, and at that time the different work at the coal preparation plant had gotten well along toward completion. The 25 houses were about complete. The telephone line had been put in, but the school house had just gotten well under way. They had done very little on that.

Mr. Mullen: We do not object, Your Honor, to the accuracy of the pictures. We reserve, however, the right to object to their offer in evidence.

Mr. Robertson: I have no right to introduce these pictures

now, but I just use them to illustrate, and I am  
page 30 } going to ask the jury as I pass them to look at  
them, which will give you an idea of what that  
country was and what this work was. The first picture I  
hand you is a picture taken from up on top of the mountain  
where they were stripping the coal and laying down along  
the road that comes into that place.

The next picture I shall show you is the conveyor that  
carries the coal from the top of the mountain down to the  
tipple, and you are standing up at the top of the conveyor  
looking down toward the tipple.

The next picture, you are standing down at the tipple look-  
ing up toward the mountaintop.

The next picture shows a truck dumping coal into the con-  
veyor up on the mountaintop to let the coal go down to the  
tipple.

The next picture shows the tipple and the conveyor pretty  
well completed. You are down at the tipple looking up at the  
mountaintop.

These other pictures that I hand you are just showing  
various stages of the work while it was in progress.

(Counsel conferring.)

Mr. Robertson: In order that you gentlemen may visualize  
what is going to be talked about here all through this case,  
we have a sketch here entitled "Coal mine operations, Pond  
Creek Pocahontas Company, Breathitt Count,  
page 31 } Kentucky, scale 1 inch equals one-third of a mile."

Right there in that circle is No. 1 coal prepara-  
tion plant. You will notice over here a road that says it  
comes from Salyersville, coming around and you get in there  
that way.

Here is a creek bottom coming around here, and that is  
where the C&O Railroad was building their road to get the  
coal out of there. It came along the creek bottom, followed  
the creek bottom on around, making this loop. It came up  
here, and they even built a tunnel to go through and go back  
and make a connection, I believe, at Salyersville.

Incidentally, it is very interesting to know that there was  
a race on between Laburnum and the railroad to see whether  
the railroad was going to finish and then they could not start  
to running coal on account of Laburnum being behind time,  
or whether it would be the other way. There was a friendly  
race on there, and Laburnum beat them, I think, by two days.  
The plant wasn't completely finished enough to run coal  
through it by the time the railroad was ready to take it.

Here is your No. 1 preparation plant (indicating). Then you come back over here and see the road comes back over here, and there is the place called Evanston. That is where they built 25 houses, and they also built a store there. They gave Laburnum that proposition.

page 32 } Then there was another *cole* preparation plant down there, and then here is the school house that I told you about. Here is the school house. You come on up here and can cross back over the railroad and get over to the 25 houses and the store, and where they put in the post office. You come on up here and you get to the coal preparation plant, and here are Laburnum's barracks and offices and eating houses.

That is just the general layout of the thing.

In a few moments, gentlemen, it is going to become necessary for you to visualize the school, the tippie and back over to the 25 houses.

Everything was going along all right until July 14, 1949, which was Thursday. On that day, Mr. Bryan was in Richmond and a man named William O. Hart called him on the telephone from Pikesville, Kentucky, not Paintsville, Pikesville, Kentucky. Pikesville is a town of about 10,000 people. It is right near the Virginia line, just over the mountains out in southwest Virginia. This man Tom Raney, the member of the International Executive Board of the United Mine Workers, lives in Pikesville. He has his office there in the Seward Building. He draws a salary of \$1,000 a month for performing those duties. The regional offices of District 50 are also in Pikesville in the same building. And the regional offices of the United Construction Workers are also in Pikesville and in the same building. I think they all  
page 33 } use the same post office box. I am not sure of that. I think they all do. Some of them do, at least.

Mr. Bryan got this call, and this man said, "I  
page 34 } am William O. Hart, and I am field representative of the United Construction Workers; and my boss is David Hunter, Regional Director, who lives in Pikesville, and I am calling you from Pikesville. His boss is John L. Lewis. We know about this work that you are doing out in Breathitt County, Kentucky. We understand the Pond Creek Pocahtontas Company is intending to give a whole lot more work out there, some 500 houses, stores, school houses, and various things, running into real money and big work.

"I want to tell you, I am not so concerned about what you

are doing now as I am about what you are getting ready to do, and I just want to tell you, you are in United Construction Workers territory, and you are in United Mine Workers territory, and you can't work out here unless you use United Mine Workers and United Construction Workers labor. If you don't do it, we are going to run you off the job and run you out of Kentucky. You can't work in our territory without using our men, and we don't recognize the A.F. of L. in our territory."

He said, "After all, we would be doing to you just what we did to the Beckett Construction Company and the Link-Belt Construction Company over in Wheelwright, Kentucky. You had better come along now and sign up with us and use our men, or get out."

Mr. Bryan told him of this contract he had with page 35 } the A. F. of L., and said, "I am under contract with them. I am not bucking organized labor, but I have this commitment, and I can't do what you say."

He said, "Well, that is it: You either do it or get out."

Mr. Bryan understood from him, he said, "I am acting under orders from David Hunter," and I think he said it at that time. It doesn't make any difference. If he didn't, he said it later. We are going to give you the evidence on it. "I am acting under orders from David Hunter, and also under orders from Tom Rainey."

Mr. Bryan discussed the situation with him, and Bryan understood that Hart wouldn't take any action, and wouldn't try to run them off the job without a further talk with him to see what could be done to try to get out of this jam that he was being put in.

As soon as he hung up the phone, Mr. Bryan telephoned the Superintendent out on the job in Kentucky. He said he didn't know anything about that. Mr. Bryan told him, "Well, watch the situation closely; watch out for developments. If anything happens, let me know."

Then Mr. Bryan called up the top office of the A. F. of L. in Richmond and told them what Hart had said, and asked them to see if they couldn't save him in that situation. page 36 } The evidence will show they couldn't do it.

He also called up the appropriate top man in the A. F. of L. in Washington and told him what happened, and asked if he couldn't save the situation. The evidence will show that they couldn't do it.

So, from Thursday, the 14th of July, until the following Friday, the 22nd of July, Mr. Bryan followed the thing closely by telephone, kept in touch with the superintendent out there, kept in touch with the labor people in Richmond and Washing-

ton, and once during that week went out to the job site on some other matter, and of course made inquiry about this while he was there, and apparently everything was getting along all right, and there was no reason for feeling alarmed.

On Friday, the 22nd of July, he was back in Richmond, and during the day he got a telephone message from his superintendent, Delinger, saying, "I am reliably informed that William O. Hart is coming here next Monday, the 25th, with a number of men sufficient to run us off the job, and he is going to run us off the job. I am just giving you the information."

Mr. Bryan had just come from out there. He had seen no sign of any trouble. He was incredulous. He believed that the superintendent had just gotten jittery. He told him to watch the situation and let him know of any developments. He kept

in touch with him by telephone over that weekend.  
page 37 } Nothing happened over the weekend, and nothing happened during the day Monday the 25th. There was a weekend in there from Friday the 22nd to Monday the 25th.

About 7:30 at night on Monday the 25th, Delinger telephoned him again from out in Kentucky, and he said, "My information is that Hart is coming here tomorrow with 100 or more men, or whatever number of men is necessary to stop our work and run us off the job, and I want you to come out here."

It was too late to catch a train that would put him there in time. Bryan looked up a man named Tony Meli, and got in the company truck and drove all night until they got to Huntington, about 7:00 o'clock or so in the morning.

You see, Bryan had understood from Hart that Hart wouldn't take any drastic action without communicating further with Bryan. So when Bryan got to Huntington, he undertook to telephone Hart at Pikesville, and the information was, "Hart is not here, but you can speak to his boss, David Hunter." You remember, David Hunter is the Regional Director, both of District 50 and of United Construction Workers.

So Bryan got David Hunter on the phone and told him of this telephone conversation he had had with Hart back on the 14th of July, and told him of this last report he had gotten, that Hart and these men were going to be on the job site about noon that day, the 25th, and asked him to get a message to

Hart to hold up and not do the thing until Bryan  
page 38 } could get there and talk to him.

David Hunter said, "Well, I will try to get the message to him."

Just to tell you right now, so that you know what the outcome of that was, both David Hunter and Hart subsequently

admitted to Bryan that Hunter gave him the message, and Hart said, "It is too late; all my plans are made and I can't stop. I am going to it."

Then Bryan started out through the country I have described to you, to the job site. When he got outside of Huntington, his truck broke down. There were several hours delay there in getting transportation, and he didn't get to the job site until 3 o'clock in the afternoon.

When he got there, the men had all quit work. The superintendent was there. A man named Ragen, his field clerk, was there. But the men who were doing the work on the tipple, and down at the school house and over at the 25 dwellings, had left. Everything was still and quiet and at a standstill. That was what reported to Bryan by his men on the job. They said that Hunter and a crowd of men—I mean that Hart and a crowd of men came there and ran them off.

In order to keep the continuity, I am going to tell you what happened there from 12 o'clock on to the time that Bryan got there. He didn't see it, but we are going to have the people here, or their depositions, to tell you in their own  
page 39 } words what happened. I know you want to know  
right now.

On that Monday, the 25th, the men went to work there, I think probably 30-odd altogether, down at the school house and at the bottom of the mountain. The men at the top of the mountain are not involved in this thing at all. They went to work in the regular way, and there was a foreman and about 6 men working down here at the school house. The school house is right on the side of the road, and the woods come down right to it. You can sit in the woods and throw a rock over on the school house.

Along about the time these men were stopping for lunch, here came a crowd of people up the road in automobiles and jeeps, and one thing and another, led by Hart, variously estimated to be anywhere from 50 to 100, a nondescript group of men, some of them drunk, some of them carrying guns, a sufficient number there so that these 6 or 7 men working on that school house didn't have a ghost of a chance to buck them.

They came up there and told them virtually the same thing, Hart and also the men, "You are out here in United Mine Workers territory. You are in United Construction Workers territory. You haven't joined up and you can't work here. You have got to quit right now, or else."

They said also, "You know about Beaver Creek over there. They are rough over there. We will bring whatever  
page 40 } number of men over here is necessary, 100 more,  
300 more, whatever it takes; and if you don't get

off, we will throw you off and do whatever is necessary to put you off."

Some of the men said they were drunk, cursing, calling them everything you could think of. I think one man would run up against another one and show him he had a gun under his shirt. The men were outnumbered, and they quit. They began to gather up their tools and to get ready to leave there.

Then Hart said to this mob that he was leading, "Come on, we will go down to the tipple." Here is the school house down here, and the tipple is up here about a half mile, I think (indicating).

He left enough there at the school house to be sure they had them outnumbered so they couldn't work, and the balance of them started on to the tipple. As they went, these fellows back at the school house could hear shots. When they saw they couldn't work, they said, "Well, we will go on down to the tipple."

When they got down to the tipple, they were pulling the same thing: drunk, cussing, threatening, telling them they were in United Mine Workers and United Construction Workers territory. "You can't work here. You have to join up with us or get off this job."

page 41 } The fellows would show them their cards, and they said, "We don't care anything about that. We don't pay any attention to the A. F. of L. out here. This is our territory."

The threats and reports and the rumors were that they would be lying out in the bushes there in the hills and shoot them. They would get up on top of the tipple and drop something down on them. They would beat them up. They would do whatever was necessary to get them out of there.

There were a few laborers there who had made application to join one of the A. F. of L. unions, and this gang with Hart would just get two or three of them and say, "Come along, now, you are going to sign up."

Some of them just by brute strength and compulsion made them sign, and some of them didn't.

Finally, a lot of them got into the tool house there at the job, and there were some of the leading A. F. of L. officials in there, a man named Subins, I believe; a man named Arnett; a man named Merk Preston. They got in there, and some of these men resented what Hart was saying, and what he was doing. They almost came to a free-for-all shooting match there in the tool house, but the older men there succeeded in quieting them down.

The net result of it was that they were threatened, intimi-

dated, and scared until they left. They pulled the whole thing in about a half hour, I think, down there at the tippie.

When Bryan got in there at 3 o'clock, everything page 42 } was closed down and gone, in the way I have told you.

Also, when Bryan got there—I believe this is the day but, gentlemen of the jury, it is hard for me to get all these facts in sequence—that day when Bryan got there, they had put out a picket, something about a strike, United Mine Workers. Bryan pulled it down and threw it over in the bushes. I think it was that day. If it wasn't that day, it was another day.

While he was on the job there, Hart told these men who he was; that he was working for the United Construction Workers, and he was working under orders from David Hunter, the Regional Director, and he was working under orders from Tom Raney, a member of the International Executive Board of the United Mine Workers of America.

After Bryan got to the coal preparation plant, about 3 o'clock in the afternoon, when everything had quit and his men reported to him what was there, there was no use staying there any longer. So he started over to the 25 dwellings. When he got to the railroad crossing there was an automobile there, and they stopped and they got out to speak to each other. Bryan asked if they knew where he could find Hart, and one of the men said he was Hart. There were three men there with Hart. Two of them were good and stinking drunk. They went

back about as far as from here over to the window, page 43 } and pulled up the windows and locked the automobile and came over, and Bryan got into a talk with Hart. He reminded him of the telephone conversation back there on the 14th of July, when Hart had made these threats. He reminded Hart that he was going to let him hear from him again before he undertook to stop the work.

Hart said, "I didn't understand it that way, that I was under any obligation like that."

He told him about the telephone message he tried to get to him from Charleston that morning. Hart said, "Yes, I got the message from David Hunter. It came too late. I had made all my arrangements; I was acting under instructions, and I had to go ahead."

Bryan said, "Why did you run my men off this job that way in any such highhanded way as this?"

Hart said, "Well, you know so much about it, I don't think I will answer any more of your questions. I don't want to answer your questions." He said, "I will tell you one thing. I bet you \$500 you will not finish this job in Kentucky. You

are in United Mine Workers territory, and you can't work out here and buck the United Mine Workers. Nobody else has ever been able to buck them, and get away with it; and you can't do it, either."

Bryan said, "I won't take your bet, but I resent what you are doing to me, and I am not going to take it lying page 44 } down, and I expect to hold you responsible for it."

The interesting point of that is that they were put on notice right then that they might get into this lawsuit. Before we get to the end here, we are going to show you that some reports that Hart made in the routine course of business have mysteriously disappeared.

Then Hart, in the course of this conversation, told him also, he said, "You are not the only one. We have run other people out of our territory out here, and you are just getting what they got. You haven't any right to complain."

Hart, in the course of that conversation, said, "And if we ain't got what it takes to run you out of here, if necessary we will shut down the whole doggone Pond Creek Pocahontas operation of mining coal, if that is necessary, to put you out of here."

There was nothing more he could do there. Bryan went on back to Paintsville. That is where the local union was, through which he hired his carpenters. They had a union meeting that night, of the A. F. of L., and Bryan went to the meeting. Bryan made a talk to the meeting. The purpose of the meeting was for these men to determine whether or not they would go back to the job site the next day and try to work.

Bryan did everything he could to induce them to go, and tried to appeal to their pride and manliness. Somebody spoke up and said, "You don't know anything about it. page 45 } You are a city man from Richmond. We have lived out here in these hills, and we know what we are up against. You don't. Do you want to see somebody get killed?"

Finally, somebody spoke up and said to Bryan, "If we go back tomorrow morning and go to work, will you put on carpenters overalls and lead us across the picket line?"

Bryan said—they had him on the spot, and Bryan said, "Yes, I will."

They said, "All right, we will go."

One of the older men there, a fellow named, I believe, Burke Preston—I may fall into some minor inaccuracies here—said,

"Well, if we go over there, everybody ought to pack not less than a 38."

Bryan said he didn't want to do that. He didn't want to go over there and get somebody killed; that they would work it out some other way.

They agreed to meet at Salyersville the next morning, which would be Tuesday the 26th, and go up there together through the woods and the wilds, for self protection. That meeting was the night of the 26th. The union meeting was the night of the 26th.

On Wednesday morning, the 27th, they met at Salyersville as planned, and went out to the job site. Bryan, I believe, went, along with his superintendent, Delinger, and this man Tony Meli.

page 46 } They got to the job site, and there was a picket sign. We have it here and will show it to you and let you take a look at it. It was stuck up in a nail keg, something about "Picket Sign—On Strike," or something. Bryan pulled it down, and we have it here to show it to you. Some of these men who have testified in this case by deposition will say that when Bryan walked over there and pulled that picket sign down, they never expected to see him come back alive. The men were all milling around, the same thing about getting shot from the hill or getting a lump of coal dropped on their heads from the tippie, or the mob coming there.

Finally, Bryan said, "Come on, let's go to work." He got a group of them and went on down to the tippie with them, just a few hundred yards from where they were at the office, and they went to work.

He went back up to the office to get some more, and by the time he got up there, these fellows were so nervous and scared they quit and came on back, too.

Then a fellow arrived on the scene named H. G. Robinson, no kin to me. He was the same kind of field representative as Hart. He was giving them the same talk. The question was, whether they were scared to go back to work or not. They had a man there, Taffl, a man named Jack Parish, and he finally said, "You will just get somebody killed here and I am not going to ask them to do it. I don't think they ought to work."

page 47 } There was a report they would have 100 men there within an hour to stop them if they undertook to work.

They all quit. After they shut down there, Bryan and his superintendent drove back to Salyersville. Bryan's object was to keep the men at work on the job. He went to a State Trooper there in Salyersville, the man on duty in that terri-

tory, named Homer Howard, and tried to get him to go out to the job just for the moral support of police protection. He refused to go. They couldn't get any police protection.

So that night, Wednesday night, Bryan left his superintendent there at Salyersville and said, "You stay here and watch developments, and let me know what happens, and also try to get some men to go back out there tomorrow." Bryan went on back in to Huntington.

The next day, Bryan was called up by one of the International A. F. of L. officers who had heard about all of this trouble and had gone over to Salyersville to see about it, talking about what could be done and what the danger was. This fellow, named Freeman, said, "I am not going to order our men to go over there and be targets. Did you know that your man Delinger's life had been threatened?"

Then Delinger got on the phone and told Bryan that one of the leading businessmen there in Salyersville had come to him  
page 48 } as an emissary from these defendants and told him if he went back on that job site after July 31, which was a Sunday, his life wouldn't be any good. Delinger told Bryan over the phone right then, "I want to be relieved."

Bryan said, "All right, come on back to Richmond."

He came back to Richmond and has never been out there since.

That night, Friday night, the 29th—I think it  
page 49 } was Thursday night, the 28th, Bryan came on back to Richmond. He was in Richmond on Friday. He was attending to other Laburnum Construction Company business. He was consulting with his lawyers. He was over in Hopewell making arrangements for a man named Veltry to go out to the job site and succeed Delinger.

On Saturday, July 30, Bryan was in Louisville and Lexington, Kentucky, trying to get police protection, trying to get some sort of court action that would protect him out there in the bushes so he could go back to work Monday morning, and he couldn't get either.

Sunday Bryan spent the night in Ashland, Kentucky. I believe, and started back to the job site. He got to Paintsville and he ate breakfast with a man named Starr, who was one of his carpenters and one of the leaders in the union, and tried to induce Starr to go back to work and get some men to go back to work. Starr just didn't make any bones about it. He said "I am not going back to work. I am scared to go back to work, and I don't think you are going to get anybody else to go back to work because they are scared to go back to work."

Then Bryan went on over to Salyersville and wanted to go out to the job site. There was a man there, a sort of labor leader in Salyersville named Charlie Williams. He page 50 } went with him. A man named May, I believe, also went with him. They got over to the job site and went down to the school house first, and there was a picket up there, a picket sign, and Bryan pulled it down. We have it here and will show it to you. They went on back up to the office and there was another real fancy colored picket sign, red, white and blue. Bryan pulled it down. We have it and will show it to you. What I have told you about the strike so far, you know just as much about a strike as I do or we do.

While Bryan was with Charlie Williams he offered him a job as assistant to this new superintendent, the man Veltry. Charlie said, "I will take it under consideration." So when they started to leave out there at the job site that Sunday afternoon—I just want to get these things in sequence here and not get myself confused—as they were going on back, finally that night at Salyersville Charlie Williams came to Bryan and said, well, he wouldn't take that job as assistant to Vestry, that it made his wife nervous, that he had so many other things to attend to that he couldn't take that on. It was perfectly obvious that he was scared to take it on.

Then on Monday, August 1, Bryan went back to the job site, and there were some of the men back there that morning. Then it was the same old thing, the same old threats,

the same thing, scared to go to work because of page 51 } what would happen to them. One of the A. F. of L. men named Robert Poe, who was a labor leader there at Salyersville local which had been set up at that time, was circulating around among the men seeing if he could get them to work.

Then Hart showed up again. You see, Hart is the real leader. Hart was talking, saying he was going to run them off, repeating the old threats and everything, and Bryan said to him, "What about this meeting Sunday, yesterday, at Tip-top," a place out in the mountains, "that you all had to try to plan what you are going to do to me?" Hart didn't make any bones about it. He said, "Yes, we had a meeting there yesterday, about 250 men there. We made up what we are going to do. We are going to run you out of here, if necessary, and we will bring a thousand men here if necessary. We will bring whatever here is necessary and whatever roughness is necessary to run you off here."

Then they had run another fellow off at Wheelwright, Kentucky. Bryan learned through him that maybe if he would get in touch with a man named Thomas Davis, who was higher

up than David Hunter, he could get this thing composed. Thomas Davis is an assistant chairman of the organizing committee of District 50. David Hunter worked under him. So Bryan got him on the phone and told him all the trouble and everything, and asked him to call the thing off. Thomas

Davis said, "I can't do it and won't do it. It is  
page 52 } against my instructions. As a matter of fact, I am very sympathetic to people in your position, but you are just caught between two big unions, and you have to take the consequences." He refused to call off either David Hunter or Hart. He said, "We don't recognize the A. F. of L. out here.

About that time this man Robert Poe had been circulating among the men and reported to Bryan that he couldn't get them to go to work. They were just scared to go to work and wouldn't go to work.

Then the thought occurred to Bryan that maybe he could call a meeting of a lot of the A. F. of L. men at Salyersville the next day, which would be Tuesday, August 2, and see if he could do anything there. He asked Hart, what about it, would he attend a meeting like that. Hart said, "Yes, I will attend a meeting like that, provided you don't try to put your men back to work between now and then." Bryan said, "All right," and arranged a meeting for the next day to be held at Salyersville on Tuesday, August 2.

The Court: Mr. Robertson, let's recess for five minutes.

(Brief recess.)

The Court: All right, Mr. Robertson.

Mr. Robertson: If Your Honor please, I regret that my statement is so long, but I am getting along toward the end of it, and I think it will make it easier to follow the  
page 53 } testimony when it comes in if we have an over-all statement of our points.

If Your Honor please, and gentlemen of the jury, they had this meeting at Salyersville on Tuesday, August 2, and it was attended by quite a number of A. F. of L. officials, some of high rank, some of the International officers, some of the local and some just garden variety members. The purpose of it was to see if they could get men back to work. Bryan was there with his superintendent and his field clerk, and Bryan made another talk—I certainly think the facts in this case are going to show that Bryan had the guts—Bryan made another talk to try to get the men to go back to work, and they had a lot of backing and talking and backing and talking. Bryan tried to appeal to their pride. Bryan tried to appeal

to the feeling that they ought not to let a crowd run them off the job that way. He tried to appeal to their self-interest and keep a good job with good pay and regular work. He kept on telling them that nothing was going to happen. Finally, they just got tired of it and they said, "Well, you just don't know what you are talking about. You are a city man from Richmond. We were born and raised in this territory out here and we know doggone well what will happen to us if we go back there. We know what we are talking about and you don't, and that is it, and we are not going back. We are not going out there and get killed."

page 54 } They wouldn't go.

In the meantime, David Hunter hadn't come over. They had asked Thomas Davis to come over and he wouldn't come over. Hart, the leg man, was out there, but they said they didn't want to talk to him. Bryan went out and apologized to him for having to come and then not anybody talking to him. All right, Hart said "Well, that is all right. That doesn't make any difference to me. My position is the same still. Just tell them back in there if it takes a thousand men to keep them off the work, I will have them there. I will have whatever is necessary to keep them off the job."

He said, "What's more—You see here is what made it so difficult too. He said, "What's more, if it is necessary to run you off the job, we will close down the Pond Creek Pocahontas Coal Mining operations, close everything they have got."

There was nothing more they could do. Bryan went on in to Huntington, and the next morning he went to the officials of the Island Creek Coal Company, the Pond Creek Pocahontas Company, and the Spring Fork Development Company, and told them what he was up against, that their men were scared to work and that they had been run off the job, and that was that. They said, "If you can't do the work, there is nothing to do but cancel the contract."

They cancelled it that afternoon, cancelled both page 55 } contracts, and followed it up with a letter. They cancelled it verbally the afternoon of the third, which was Wednesday, and on Thursday they followed it up with two letters canceling it, which we will put in evidence here to show you.

Even then Bryan tried to do something about it. He called up David Hunter over in Pikesville and finally arranged to go over and have a meeting with him. He went over there and had a several hours' conference with him. David Hunter went into quite an explanation of the organization, the United

Mine Workers District 50, the United Construction Workers, and how they were interwoven and worked with each other. In the course of that conversation Bryan reminded David Hunter of the telephone conversation he had had with him there from Huntington on Monday or Tuesday morning, July 26. That was the time that Hunter said, "Yes, I remember that. I got hold of Hart and got the message to Hart, but Hart made all the arrangements to run you off and it was too late and we could not stop." He said, "I will tell you another thing, Hart could bring 6,000 men over there to run you off if necessary."

Then there came up in the course of that conversation, discussing the whole matter somewhat in detail, as I have done with you here this morning, and there came up a discrepancy—Bryan thought Hart had done something on one date, David Hunter thought he had done it on a different date. David

Hunter said "There is no use talking about that, I  
page 56 } can settle that, I can settle that, here are my files."

He made reports on everything he did. He pulled a drawer open and referred to a file he had in the form of reports, and written records of everything that Hart did every day.

Bryan said, again, remembering what he told Hart before, "I am not going to take it lying down. I am not going to take any such treatment as this without a fight. I don't know whether I am going to sue or not, but I tell you right now I am not going to take it and I am going to hold you responsible for it."

Of course David Hunter said "That is up to you."

So he was put on notice that day of what is happening here this day, and in the meantime those files which Bryan saw of his have disappeared.

Then again on May 15, 1950—that was the end of that work there—Bryan thought that Laburnum, if they could help it they didn't want to be run clear out of the West Virginia and Kentucky coal field, and that there might still be an opportunity. He was doing one job out there that hadn't quite been finished. I think that was over in Mingo County, West Virginia. They hadn't run him off that one. So he decided he would have another talk with David Hunter. He went to see him on May 15, 1950. They went over the whole thing, and Bryan said, "I am finishing up that school house. You  
page 57 } have left me alone over there." It was not the

school house down at the job site. I am not sure it was a school house, but it was an entirely different job over in West Virginia. He said, "I want to do some more work there if I can. I understand that there is a con-

cern named the R. H. Hamil Company that you ran out of your territory because they weren't United Construction Workers, United Mine Workers. I don't want to go over there and take a job if you are going to run me out. I want to see if you and I can't fix it. I never had any trouble in all the work I have been doing in these years with all these different contracts with Island Creek Coal Company until you came in there and organized the Breathitt County and that territory in there. I don't want to take a job and then be run out of it like Hamil was and like I was over in Breathitt County. What about it?

Hunter told him the same thing over again. He said, "This is United Mine Workers territory, it is United Construction Workers' territory. We don't recognize A. F. of L. over here. We don't care what contract you have got with them or whether you would be breaking that contract if you signed up with us. You can't work out here unless you use our labor and sign up with us. If you try it we are going to run you out again just like we did the last time."

Bryan said to him, "If you and Hart would talk to Tom Raney"—that is the fellow you remember of the page 58 } International Executive Board of the United Mine Workers who lives in Pikesville—"If you will talk to Tom Raney and tell him what is what, and you and Tom Raney tell them to lay off me, that would be the end of my troubles."

He said, "Yes, that might be so, but we are not going to do it. It is against our instructions and we are not going to do it. If you come back here and try to work out there without using our men we are going to run you off the job, and Hart will bring in 6,000 people to run you off if necessary."

Bryan told him again on the 15th day of May, 1950, he wasn't going to take it and that they would hear from him later. They were put on notice then that he wasn't going to take it lying down and now the files have disappeared.

From that day to this Island Creek and its companies have told them, "Don't bid any more. We have the highest regard for you. We have the greatest sympathy for you, but we can't run the risk of the United Mine Workers coming down on us and shutting us up. If you are in any such situation as that you just can't do any more work for us. We don't invite you to bid any more and we tell you in a friendly, nice way don't bid any more on our work."

They haven't had any more work from Island Creek Coal Company from that day to this.

In their defense they deny, of course, that they page 59 } said or did anything wrong. As far as I can tell, it will be an absolute question of veracity between Bryan and some of their men. They deny that Hart, Robinson, David Hunter, and Tom Raney were authorized to do what they did in a way that made their unions responsible. We say we are going to show you, we say in the grounds of defense, that are filed in here, "You admit that Hart and Robinson and David Hunter were the agents of the United Construction Workers and were also the agents of District 50 of the United Mine Workers, but you deny that anybody was the agent of the United Mine Workers of America, and therefore they had nothing to do with it at all." We say, "We are going to show that all three of you are in the same boat from the facts that I have already recited here and other facts, and we are going to introduce photostatic copies of proceedings at your international convention which were afterwards approved by your International Executive Board and published in your official newspaper where you said in effect—not about this particular thing but about anything—organizing the unorganized. 'We are with you boys. You are doing a fine job. Go to town. We are back of you financially, morally and every other way.'"

"you are all parts of the same thing and you are all three liable to us."

Now I come to the end of my opening statement here. I hope you won't think I am always this long. It is page 60 } the longest opening statement I have ever made since I have been practicing law, but I think it has been necessary.

As I said in the first sentence, we are asking for \$500,000 damages, and that would be divided into two items: compensatory damages and punitive damages. Compensatory damages, as the word implies, are damages to compensate or satisfy or make whole and save from money loss Laburnum Company for the wrong that has been done to it.

What is the wrong that has been done to them? As the evidence will show you here? They had a business relationship there that was netting them \$25,000 a year and that would go on indefinitely. If you run it out to 10 years, it is \$250,000. If you run it out to five years, it is \$125,000. They had gone along with these two jobs there and were well toward completion. The actual damages on those jobs amounted to only \$2,000 or \$3,000. They destroyed their business relationship. They destroyed those future earnings. They damaged their

reputation. They have made it so now if they go into the field to compete with anybody to do any kind of construction work in either Eastern Kentucky or West Virginia, they won't even ask them to bid, the third biggest coal company in America, because of what they have done to them. They have run them out. So much for the compensatory damages.

Now, the punitive damages: The theory of page 61 } punitive damages, means just exactly what the words say, to punish somebody. If a person has done something wrong, wilfully, maliciously, wantonly, with malice and insolence and cruelty and threats, the jury may give damages against them as the law says to keep them from doing the same thing in the future, as an admonition that they can't do it and get away with it, and also as an example to others that here is what you may expect if you do these things.

Of course, I don't have to tell you that a \$5 punitive damages doesn't mean anything to the United Construction Workers or District 50 or the United Mine Workers of America. When we have finished this case and have put in the testimony that I have reviewed here, we are going to ask you gentlemen to give us the full amount we are suing for because we think you are going to agree with us that no such insolent and wicked thing can be done here in this country without the perpetrators of it being held responsible for it.

\* \* \* \* \*

page 83 } (The following conference was held in Chambers.)

The Court: First, gentlemen, I have two letters here that were delivered to me today, addressed to the Court, both letters dated January 17, 1951. The first letter:

"Dear Judge Snead:

"I hereby respectfully request the permission of the Court to withdraw whatever appearance, if any, I have made in the above case as counsel for District 50 United Mine Workers of America.

"Respectfully yours,

YELVERTON COWHERD."

Then the second letter asks permission to withdraw his appearance as counsel for United Construction Workers.

I just wanted to call that to the attention of you gentlemen.

Mr. Robertson: Judge, I would like to bring to the attention of the Court this fact: At our last pre-trial conference here when Colonel Harris was not present, the Court requested counsel for the different defendants to state who each one was representing. I understood at that time that the firm of Williams, Mullen, Pollard & Rodgers was representing all of the defendants. I have understood throughout these pre-trial conferences that Colonel Harris was representing all three defendants. I was sitting in the courtroom during the lunch hour and the young lady who is reporting this trial

for the newspaper asked Colonel Harris whom he  
page 84 } was representing in here, and I understood him to say that he was representing United Mine Workers. I couldn't understand whether he said he was or was not representing the other two defendants. It seems to me that there might be some maneuvering there for position about examining witnesses or argument of the case. I don't know whether there is or not, but before you let counsel withdraw I would just like to have it known here who is representing whom, which is what the Court asked at the last pre-trial conference.

If Mr. Mullen's firm is representing all three defendants and Mr. Harris is representing all three defendants, then I personally have no objection to Mr. Cowherd withdrawing, but I don't want to be maneuvered into any position here where it may be argued that they are inadequately represented here by counsel.

The Court: As I recall, you gentlemen stated at the last meeting of counsel that you would inform the Court today as to your position, and I think this is the proper time to receive your statement. Mr. Mullen?

Colonel Harris: May I state, since he mentioned my conversation with the young lady, that I saw Mr. Robertson sitting right there within a few feet of me and I purposely talked loud enough for Mr. Robertson to hear every word that I said. There was no effort to keep him from hearing. On the contrary, I tried to talk loud enough so that he would  
page 85 } hear everything that was said. There was no secret about it.

Mr. Robertson: I didn't say I didn't hear you. I said I couldn't understand what your position was. I still say that.

The Court: That is what we are here for now, to find out what his position is and what the position of all counsel is.

Mr. Mullen: If Your Honor please, our appearance has

been entered for all three. Our plan is that Colonel Harris and ourselves would represent for cross examination purposes United Mine Workers and United Construction Workers, and Mr. Pollard will represent District 50. That is for the purpose of examination and cross examination.

The Court: Let me get that straight, please. You want to examine—

Mr. Mullen: Either Colonel Harris or myself will examine the witnesses or cross-examine witnesses for United Mine Workers and United Construction Workers.

The Court: United Mine Workers. In other words, there would be just one counsel on one witness.

Mr. Mullen: One counsel on one witness, yes. But Mr. Pollard would speak for the District 50 and would want the right to cross-examine for District 50.

Mr. Robertson: If Your Honor please, I think they have a right within their group of counsel as long as there page 86 } is only one lawyer who examines or cross-examines one witness, to proceed as they choose, but I submit that they have not answered the question. Mr. Mullen has stated very frankly here before that his firm represents all three defendants. I asked Mr. Harris to say that and he went in a huddle and he hasn't said it yet and I ask the Court to ask how many defendants is he representing and if so who are they.

Mr. Mullen: I beg your pardon. I just said that we all three had been entered as appearing for all three counsel.

Mr. Robertson: All three counsel?

Mr. Mullen: All three defendants.

Mr. Robertson: Is one of the lawyers for all three defendants?

Mr. Mullen: Entered of record, yes. Each defendant has the right, certainly, to have a spokesman for it. Colonel Harris and I will speak for the United Construction Workers and the United Mine Workers in examining or cross-examining. Mr. Pollard for District 50.

Mr. Robertson: They have a perfect right to do that.

The Court: In other words, if I understand you correctly, just one attorney will take a witness on cross examination, is that right?

Mr. Mullen: Suppose I take a witness on cross examination, Colonel Harris will be barred from cross page 87 } examination, but Fred for District 50 could ask some questions if he wants to.

Mr. Robertson: I don't think that is proper, Your Honor. Counsel are just trying to take a double shot at it and I don't think they have any right to do it.

The Court: I am wondering if you gentlemen could not confer when you have a witness. I would like to be reasonable about that. Let counsel cross-examine the witness. Could you do that? I will be reasonable about the time. If you want to confer on any questions that you want to ask.

Mr. Pollard: Can we recall the witness whenever we want?

Mr. Robertson: I don't think you can make any such bargain as that, do you?

The Court: It all depends on what takes place. I wouldn't like to bind myself one way or the other on that. It is within the discretion of the court.

Mr. Harris: I didn't understand the question.

The Court: Whether or not he could recall a witness. I think that is within the sound discretion of the Court.

Mr. Pollard: Judge, it seems that each defendant is entitled to counsel and each defendant is entitled to cross examination.

Mr. Robertson: And they have lawyers there to page 88 } do it, but they have the same group of lawyers representing all three defendants, and they have not got a right to take two cracks at it any more than I would have that right.

The Court: One moment, Mr. Robertson. If you gentlemen represented different defendants, but as I understand it you all represent the same defendants.

Mr. Pollard: But for purposes of the trial of the case Mr. Mullen and Colonel Harris would represent two of them and I would represent one of them.

Mr. Robertson: That is what they have said and that is what they have entered as counsel on the record.

Mr. Allen: As I recall, you filed an answer here, a joint and several answer, and all of you, as I recall, signed that answer as representing those several defendants.

Mr. Pollard: That is correct, sir.

Mr. Allen: They could assign you to examine or cross-examine the witnesses for District 50, but I don't think you should be permitted to cross-examine a witness put on by District 50 by them, or that you should be permitted to cross-examine a witness that they have cross-examined, whom we put on the stand.

Mr. Pollard: Wouldn't we have had that right if there were separate attorneys representing each one of them?

The Court: Yes.

Mr. Allen: If you had separate and distinct defendants. page 89 }

Mr. Pollard: We have separate and distinct defendants.

Mr. Allen: With distinct separate issues and rights, for instance, like a man in a three-cornered collision and the plaintiff sues everybody involved in the collision. Their rights are entirely different. They employ separate and distinct counsel. They don't sign the same pleadings and don't represent themselves as representing all the defendants.

The Court: If you gentlemen could confer, I would be very reasonable in that respect as far as time is concerned. I won't pass on the matter definitely at the moment, but I understand your request.

In other words, you would have the right under your theory, to cross-examine further the witness after either Mr. Harris or Mr. Mullen cross-examine for United Construction Workers and the United Mine Workers of America.

Mr. Pollard: That is correct, sir. I would have the right to cross-examine the witnesses put on by the United Construction Workers and the United Mine Workers.

Mr. Robertson: I say, Your Honor, that is contrary to every rule of practice I have ever seen followed in any trial court in Virginia that I have ever been in.

Mr. Mullen: We have a complicated situation here. Three defendants—

page 90 } Mr. Robertson: All with the same group of lawyers.

Mr. Mullen: All right. Three defendants certainly have the right, each individually, to question a witness.

Mr. Robertson: Yes, and they can pick anybody they want and go to it from beginning to end. They can pick any one they want, any witness, and go to the full extent of the law, but they can't be shifting it around now like a kaleidoscope spitting on their hands and taking a fresh hold every time a different one thinks he has a new idea.

The Court: In other words, you want to cross-examine witnesses put on by United Construction Workers and also United Mine Workers as well as the witnesses put on by the Plaintiff.

Mr. Pollard: I don't say that we would, but I should certainly think we are entitled to that right, Your Honor.

Colonel Harris: Judge, it seems to me that if each defendant has a right to be represented and for his lawyer to conduct examinations and cross examinations, the defendant should not be held to forfeit that right because two or three of them agree on the same lawyer. That would require, every time that you had three or four defendants, that they get entirely different lawyers in order not to forfeit their right of cross examination.

page 91 } Mr. Robertson: Judge, you are familiar with the *the* Virginia practice just as much as I am, and you know that what Colonel Harris is suggesting is just not done in the Virginia practice. They go and get a whole group of lawyers, and then they have a right to agree among themselves who is going to take each particular witness, either on cross examination or examination, and he must complete it. He is representing all three when he does that. That is what they have said of record and that is what they have repeated here verbally.

Mr. Allen: If Your Honor please, the right of cross examination is based on hostility, adverseness, and the person who puts the witness on the stand, it is supposed to be his witness and he is supposed to be adverse to the other side. There is no hostility or adverseness as between these defendants, and to permit Mr. Pollard to cross-examine witnesses put on by the United Mine Workers or the United Construction Workers would violate every principle relating to cross examination of witnesses.

Mr. Robertson: It is just to try to maneuver it to there he can ask leading questions, tell the witness what to say and repeat the story. It is perfectly obvious, Your Honor. I am not saying it is with any improper intent, but that is what it amounts to. He would tell the story and then he would ask leading questions. It is too obvious to discuss.

page 92 } The Court: I will take that under advisement. We won't reach that this afternoon.

Do you have a witness to put on now?

Mr. Robertson: Yes, sir. I have two or three exhibits. I was going right ahead with Mr. Bryan as my first witness. He will be quite a long witness. We won't finish him this afternoon.

The Court: That will give me time to think this over before cross examination begins.

Mr. Robertson: Do you want to start this afternoon? It has been suggested to me that we might start tomorrow morning.

The Court: I think we ought to get along as fast as we can. Gentlemen, I will grant Mr. Cowherd permission to withdraw as counsel in the case.

page 93 } (The following proceedings were had in open court.)

Mr. Robertson: If Your Honor please, plaintiff offers in evidence copy of Constitution of the International Union,

Mine Workers of America, Washington, D. C., effective November 1, 1948, adopted at Cincinnati, Ohio, October 11, 1948, and ask that it be marked Plaintiff's Exhibit No. 1.

The Court: It will be marked.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 1.)

Mr. Robertson: If Your Honor please, I wish to read Article 20, which appears on page 77, entitled "District 50," as follows:

"Section 1. District 50, United Mine Workers of America, subject to the jurisdiction and regulation of the International Executive Board, is hereby created and set up under authority of the International Union and may adopt by-laws and rules not inconsistent with this Constitution."

Plaintiff offers in evidence copy of Rules of District 50, United Mine Workers of America, March 15, 1949, District 50, United Mine Workers of America, 900—15th Street, N. W., Washington 5, D. C., and asks that it be marked Plaintiff's Exhibit No. 2.

page 94 } (The document referred to was received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Robertson: Plaintiff offers in evidence copy of the Rules of the United Construction Workers, affiliated with United Mine Workers of America, March 15, 1949, 900—15th Street, N. W., Washington 5, D. C., and asks that it be marked Plaintiff's Exhibit No. 3.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 3.)

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ALEXANDER HAMILTON BRYAN,  
was called as a witness on behalf of the Plaintiff, and having  
been previously duly sworn, was examined and testified as  
follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Bryan, is your name Alexander Hamilton Bryan?

A. Yes, sir.

Q. I believe you sign your name A. Hamilton Bryan?

A. That is correct.

Q. Where do you live?

page 95 } A. I live in Richmond.

Q. How old are you?

A. Forty-two.

Q. Have you lived in Richmond all your life?

A. Yes, sir.

Q. What is your present connection with Laburnum Construction Company?

A. I am President of the company.

Q. How long have you been president?

A. Since 1942.

Q. Is that a Virginia corporation?

A. Yes.

Q. Where is its home office?

A. Richmond, Virginia.

Q. Who is the principal owner of the corporation—

Colonel Harris: We object to that as immaterial, if the Court please.

Mr. Robertson: I think it is highly material, Your Honor. It shows what his ownership of the corporation is, and what interest he has in it. It shows his bias. It shows his interest. It shows his motive in everything that is going to follow here as to what he has done.

Colonel Harris: They can't put a witness on and then show his bias, if the Court please.

Mr. Robertson: We certainly can, under our  
page 96 } practice, Your Honor. That is not a matter of  
cross-examination. We can show here just what  
his connection is. Just let them have the whole works, tell  
the story.

The Court: The objection is overruled.

Mr. Robertson: Repeat the question, please, Mr. Reporter.

*Alexander Hamilton Bryan.*

(The pending question was read by the reporter.)

The Witness: I am.

By Mr. Robertson:

Q. What percentage of the entire corporation would you say you own, approximately?

A. I own all the common stock, and some of the preferred stock.

Q. Could you put it in proportion, two-thirds, one-third, I mean of the whole ownership?

A. I could if I had a little time to think about it.

Q. Do you own over half of the whole company?

A. Oh, yes.

Q. When was the company organized?

A. In 1937.

Q. By whom was it organized?

Colonel Harris: We object to that. It is immaterial. There is no question of who organized it, and that wouldn't throw any light on the issues in this case.

The Court: I will sustain the objection.  
page 97 } Mr. Robertson: All right, sir.

By Mr. Robertson:

Q. Is the Laburnum Construction Corporation prepared to do general construction work?

A. Yes, we perform all types of construction work with the exception of road construction and bridges.

Q. Do you specialize in any particular type of construction?

A. Yes, we specialize on industrial work in connection with chemical plants. We have performed a great deal of work for the du Pont Company, the Solvay Process Division of Allied Chemical and Dye Corporation, the General Chemical Division of Allied Chemical and Dye Corporation.

It is not just building construction work, but includes work of almost all crafts and trades, electrical work, piping work, millwright work, carpentry work, heavy rigging work, and work of that nature.

Q. Could you name some of the localities where the Laburnum Construction Company has done work?

Colonel Harris: We object to that as immaterial. The history of Laburnum as to the places where it has worked in times gone by is not material.

*Alexander Hamilton Bryan.*

Mr. Robertson: If Your Honor please, of course I have no right to cut off any objection, but it looks to me page 98 } that this is just the beginning of an attempt to interrupt the telling of this story. Of course, it is perfectly admissible, and any experienced lawyer is bound to know it is admissible. You have to show that this company was qualified to do the work and set itself out to do the work and did do work, in order to demonstrate what damage has been done to it.

The Court: The objection is overruled.

Colonel Harris: We ask an exception.

By Mr. Robertson:

Q. Could you name some of the localities where you have done work?

Colonel Harris: Do we have to repeat our objection, Judge?

The Court: You may make your objection to this line of questions.

Colonel Harris: All right, sir, thank you.

The Witness: We worked in Detroit, Chicago, Pennsylvania, West Virginia, and Kentucky, Mobile, Alabama, down in Georgia, North Carolina, and practically every section of the State of Virginia.

By Mr. Robertson:

Q. What would you say was the approximate aggregate volume of construction work which your Company has done, in dollars, during the last ten years?

page 99 } Mr. Fred G. Pollard: Your Honor, we object to that. We asked, in interrogatories, questions concerning the financial consideration and gross amount of business and profits of the Laburnum Construction Company, and they objected to the answer, and you ruled in their favor, that they did not have to answer it. Since we couldn't get that information on interrogatories and they objected to giving it, they certainly should not be allowed to give it on trial now.

Mr. Robertson: If Your Honor please, of course it is all right with me to argue this in the presence of the jury, and I am going right to the argument. I speak from memory, but I do not understand that any such thing as that happened. It is very vivid in my memory that the Court has not ruled,

*Alexander Hamilton Bryan.*

up to this moment, on the admissibility or inadmissibility of any testimony whatsoever. I understood that they wanted to get the net worth of the Laburnum Company, and the Court refused to do it. We wanted to get the net worth of the United Mine Workers of America, and the Court refused to let us get that. All of that was tentative, subject to a final ruling at the trial.

We are not asking any net worth now. I asked him approximately how much was the aggregate volume of construction work they had done in the last ten years. I want to show whether it is a fly-by-night or a substantial company, because when I get to what they have done to them, I  
page 100 } think that is very material on how much they have hurt them.

If I were doing a \$50 a year business and you ran me out of Kentucky—

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Mr. Bryan, approximately how much aggregate construction work has your company done over the last ten years?

A. Over \$20,000,000 worth of work.

Q. That would be at the rate of \$2,000,000 per year?

A. That would be a fair estimate of the average.

Q. Are you personally responsible for any of the obligations of the company?

Colonel Harris: We object to that, if the Court please.

The Court: What is the purpose of that question?

Mr. Robertson: To show what I stated in my opening, that any disaster to the company is a disaster to him.

The Court: The plaintiff is the Laburnum Construction Company?

Mr. Robertson: That is right, sir.

The Court: I will sustain the objection.

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Q. Now, Mr. Bryan, there has been introduced in here as Plaintiff's Exhibit No. 1, the Constitution of the United Mine

*Alexander Hamilton Bryan.*

Workers of America. I am not going into it in any detail now, but I just want to ask you a few general questions about it.

Have you studied that Constitution?

A. I have made a detailed study of it.

Q. Have you also studied the official publication of the United Mine Workers of America, the newspaper that it puts out?

A. I have been to the Library of the Department of Labor in Washington, and have personally examined every issue of the United Mine Workers Journal, as far back as 1896.

Q. Have you, at my request, made various photostats which will be introduced here later, or had such photostats made?

A. We have had photostats made of portions of approximately 350 periodicals.

Q. Who is the President of the United Mine Workers of America at this time?

A. John L. Lewis.

Q. Is the United Mine Workers of America divided into districts?

A. Yes, the United Mine Workers of America page 102 } has districts numbered consecutively from 1 through 31, with the exception of Districts 24 and 25. Those districts represent employees who are coal miners and who work in and around the mines. Then there is another district known as District 50, which represents employees in practically every line of endeavor except for coal mining.

Q. Do those districts from 1 through 31 have specific geographic limits?

A. Yes, sir.

Q. What, if you know, are the geographical limits of District 50 of the United Mine Workers of America?

A. District 50 has no geographical limitations. It includes the entire United States and Canada.

Q. It includes everything that the United Mine Workers of America includes in territory?

A. That is correct.

Q. Then what classes of laborers are organized within District 50 of the United Mine Workers of America? I mean, what different industries?

A. When District 50 was first organized, on or about September 1, 1936, it represented gas and coke workers. After that, it represented, besides gas and coke workers, chemical workers. At that point it expanded, and it represents at this time all sorts of employees. I have studied copies of the

*Alexander Hamilton Bryan.*

District 50 News, and also the News, which are page 103 } the official publications of District 50. They list a tabulation each two weeks, each time the publication is published, they list a tabulation of the various bargaining agreements made. I have in my file a list of those.

Speaking right now from memory, some of those industries are as follows: bakers, barbers, hospitals, city employees, taxicab drivers, store employees, clerical employees, railroad employees, employees of dairy operators, almost everything you can think of.

Q. Has District 50 got any slogan that you know, under which it acts, to express the purposes of District 50?

A. "Organize the Unorganized."

Q. Who is the Chairman of the Organizing Committee of District 50?

A. A. D. Lewis.

Q. What kin is he to John L. Lewis, if any?

A. Brother.

Q. Who is the Secretary-Treasurer of District 50?

A. Kathryn Lewis.

Q. What kin is she to John L. Lewis, if any?

Mr. Mullen: We object, Your Honor, to what kin any one person in this may be to another. That has no possible bearing on whether a tort was committed down in Breathitt County. Your Honor has already ruled he couldn't ask that question in interrogatories.

Mr. Robertson: Excuse Me. You haven't page 104 } ruled anything finally, Your Honor. It was perfectly definitely understood between the Court and every counsel in the case that anything that has been ruled heretofore was tentative, and the Court was going to rule in the trial as it saw fit.

We have already shown that the Chairman of the Organizing Committee of the national concern is Denny Lewis, John L. Lewis' brother. I am going to ask the next question whether he was appointed or elected.

We are also entitled to know what the connection of Kathryn Lewis is with John L. Lewis, showing how these things are bound up and what the probabilities are or the improbabilities are that they are working in cahoots with each other.

The Court: Gentlemen, suppose you all step out in the hall a few minutes.

(The jury was temporarily excused and left the court room.)

The Court: Do you want to address yourself to that question, Mr. Mullen?

Mr. Mullen: If Your Honor please, the question of kinship of any officer in these organizations to any other officer in them certainly has no bearing on whether that organization has committed a tort. It is asked clearly for the purpose of prejudice. They are trying to raise prejudice page 105 } through John L. Lewis by showing that his brother and his daughter are in there. It is an exceedingly improper question, and intended for an improper purpose.

Mr. Robertson: If Your Honor please, the intention of it is to bring out the facts and to get every advantage that I am legally entitled to from them, for this plaintiff.

They have denied all agency here. When you come along to Hart and David Hunter and Robinson and Thomas Davis, they admit that they are agents of the United Construction Workers, they admit that they are agents of District 50; they deny that there is any connection at all between any of these actions that were done, between the Construction Workers and the United Mine Workers or District 50 and the United Mine workers.

If Your Honor please, what we are trying to do is to show that they are all just interwoven and intertangled and are acting, as I said, in cahoots.

Your Honor doesn't have to isolate yourself from common sense and human experience. Do you mean that if you were John L. Lewis and appointed your brother to District 50 chairmanship, that that would have nothing to do with it? If you were John L. Lewis and you appointed your daughter Secretary and Treasurer, and that they are not elective offices but that they are appointive offices, by you, and one is your brother and one is your daughter, and they are beholden to you for their jobs, and they page 106 } are members of your family, that that has nothing to do with the interrelationship of these three defendants?

Mr. Pollard: Your Honor, Mr. Bryan is not the page 107 } proper person to prove kinship as to the parties under discussion. Anything he knows about it is hearsay.

Mr. Robertson: If Your Honor please, that of course is just quibbling and it is not in accordance with the law.

General reputation and all. He got it out of all those official publications. He does know it.

Mr. Mullen: He is not testifying from his own knowledge.

Mr. Robertson raised the question of agency. If Your Honor please, the question of agency as between these three organizations is to be determined from the constitution and the charter and contracts between them. It is for the Court to construe those. They are written constitutions. They are contracts. The courts have held that they are contracts, and you determine the relationships, agency or nonagency by the construction of those by the courts.

Mr. Robertson: We might just as well go to the mat on that right now. There couldn't be any more unsound statement of law made in a courtroom. Do you mean to tell me that these three union people by drawing up a written thing and acting in accordance with that can limit their agencies and show what their legal consequences are when they employ people and put them out into the field and hold them out as their agents—I don't care what there is written

here. By their acts ye shall know them. To try  
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to make a statement to the Court that because they have a paper writing, a self-serving instrument, that that is a measure of their legal liability, that that is the measure of their agency? There is no such law in the land. I say again when we show the interrelationship and the intertangle of this thing and show that the two top officers, one of whom has the chief administrative control is appointed by his brother, John L. Lewis, and draws his pay at the will of John L. Lewis, subject to being overridden if they want to by the International Executive Board and the International Convention, and then his own daughter gets in there and she handles the money as treasurer, and she is appointed by her father and holds her job at his pleasure and draws her pay at his will—that that has nothing to show the interrelationship of these things?

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Mr. Robertson: If Your Honor please, that may be true as between the different unions as between themselves, but not as to third persons. When you show what the situation is, you are setting it up in one way on paper and acting in an entirely different way in practice. We have prepared a

trial brief here, Your Honor, which we thought would be helpful to the Court. I don't know of any more appropriate time than now to pass it up to the Court, and we will be glad to give counsel on the other side a copy of it. I am going to ask Mr. Moore, who has looked up the law on that, to address himself to that proposition here.

Mr. Allen: May I say just a word here, Your Honor. It is shown all through this record that the object of District 50 was to organize the unorganized. As I recall this record shows, the interrogatories and the documentary evidence here, that the only organizing committee that District 50 has is the organizing committee supplied by the international union consisting of a chairman or president, and A. D. Lewis, appointed by John L. Lewis, and the Secretary of the organizing committee is Kathryn Lewis. If you go back to the very beginning, which Mr. Mullen mentioned here this morning, that

District 50 was first organized or the organization of it began on February 8, 1936. At that meeting Mr. John L. Lewis said this, and I am quoting his words. It is in the documentary evidence here:

"If we take in these men—and our Constitution now permits it—there is a question involved as to the conditions under which they shall become part of our organization. I doubt if the organization will want to just issue charters of local unions, giving them the same rights and privileges of men working around a coal mine, participating in elections and conventions and things of that kind. I rather think the course of good judgment would be to keep the United Mine Workers, the heart of it, always like it is, without being subject to being torn down by any subsidiary, collateral organizations. Such expansion as we do in these things might be done on the basis of giving them a semi-autonomous organization—autonomous within their own group, perhaps, with a designated right of the International Union occupying a qualified position in that organization, because of the responsibility of our organization and the necessity of having to comply with our policies. In other words we can work out a reasonable, practical scope and plan of organization. While they might be a part of our organization they would not of necessity be the same part of the organization as the basic membership, because these plans are in every state in the Union.

page 112 } "They would in reality be members of our organization, although functioning in a different classification and in a little different orbit, with semi-autono-

mous rights—I say semi-autonomous, because I think if the United Mine Workers of America is going to be responsible for them, the United Mine Workers of America should have something to do with their policies.

“I think an entirely practicable program could be worked and followed up in a way that it would not involve the expenditure of any substantial sum of money, and perhaps permit what revenue might be received from them to diverted for a time into organizing purposes. We might have to assist them a little in the beginning, but they have developed some very good talent, some bright young men.

“Board Member Livett: In the absence of any detailed plan, after hearing President Lewis enunciate the policy and ideas of the formation of the organization and always having in mind safeguarding of the autonomous rights of the United Mine Workers of America, I move that the resident Executive Officer be empowered to issue charters to these Federal Local Unions in a form and manner prescribed by and agreeable to the Resident Offices.

“The motion was seconded and after a brief discussion was adopted by unanimous vote.”

So it shows there has been no absolutely autonomous union created out of District 50. It shows page 113 } it was part of the Mine Workers. It shows that it had no organizing committee except that supplied by the United Mine Workers of America, and Mr. Lewis appointed the chairman of the organizing committee, who was his brother, and he appointed a secretary-treasurer who was his daughter.

All of that goes to show the closeness of the relationship, the agency, and the fact, as we contend, that they are just arms of the same institution. I think it is admissible.

The Court: I will allow the question. Do you want to say something further, Mr. Harris?

Colonel Harris: On the question about kinship. I want to call Your Honor's attention to what has happened heretofore on that question. That was Question No. 78 in the interrogatories propounded by the Plaintiff to the United Mine Workers of America. Question 78 reads as follows:

“What is the relationship by blood or marriage between John L. Lewis and A. D. Lewis, and what is the relationship by blood or marriage between John L. Lewis and Kathryn Lewis?”

We objected to that question, and in the hearing before

Your Honor on October 12, 1950, according to the transcript of proceedings which I have in my hand, this took place:

page 114 } "Mr. Pollard: 78. "What is the relationship  
by blood or marriage between John L. Lewis and  
A. D. Lewis, and what is the relationship by blood or marriage between John L. Lewis and Kathryn Lewis."

Mr. Mullen: That is plainly for the purpose of prejudicing the jury. It certainly is objectionable, too."

We were arguing our objections, and Mr. Robertson then stated to the court: "I will agree that will come out."

"The Court: All right. Delete 78."

"Colonel Harris: That is withdrawn. No ruling.

"The Court: Yes."

We argued the question of law and admissibility to Your Honor, and we submit that they agreed with us when they withdrew the question that our objection was well taken. Now they come back and ask the same question of this witness from the stand. We think the consistency of counsel and the consistency of the proceedings in this court establish that they are not entitled to ask that question.

Mr. Robertson: If Your Honor please, we might as well clear the ground on this and not have all this quibbling and backing and filling.

Your Honor, I am sure, knows just as well as I do and every counsel in this case knows that time after time after time in these pre-trial conferences when these questions came up the Court said, "I am ruling tentatively when I  
page 115 } make a ruling and I reserve my right and I am  
going to rule as I see proper during the course of  
the trial as the pattern of the trial develops."

That thing shows now that I withdrew the thing because I elected to withdraw it, and it shows that Your Honor made no ruling on that at all, that I voluntarily withdrew it. They cannot fairly come here and say that I bound myself not to do anything. I have learned a whole lot in further study. I don't remember the date of that thing. I have learned a whole lot from further study. Every counsel in this case knows that this case is wide open all through this trial for anybody to make any objections that they see proper to make here or to urge anything that they see proper to urge here. That was understood all the way through. I understand that the Court ruled that the question will be allowed for what it is worth.

The Court: I will hear from Mr. Mullen if he has something to say.

Mr. Mullen: No, I haven't anything further to say, Your Honor. I think the case is perfectly clear on the question of how agency is determined in these union cases. It has been so held not only in intra-union matters, but as to outsiders in cases I have cited there.

The Court: Did any of those cases you cited a moment ago include outsiders suing the union concerning a contract?

Mr. Mullen: I will be glad to give the Court page 116 } a copy of it.

Mr. Robertson: If Your Honor wants to go into that now, Mr. Moore will address it. I don't know that it has anything to do with the question.

The Court: We will pass it by and I think I will pass this question by overnight. I won't allow him to answer the question tonight. But I will take it under advisement.

Mr. Robertson: Until tomorrow, subject to Your Honor's ruling, I am not going to ask him anything about kinship. I have already asked him whether they were appointed or elected and if they were appointed, by whom.

The Court: And just leave out kinship.

Mr. Pollard: Your Honor, this whole line of questions of course is hearsay, and rather than have to bring it up at the end of each question we might as well thresh that out right now. I think we ought to put the other side on notice.

The Court: I think that should be decided and determined, too, since you have raised the point. I think I might just as well let the jury go on home. What do you think about it, gentlemen?

Mr. Pollard: That is the only thing I have to page 117 } say. Everything Mr. Bryan has said so far is hearsay. We haven't objected to it.

The Court: But you are objecting now to further questions.

Mr. Pollard: To anything further along this line of testimony.

The Court: What do you have to say about that, Mr. Robertson? The objection on ground of hearsay?

Mr. Robertson: I say the hearsay rule has nothing to do with it. I am trying, Your Honor, to clear as much ground as we can so we can move along here. I don't want to quibble and make a lot of objections that have no merit in them if I can help it. When I think that something is entitled to go in here and they can put it in, I will not object to it.

What do we have here? Mr. Bryan says that he has studied those three pamphlets in detail. He says that he has made

an exhaustive study of the official publications of these different unions. He says that these questions that he has given are biased on those publications. I say to Your Honor that before the trial is over, we will produce photostats of them and substantiate what Mr. Bryan says, but independently of that when he says that what he has done is based on a study he has made, it is admissible in evidence.

page 118 } Mr. Pollard: Your Honor, he has the documents, and they are the best evidence.

The Court: Where are the documents? Why not offer the documents?

Mr. Robertson: Because they don't come into the trial in an orderly way at this time.

Mr. Pollard: We can't just suit Mr. Robertson's convenience and allow Mr. Bryan to testify as to hearsay.

Mr. Allen: If it please Your Honor, I may say there is an rule of evidence where documents which are voluminous and lengthy, as they are here, interrogatories—I suppose there are several hundred interrogatories with the answers to them, with just dozens of exhibits and copies of these Mine Workers journals, the District 50 news—Your Honor will remember that they were called for in the interrogatories and these gentlemen answered that they had them. All of those documents have been studied and read carefully by Mr. Bryan, and the Courts hold that where documents are voluminous in that sort of way and they are offered in evidence, you understand, and are there for anybody to examine, anybody who has made a study of them and knows what is in them can help the jury along by telling the story in a chronological way as it is told in the complicated and voluminous documentary evidence.

Mr. Greenleaf lays that rule down and Mr. Wig-

page 119 } more lays that rule down. There is no authority to the contrary so far as I know. It is done all the time by accountants, all the time. They are permitted to get on the witness stand even in a criminal case and testify to the substance of what is in documents.

Mr. Pollard: Mr. Allen is speaking of the Shop-book rule which was reviewed by our Supreme Court in the Dupont case which was decided in November, but that applies to records of a corporation where they have been gone over by the CPA and where he has conferred with officials of the company and the documents have been sworn to, that they are the documents of the company. We have no such condition here in the evidence that Mr. Bryan is attempting to bring in.

Mr. Allen: I am not talking about any Shopbook rule, if Your Honor please. I am talking about an entirely different

rule involving putting before the jury the facts that are found in a lot of documentary evidence. How would we ever get to the end of this case to dump before this jury these constitutions and these hundreds and hundreds of interrogatories and hundreds of pieces of documentary evidence? The jury would never be able to read them or understand them. When that is the case, a man who has read them and studied them and condense what is in them and give it to the jury in a short fashion is permitted to do it.

Mr. Mullen: If Your Honor please, that refers page 120 } only to experts. Public accountants, yes. That refers to figures. In the first place, you don't know whether these voluminous papers are admissible. They haven't been passed on. Certainly if they have a bearing on the case, we are not going to let a witness on one side testify what is in them from his point of view. If they are to be introduced, the whole thing has to go before the jury. They have not been introduced here. You would have to take each one and go through it and see whether it is proper evidence to be introduced here. That was all likewise determined in the pre-trial conference. Until that is done and they are put in, I don't think there is any question which can be asked about them.

page 121 } Mr. Robertson: If Your Honor please, I just picked one at random. I can get it out of a hundred. I have here a copy of the United Mine Workers Journal for November 1, 1948. I can bring them on down to date. In every issue, published twice a month, they put down there, "Official Roster of the United Mine Workers of America"; and down here we get to District 50 and there are shown A. D. Lewis, Chairman, Organizing Committee, United Mine Workers of America; Kathryn Lewis, United Mine Workers Building, Washington, D. C., Secretary-Treasurer.

Mr. Bryan is prepared to swear that that is a photostat of an original record which he has himself examined and picked it out and had it photostated. If they want to stick us to the letter of the law rather than the spirit of it, to delay us, we can pull it out and there it is right now. He is prepared to swear to it.

The Court: You are offering that in evidence?

Mr. Robertson: Yes, I will offer it in evidence when the jury comes in.

Mr. Allen: May I say here, too, of course we have a statute which provides for certified copies of documents obtained from public officers like the Department of Labor, but that is only an additional method of proof. It avoids the necessity of calling a witness. When you produce a certified copy,

it just speaks for itself and you don't have to put  
page 122 } anybody on the witness stand even to identify it.

The common law method of proof of a document by compared or examined document is still in force, and it has been distinctly so held in Virginia. We can put Mr. Bryan on the witness stand and hand him as many of these documents as we please, as we think are admissible, and as many as Your Honor will admit, and say, "Mr. Bryan, did you go to the Department of Labor? Did you read this?" "Yes."

"Did you examine it and compare it? Is it an accurate copy of the original?" That is all the law requires.

Mr. Moore: May it please the Court, I would like to say that is found on page 12 of that trial brief, the point Mr. Allen was just making, if Your Honor would care to see the authorities which establish that.

Mr. Robertson: May I make one further statement, Your Honor? I am offering Mr. Bryan as an expert on these constitutions and rules, and as an expert in his knowledge of these official publications. I am prepared right now, if the Court wants to find out whether he is an expert or not, to examine him in detail as to what study he has made of them.

Colonel Harris: We respectfully submit that Mr. Bryan has never been a member of the United Mine Workers, he has never been an administrative officer, he has never worked for the United Mine Workers; and any information that he has  
page 123 } is a conclusion that he reaches. It is purely hear-say and invades the province of the court and jury in this case. If you could take a plaintiff and put him on the stand and say, "We have a long mass of documents," under the law of Virginia, we could make an affidavit and get them. We didn't do it. But we will circumvent all the customary rules of getting documents and put an interested party on the stand to offer his conclusion and thereby take away from the jury and away from the court the construction of the documents. He merely gives, as one general substitute, his opinion as if it were evidence in the case. We submit that it is not admissible and is not the proper way to prove documents or the contents of documents and is not a subject of expert testimony; and if it were, he is not an expert.

Mr. Robertson: If Your Honor please—

The Court: Let us have the jury. Bring in the jury.

(The jury was summoned and returned to the courtroom.)

The Court: Gentlemen of the jury, it seems that I will be conferring with counsel a little longer. It is 25 minutes after 4. I am not going to delay you further. I think I will excuse you for tonight. Be back tomorrow morning at 10 o'clock. In the meantime, don't discuss the case with any outsiders and don't read any newspaper articles about this case during the trial of the case. I don't mean page 124 } don't read the newspapers, but if you see something about it in the newspaper, you had better skip it, because you will get firsthand information right here, and you are bound by the law and the evidence in this case. You are excused until tomorrow morning at 10 o'clock.

(The jury left the courtroom.)

Mr. Robertson: If Your Honor please, of course any expert merely gives his opinion. It is absurd to say you have got to be a member of the union in order to be an expert about the union. You might just as well say that Senator Byrd was no expert on any phase of the law because he is not a lawyer. My suggestion is that Mr. Bryan take the stand and that the Court ask him questions about what study he has made about these constitutions and rules and regulations and what studies he has made about the official publications of these unions; or if the Court prefer, we will do it. Mr. Bryan has spent hours and days and weeks in these studies, and I say without any qualification that he is a highly expert witness on them.

Mr. Mullen: All the study by a man on the evidence in his own case doesn't make him an expert in the case.

Mr. Robertson: That goes to the weight of it, not to the admissibility of it.

Mr. Mullen: Outsiders who are experts can page 125 } testify as experts. Otherwise, it is purely hearsay and purely opinion by one who is not qualified as an expert to make them.

The Court: What would be the objection to offering the documents to substantiate what he is saying?

Mr. Allen: That is exactly what we are going to do, Your Honor. I think these gentlemen have missed the point in the case. Mr. Bryan is not going to testify to anything that is not in these various and sundry hundreds of pages of documents, but the rule of evidence that I am talking about permits him in unfolding his case to testify to things that are in the document which we will put in. If he doesn't do that,

the case will be botched, and you will be stopped here, there, and yonder, and we will never be able to unfold the case.

Talking about an expert, of course there is a variety of opinion as to what an expert is. I don't know whether Mr. Bob Pollard was in the case or not, but I took a farmer in a condemnation case and proved he was an expert in his own case, and we got along all right. All a man has to do is to testify that he has special knowledge of the thing from study or experience or practice, and that makes him an expert. This man had special knowledge of real estate values because he had done some trading in real estate, although he was only a farmer. Judge Pollard let him testify as an expert against government experts who testified in the case, and the jury accepted his opinion as an expert rather than that of the government expert. It just depends on how much  
page 126 } the man knows about the subject as to whether he is an expert or not. -

Colonel Harris: What experience has Mr. Bryan had in organizing unions and administering unions, in drawing contracts between unions? He hasn't had any.

They say that the records are voluminous in the interrogatories. Who made them so? They asked voluminous questions. Then they come into court and say, "Because we ask a lot of questions that will take up a lot of time, we ask you to relax the rules and let us put a plaintiff on to summarize all the documentary evidence in the case."

I have never heard of any such procedure as that. The problem for the court and for the jury could always be removed, and all the trial lawyer would have to do would be to tell his interested client, "Go spend two or three months reading, and then I will put you on and prove your case with one general question to you."

There are restrictions about proving documents. There are predicates that have to be laid. In Virginia, if you want them, you have to make an affidavit about them. We submit that what they are trying to do is a mere device to escape all the rules of evidence, and I challenge them to cite to this Court a single case from Virginia or any other jurisdiction where they put a plaintiff on and allowed the plaintiff to summarize all the documents that he had asked the  
page 127 } defendant to furnish.

Mr. Robertson: If Your Honor please, let's get back down to what we are doing, and don't let us have all these rhetorical challenges like Hart's \$500 bet. We haven't done any such thing. We have said that Bryan has studied these things enough to have expert knowledge on them and

that he is entitled to state generally, here and there, in response to a specific question, what it provides. He can refer you to the section of it if he wants to.

The Witness: May I state, Your Honor, what I have done?

Mr. Robertson: Wait one minute.

The Court: I would like to see some authority on experts on documents. I know you have experts on real estate values.

Mr. Robertson: You have experts who have studied the law and come in here and tell you what the law of Virginia is. Your Honor, I could come up and get on the stand and testify as an expert to the law of Virginia. How good or how poor I was would go to the weight of my testimony. But if I can do that, anybody else can read these things and come along and talk about them for whatever it is worth. That goes to the weight of it.

The specific thing that we are up against right now is that we asked him, "Was Denny Lewis Chairman of page 128 { the Organizing Committee of District 50?" "Yes."

"Is he a brother of John L. Lewis?" "Yes."

"What is your authority for that statement?" "The official publication of the union, which I have studied and read, and which I will hereafter put in evidence."

"Was Denny Lewis appointed or elected?" "He was appointed by John L. Lewis."

"What is your authority for that statement?" "These publications which I have studied and spent weeks on, and which we will put in here later to substantiate what I say."

"Is Kathryn Lewis John L. Lewis' daughter?" "Yes."

"Was she appointed or elected?" "Appointed."

"What is your authority for that?" "The same thing."

Mr. Mullen: The best evidence—

The Court: You are not offering those publications at this time?

Mr. Robertson: No, sir.

Mr. Pollard: Your Honor, we have to make a distinction between these three rules or constitutions that have already been introduced, and these newspapers. What is in the newspapers is hearsay itself. Instead of bringing the original newspaper, they have just photostated something. They say it is the official publication of the union, but they haven't proved that. Everything they talk about is hear- page 129 { say.

The Court: I understood it was agreed that if it was identical to the official publication, a photostatic copy

would be accepted, subject to certain rights of the defendants to object to the admission on other grounds.

Colonel Harris: That is right.

The Court: Wasn't that the agreement?

Mr. Mullen: That was the agreement, Your Honor, to object to it. As to the accuracy, it was to be submitted to us in time to examine them. Between 300 and 500 documents were submitted last week. We had two days to go to Congress and all and examine them. It was a physical impossibility. Your Honor had said two weeks before. You told him to get together with me at once. So, we haven't had a chance to check them for accuracy, nor was it pointed out what particular article they wanted to put in evidence.

Mr. Allen: Mr. Mullen, may I ask you a question?

Didn't you agree in the answer to the interrogatories that this District 50 News was the official organ of District 50? Didn't you agree also that the United Mine Workers Journal was the official organ of the United Mine Workers Union? When we called for the District 50 News, certain copies of them, you agreed to furnish them; and when we called for the Mine Workers Journal you said you had all of them except one or two copies that we called for. You page 130 } said you had them.

Mr. Mullen: You have the interrogatories as to what these documents were. You have your questions in the interrogatories. You can use them there. We handed you certain documents that you called for, yes, but with the understanding that Your Honor had not passed on the admissibility.

Mr. Allen: Of course not.

Mr. Mullen: You have the point of the admissibility of all these documents before you get to the point of asking him anything about them.

The Court: You gentlemen consider it overnight and see what you can find. Would it be satisfactory to meet, say, at 9:30 in the morning? We will meet in chambers at 9:30 in the morning and see what we can find. Court will adjourn for the day.

(Whereupon, at 4:35 o'clock p. m., a recess was taken until 9:30 o'clock a. m. the following day.)

Hearing in the above-entitled matter was resumed, pursuant to recess, at 9:45 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 23, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for defendants.

Also Present: Robert N. Pollard, Jr.

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### PROCEEDINGS.

(The following proceedings were had in Chambers.)

\* \* \* \* \*

Mr. Pollard: What question would you like to take up first?

The Court: The relationship, since that was mentioned.

Mr. Pollard: The objection there is first that Mr. Bryan isn't qualified to testify as to that.

The Court: I believe there were two points, were there not, the relationship and hearsay?

Mr. Robertson: Yes, sir.

Mr. Pollard: What we are prepared to discuss page 133 } is that they are trying to put in accumulative evidence. Mr. Bryan is trying to testify to a mass of records.

Mr. Mullen: Summarizing their language.

Mr. Robertson: We are not pressing that at this time, Your Honor. What we are saying here now is that it is a matter of common knowledge, the relationship between these two people.

The Court: Let me ask you this: I gather from your statement you are not going into the question of what is in those various records at this time.

Mr. Robertson: No, sir; but what I am going into is just to get the issue clear here on that, that there is a well recognized exception to the hearsay rule, if somebody is kin to somebody, if you say you are your father's son or I say you are your father's son, I don't have to go into a long proof to show whether or not you are of legitimate birth. The same thing with Mr. Pollard or Mr. Mullen or me.

The Court: I might shorten this argument a little bit. I have given that matter some consideration overnight, and

unless I can be shown to the contrary, that is my belief, that it can be stated in evidence.

Mr. Pollard: Judge, it is neither material nor relevant.

The Court: When it comes to the question of agency, the courts give quite wide latitude on what may be page 133-A } introduced into evidence.

Mr. Moore: May I add one thing which shows this very clearly, right on the point, from 2 *Corpus Juris*, speaking of the relationship of the parties. It says: "The relationship of agency can not be inferred from mere relationship or family ties unattended by conditions, acts or conduct clearly implying agency, but proof of certain close relationships such as those of husband and wife, parent and child, brother and sister, is usually entitled to considerable weight when taken in connection with other circumstances as tending to establish the fact of agency."

Agency as to third parties is always a fact to be drawn from the acts and circumstances surrounding the case. We believe clearly the Court is correct in that ruling.

Mr. Pollard: That may be, sir, but so far as Kathryn Lewis is concerned, she is an employee of the International Union, and it does not show any agency between the International Union or any other union with respect to her.

Mr. Robertson: If Your Honor please, she is hired by her father and holds her position and draws her pay subject to his pleasure.

Mr. Pollard: Yes, but she is in the same union that he is.

Mr. Robertson: That doesn't make any difference.

Mr. Pollard: That is the reason it ought not to page 134 } be admissible.

Mr. Bryan: She is a higher official in District 50.

Mr. Mullen: If Your Honor please, the very item that he read there shows that it has no application to this case, nor do the cases that they cite here. These are all cases in which there were no written instruments. In *Bloxom v. Rose*, which they cite, it is impossible to lay down any effective rule whereby it can be determined where agency shall be sufficient to establish agency in any given case. This question must be determined in view of the facts in each particular case. Whatever form of proof is relied on, however, must have a tendency to prove agency and must be sufficient to establish it by a preponderance of the evidence. It may be said in general terms, however, that whatever evidence has a tendency to prove agency is admissible even though it is not full and satisfactory, it is the province of the jury to pass upon it.

That is spoken of where there is no written instrument. In

that case of father and son, the son was in the Army. The father made a lease for property owned by the son. It was denied that he had a right to do it. The claim was agency. They went on to show that he had deposited money to the son's account, collected money, drawn on it, had sold crops, and so forth from the son's property. All of it was a page 135 } case where there was no written instrument.

(Off the record.)

Mr. Mullen: The second case they cite, we have the same thing, a real estate agent claimed that he was an agent to sell the property. There was no written agreement. They therefore undertook to put in evidence showing that he was an agent by outside evidence because there were no written instruments to be construed.

In *Laird against Billing Company*, we have exactly the same thing. There a man travelling for a wholesale concern sold a bill of goods. After he made out the order he wrote on it, "subject to approval at the home office," and the home office didn't approve it. The party to whom he sold took the position that he was an agent to make sales, not merely to solicit orders. They introduced evidence as to his prior dealings.

In one of the cases where there is a written instrument do they permit outside evidence. It must be construed by the Court. That is the case that I read to you yesterday. There are several of those cases. There is another case in which a man was sued because they interfered with his barge line by strikes. He claimed that the local union was an agent of the international union and that in as much as the international union's constitution provided that there shall be page 136 } no strikes without approval of the international

union, that this man on whom there was the question of service, the president of the local union was served the summons and there was an attempt to hold the international union on it. It was held that it could not be done, that they had to construe the constitution, and they ruled whether or not he was an agent, and he was not an agent for that purpose.

Mr. Pollard: Judge, just one other thing here. It might be proper to show the family relationship of Kathryn Lewis and John Lewis if they were trying to prove that she was his agent, but this suit is not against Kathryn Lewis, and it is not against John L. Lewis. It is against the two unions, and their relationship is not relevant in an attempt to establish agency between the unions. It may be relevant to establish personal agency between the individuals.

The Court: What have you got to say about that?

Mr. Moore: Judge, we would like to show you how far off

the point the case cited by counsel for the Defendants yesterday is. The case they relied on chiefly was *Green v. Obergfeil*, 121 Federal (2d) 46. You must keep in mind from the very beginning there is a great difference of what is agency when the matter arises between the principal and the agent. That is when you look at the contract between the two of them, but where a third party is involved the principal and the agent can call each other anything they want to. If their page 137 } acts and circumstances show they were in fact agents, then the jury may find they are agents, even though they specifically say they are not agents.

In the case they cited it was strictly one of these intra-union affairs. It was a suit by the International Union of the United Brewery, Flour, and so forth, workers, against the International Brotherhood of Teamsters. It was a plain jurisdiction dispute, as they call it in the labor law, over who should have jurisdiction over the drivers of brewery trucks. The brewery workers were under the A. F. of L. first, and they complained they had exclusive right to organize these brewery truck drivers. The teamsters union came under the A. F. of L. domination later, and they claimed that the drivers naturally would come under their jurisdiction. The A. F. of L. executive council issued a ruling saying that the drivers should come under the teamsters jurisdiction. The brewery Workers refused to abide by that decision and sought an injunction in the district court of the United States to prevent the A. F. of L. executive council from making such a transfer as this.

It is interesting to note that there were not outside parties involved. The employer of the brewery truck drivers was not involved. It was strictly between these unions.

There the Court of Appeals dissolved the injunction, holding, first, it was "a labor dispute within the meaning of the Norris-LaGuardia Act, and therefore no injunction would lie," and then the Court held that this was an intra-union affair and the court would not interfere with intra-union affairs unless some injustice was shown. The real question was whether the A. F. of L. council acted within the rights of the contracts it had with the brewery union and the teamsters union in making this decision. The court held that if that council had acted within its rights, no party was aggrieved. Therefore they said the only time you can get to the courts is when you show one of these contract provisions has been violated.

That has absolutely nothing to do with where a tort has been committed against a third party. He is claiming that the two parties are agents for each other.

The second case, as Mr. Mullen said, it was simply a question of whether or not service on a member of an international union was service on the union. Of course the courts held that it was not. And that is not involved in this present case.

Mr. Mullen: Service on the local union was page 139 } service on the International Union. That was the question. That was an outside party, a third party.

Mr. Moore: This is what the headnote says, Mr. Mullen:

"Service of process on the president of a local Longshoremen's labor union who was not an officer or representative of the international labor union, was held insufficient to give the court jurisdiction,"—

Mr. Mullen: That is exactly what I said.

Mr. Moore: —"In an action against the international union under the Clayton Antitrust Act."

Mr. Mullen: But it is based on the construction of the Constitution as to the relation between the international union and the local union. The Court also cited the Coronado case, and said that an action could not be brought into court against an international union on service to the local union. That was service on a third party.

Mr. Moore: It is exactly the question of service of process. The court also said the third party had made out a good cause of action. Here we are not involved with service of process. They have all appeared.

Mr. Robertson: It is a novel proposition to me, Judge. We are charging the commission of a tort by Hart, acting within the scope of his authority for all three of these page 140 } defendants, and it is a novel proposition to me that they come along here and say that under the written contract between us, you are out of court. I might just as well come along and say that the private instructions to a motorman not to hurt anybody made the transit company immune when he ran over somebody and killed him. I have never heard that proposition put out yet.

Mr. Mullen: You have introduced these three written instruments, and certainly ever since I have known anything about the law, where you have a written instrument like that, it is up to the court to construe it or put in evidence to change it.

I think Mr. Bryan is not involved in this discussion.

Mr. Allen: That is only a part of evidence. We are going

to introduce not only the written instruments that have been introduced, but certain of the interrogatories which deal with their answers, and we are going to introduce documentary evidence of proceedings at their convention, and statements by the president of the international union contained in the United Mine Workers Journal, all sorts of documentary evidence to show that these men were acting within the scope of their employment.

Certainly when Hart admittedly went there to do what Mr. Mullen says he went there to do, they can't deny page 141 } that he was acting within the scope of his employment then, but if on that mission he exceeded his authority or instructions, and what-not, on the same principle referred to by Mr. Robertson here, they would be liable for his tortious acts. Nobody has ever disputed that.

Mr. Robertson: Haven't they confused the point? Of course, we put in the three booklets, and if the book says one thing and we come before Your Honor and it develops there is a dispute here as to what the meaning of it is, and there is no ambiguity in it, then it is a question for the Court to construe those written instruments.

That is not what we are here for now. We say that this man went out there acting within the scope, we say, of both his actual and ostensible authority.

Mr. Mullen: But he was only an employee of the UCA.

Mr. Robertson: It remains to be seen. We say he is an employee of all three. You have admitted he was the agent of two of them, in your answer signed by all counsel, and I can get it out and read it. You have admitted he was the agent of the United Construction Workers, and you have admitted that he was the agent of District 50. You have denied that he was the agent of the United Mine Workers, and that is what we are going to prove here.

Mr. Allen: When it comes to the question of page 142 } whether he is the agent of the United Mine Workers, you go back to the power of control, not what they actually—

Mr. Robertson: Excuse me once more. When you get him in—I think this is a jury question if we didn't go any further. They have admitted that the United Construction Workers is a part of District 50, and that District 50 is a part of the United Mine Workers. Our contention is that we have a jury question right there; that when they say that these are too smaller parts of the whole, and when this thing can act only through its instrumentalities and members and agencies, then it is a jury question as to whether they were doing it or not.

When we get back to District 50, we have already got it back to the United Mine Workers.

Mr. Moore: The case of agency is a fact. It is always a jury question. The contract may be part of the circumstances, but it certainly is not all of the circumstances.

The Court: Do you have anything else you want to say, Mr. Mullen?

Colonel Harris: I thought Mr. Pollard's statement, Judge, was most important, that it is not a question of proving agency of Kathryn Lewis for John L. Lewis. They are trying to prove the agency of one union for another. It seems to me that that distinction and difference is one that we page 143 } can't overlook.

The Court: What about that point?

Mr. Allen: Let me answer that. This is a complete answer.

Mr. Robertson: Let me say one thing. Judge, these labor unions, all the cases say, while they are not incorporated, they partake of the nature of a corporation. They can act only through their agents and officers and smaller units. We say John L. Lewis, the top man in charge of the whole thing, appointed his own daughter the Secretary and Treasurer of District 50, the biggest district in the whole thing. That is admissible to show the close interrelationship and how they were hooked up together.

The Court: The relationship between District 50 and the United Mine Workers?

Mr. Robertson: That is right.

Mr. Allen: Now, let me finish what I was going to say. I will go back to this premise: It is admitted in this record that District 50 is co-extensive, geographically and jurisdictionally, with the United Mine Workers. It reaches all over the United States exactly as the United Mine Workers does, and up into Canada like the United Mine Worker does.

To connect the United Mine Workers with District 50, in view of that set-up, you go back and inquire who page 144 } has the power of control over District 50. There isn't any question about the fact, from the constitutions and rules and all this other documentary evidence and interrogatories, that the United Mine Workers has the power of control over District 50. It exercises it by the President of the United Mine Workers appointing the Chairman of the Organizing Committee of District 50, namely, A. D. Lewis. It exercises it by the President of the United Mine Workers appointing the Treasurer of District 50, namely, Kathryn Lewis.

The Virginia cases—*Booker v. Musselman*, 152 Va. 293,

*Ideal Steam Laundry v. Williams*, 149 S. E. 479 and 153 Va. 176, and a number of others, *Southern Stevedoring Co. v. Harris*, in 58 S. E. (2d) 302, and *Nolde Bros. v. Chalkley*, 35 S. E. (2d) and 184 Va. 553—they all say it goes back to the power of control. If you have the power to control the party, then you are responsible for that party's actions. It is a jury question here, under all this documentary evidence and anything that may be said, as to whether that agency exists by virtue of the several things we have referred to.

Mr. Mullen: Even if he is correct that he can show the power of control, the power of appointment, that is one thing. You say he appointed the administrative officer or Chairman of the Organizing Committee, whatever you wish to call him, and Kathryn Lewis, and by reason of his appointment showed control; but the fact that she was kin to him had page 145 } nothing to do with it. You are basing it on the power of control by appointment, not by kinship. The kinship has nothing whatever to do with it. It is solely, I think, to prejudice the jury.

Mr. Robertson: May I ask you one question?

Mr. Mullen: Yes.

Mr. Robertson: Would you seriously argue that if you were the president of the United Mine Workers of America, and District 50 comes along and you appoint your own son and daughter in there to hold office at your pleasure, and draw their pay at your will, that that has nothing to do with influencing and showing the relationship?

Mr. Mullen: Not the mere kinship, no. Appointment is the matter you are arguing about, and it is the matter Mr. Allen was arguing about.

The Court: Gentlemen, I overrule the objection, and we will proceed now. Of course, you want to note your exception to the Court's ruling.

There is one other question that I was going to consider, and I have not come to any conclusion on it yet. I failed to get whether Mr. Harris, during the pleadings, had represented himself to be counsel for all of the defendants or one. I do not know whether we went into that yesterday or not. Did we, Mr. Harris?

Colonel Harris: We didn't conclude it. On the page 146 } pleadings, I think that both Mr. Mullen and I represented all three defendants; but in the distribution among ourselves, Mr. Pollard represents District 50 and Mr. Mullen and I represent the International Union and the UCW.

The Court: I will not try to decide that at this time.

*Alexander Hamilton Bryan.*

Mr. Fred G. Pollard: Please let the record show that we except to the Judge's ruling allowing the question to be asked.

Mr. Mullen: Judge, concerning the interrogatories, studying overnight, I ran into a typographical error, and we would like to file amended answers to Question 83 in the Answer of the United Construction Workers to the interrogatories.

Mr. Robertson: Let's see what it is.

Mr. Mullen: And to 85.

The Court: It is a typographical error?

Mr. Fred G. Pollard: Addressed to District 50.

Mr. Mullen: It is plainly a typographical error. I know just how it was made.

Mr. Robertson: I can't get the sense of it from reading it now. I will ask the Court to hold the ruling in abeyance until I can compare them.

The Court: Counsel tells me it was a typographical error, and I will let you make your objection. I am sure page 147 } it was, if Mr. Mullen tells me it was.

I will not pass on it at the moment, and give them an opportunity to pass on it.

Mr. Fred G. Pollard: May we lodge that with you?

The Court: Yes, surely.

(The following proceedings were had in open court.)

Mr. Robertson: Mr. Bryan, will you come back to the stand, please, sir?

Whereupon,

ALEXANDER HAMILTON BRYAN,  
the witness on the stand at the time of recess, resumed the stand and testified further as follows:

#### DIRECT EXAMINATION (continued).

By Mr. Robertson:

Q. Mr. Bryan, toward the conclusion of your testimony yesterday, you testified that John L. Lewis is President of the United Mine Workers of America, and that A. D. Lewis is the Chairman of the Organizing Committee of District 50. Is A. D. Lewis also known as Denny Lewis?

A. That is correct.

Q. What kin is Denny Lewis to John L. Lewis, if you know?

*Alexander Hamilton Bryan.*

A. Denny Lewis is John L. Lewis' brother.

Q. Who is the national highest ranking executive officer of the United Construction Workers, if you know?

A. Denny Lewis.

page 148 } Q. Who is the Secretary-Treasurer of District 50?

A. Kathryn Lewis.

Q. What kin, if any, is Kathryn Lewis to John L. Lewis?

Mr. Fred G. Pollard: Your Honor, we would like to make the objection that you have already ruled on. We would like the record to show that our objection runs to this entire line of testimony.

The Court: Very well.

The Witness: Miss Kathryn Lewis is John L. Lewis' daughter.

By Mr. Robertson:

Q. Was Kathryn Lewis elected to her position, or appointed to it by her father?

A. She was appointed by Mr. John L. Lewis, with the approval of the International Executive Board of the United Mine Workers of America.

Q. Who is the Secretary-Treasurer of the United Construction Workers?

A. Mr. O. B. Allen is the Comptroller of the United Construction Workers.

Q. Do you know whether or not he was appointed by John L. Lewis?

A. He was appointed by Mr. Lewis with the approval of the International Executive Board.

Q. Was Denny Lewis appointed by John L. Lewis as Chairman of the Organizing Committee of District 50, or was he elected to that office?

A. He was appointed by Mr. John L. Lewis, with the approval of the International Executive Board.

Q. Who has the power to discharge him, if you know?

A. Mr. John L. Lewis, as President of the International Union, has the power to suspend or remove from office any appointed employee, subject, however, to the approval of the International Executive Board.

Q. If you know, who has the power to suspend Miss Kathryn Lewis?

A. Mr. John L. Lewis can suspend or remove her from office, again with the approval of the Board.

*Alexander Hamilton Bryan.*

Q. If you know, who has the power to discharge the gentleman that you said was the Comptroller of the United Construction Workers?

A. Mr. John L. Lewis, subject to the approval of the Board.

Q. Mr. Bryan, under date of April 15, 1947, did you execute a contract with the Richmond Building and Construction Trades Council regarding the employment of A. F. of L. labor by Laburnum Construction Corporation?

A. Yes, sir.

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\* \* \* \* \*

By Mr. Robertson:

Q. Is that the executed original of the contract you have mentioned?

A. Yes, sir.

Mr. Robertson: Plaintiff offers this contract in evidence and asks that it be marked Plaintiff's Exhibit No. 4.

(The document referred to was marked Plaintiff's Exhibit No. 4, and received in evidence.)

Mr. Robertson: I don't think it is necessary to read it at this time, Your Honor.

By Mr. Robertson:

Q. Mr. Bryan, in your opening statement here, a contract between Laburnum and the Pond Creek Pocahontas Company, dated October 28, 1948, has been mentioned. I will come to that contract in a moment.

Prior to the execution of that contract, had Laburnum done any construction work for Island Creek Coal Company or any of its associated or subsidiary companies?

page 151 } Mr. Fred G. Pollard: Objection, Your Honor.  
It is immaterial and irrelevant.

Mr. Robertson: If Your Honor please, the Court ruled yesterday that this line of testimony is admissible to show the business relationship that had been built up between Laburnum and these companies, and the value of it.

Mr. Fred G. Pollard: Your Honor made no such ruling yesterday.

*Alexander Hamilton Bryan.*

The Court: The objection is overruled.

Mr. Mullen: Note an exception, please.

Mr. Fred G. Pollard: We note an exception.

By Mr. Robertson:

Q. The question, Mr. Bryan, was whether, prior to October 28, 1948, Laburnum Construction Company had done any construction work for Island Creek Coal Company or any of its associated or affiliated companies.

Mr. Fred G. Pollard: Your Honor, I would like to know what the plaintiff is reading from. I don't think that is proper.

Mr. Robertson: If Your Honor please, there is quite a list of these contracts here, and we are going, in due course, to introduce them, one by one. We can take only one step at a time. At my request, Mr. Bryan has made a memorandum of these contracts in order that he may mention them now, as to which ones they are. Of course, he page 152 } could lay that aside and do it from his memory.

I think in fairness to the witness, he has a right to refer to a record in a matter of this sort, to call the roll of the contracts he had before October 28, 1948.

Mr. Fred G. Pollard: It is not the established practice in Virginia, Your Honor, and the cases say it is not allowed.

Mr. Robertson: I take issue with that.

Mr. Fred G. Pollard: I don't see why Mr. Bryan should be privileged in that respect.

Mr. Robertson: I take issue with that, Your Honor. It is in accord with the established practice in Virginia; and when they get on the stand, if they get into a complicated sequence of events which it is impossible for anybody to hold within their memory, they have the same right Mr. Bryan has, and I have no right to object to it.

Mr. Mullen: If Your Honor please, it is provided in *Paul v. Miller*, 17 Gratt. 187, that a witness cannot read from a memorandum; that he cannot bring a memorandum on the stand and read from it; that he has to testify from memory; that prior to his examination he can refresh his memory, but he cannot read from a memorandum or record of answers to be made, brought on the witness stand. That never has been changed in Virginia. That is the law.

Mr. Robertson: If Your Honor please, my understanding is that the entire matter is within the discretion of the Court as to what is necessary

*Alexander Hamilton Bryan.*

in a given situation to advance the interests of justice and to help in the proper trial of the case. I am going to ask Mr. Allen to address himself to that.

Mr. Allen: If it please Your Honor, Mr. Robertson is exactly right in that statement. The case referred to by Mr. Mullen does not prohibit the practice we are following here. It is true a witness will not be allowed to read the memorandum to the jury, but the universal rule is, not only in Virginia, but Mr. Wigmore lays it down in Volume 2, pages 826-829, and in his New Wigmore Code at pages 37 and 40 of 2 Wigmore, that the witness will be permitted to take any memorandum with him to the witness stand, whether it is made by himself or somebody else. The question is: Does it refresh his recollection? He looks at it. Then he raises his head and testifies. He looks at it and then he testifies. He is testifying from his own recollection, refreshed by the memorandum. That is the universal rule.

It is largely within the discretion of the jury; and if they want to see the memorandum he is using, Mr. Wigmore says they have a right to look at it, and not only that, they have a right to call for the documents he is talking about. We have them, and will produce them. One of the requisites of that rule is that the documents must be in court.

page 154 { The Court: You expect to produce those documents.

Mr. Allen: Yes, sir.

The Court: You have checked and you have gotten that list from the documents.

The Witness: Yes, sir.

The Court: Objection overruled.

Mr. Mullen: An exception noted.

Mr. Pollard: Note an exception.

By Mr. Robertson:

Q. I will ask you, Mr. Bryan, to refresh your memory from the memorandum you have there and then testify from your memory as refreshed.

A. Do you want me to name the contracts?

Q. Yes, sir. I do not at this time want to go into any detail of them. We are going to produce them later, but at this time we just want to mention it and get the broad outline of what the facts of the case are according to our contention.

A. Prior to October 28, 1948, we had been awarded these contracts by Island Creek Coal Company and its associated

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and subsidiary companies. Contract dated September 6, 1947, with the Pigeon Creek Development Company for the construction of 53 prefabricated dwellings at Delbarton, West Virginia. A contract dated June 29, 1948, with the Island Creek Coal Company for the construction of two  
page 155 } store buildings, one at the Brookside Subdivision near Delbarton and the other at the Valley View Subdivision near Logan, West Virginia.

Q. I am going to ask you what was the money value, the money amount of construction in each contract, if you will.

A. In the first contract mentioned for the construction of the 50 prefabricated houses, the money value was \$95,631, including extra work which was awarded. In the case of the two store buildings at the Brookside Subdivision and the Valley View Subdivision the amount of the work was \$66,486.05.

On September 19, 1948, we were awarded another contract by Island Creek Coal Company for the construction of an appliance warehouse near Holden, West Virginia. The amount of that contract was \$40,898.89.

On October 21, 1948, we were awarded another contract by Island Creek Coal Company for the construction of a building known as Store No. 15 near Holden, West Virginia. The amount of that contract was \$34,313.31.

They were the contracts which were awarded to us prior to October 28, 1948.

Q. Do you know what the total volume of construction was in those contracts?

Mr. Pollard: Excuse me.

page 156 } Mr. Robertson: In dollars.

Mr. Pollard: Your Honor, to save the Court's time we would like to have an understanding with the Plaintiff that when we make an objection it will apply to the entire line of testimony so that we won't have to keep repeating it.

The Court: That is understood.

Mr. Robertson: I understand you are objecting to everything we offer.

The Witness: It would be necessary, Mr. Robertson, to add up those figures. I do not have a sub-total. The total amount of all the work which we performed for Island Creek Coal Company, Pond Creek Pocahontas Company and its subsidiaries amounted to \$651,192.84 over a 28-month period.

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By Mr. Robertson:

Q. That would include all work in Breathitt County, Kentucky?

A. That is correct.

Q. What was the sum total profit to Laburnum on that work?

A. The total net job profit which we made on all of those contracts, 12 or 13, amounted to \$58,714.26. That work was over a period from September 6, 1947, until the end of 1949, 28 months roughly.

Q. At my request, have you made a computation to show what the average profit per year would be on that work?

A. Yes, sir. Based on a total net job profit page 157 } of \$58,714.26 for work performed over a period of 28 months, the average earnings per year would be \$25,163.28.

Q. Mr. Bryan, who is the president of the Island Creek Coal Company?

A. *The* the present time the president is Mr. R. E. Salvati.

Q. Do you know whether or not he is president of the associated and affiliated companies of Island Creek Coal Company?

A. He is also president of Pond Creek Pocahontas Company. Island Creek Coal and Pond Creek Pocahontas Company have a common management.

Q. Do you know whether or not he is president of the Spring Fork Development Company?

A. Spring Fork Development Company is a wholly owned subsidiary of Pond Creek Pocahontas Company. I don't think Mr. Salvati is President of that subsidiary. Somebody else is.

Q. Are you personally acquainted with Mr. Salvati?

A. Yes, sir.

Q. Is he a friend of yours?

A. I regard him as a friend.

Q. Who is the chairman of the board of directors of Island Creek Coal Company?

page 158 } A. Mr. J. D. Francis.

Q. Are you personally acquainted with him?

A. Yes, sir. He was the president of those two companies before Mr. Salvati became president.

Q. Is Mr. Francis a friend of yours?

A. Yes, sir.

Q. Before you entered into this contract of October 28, 1948, what was the relationship between Laburnum and Island

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Creek, Pond Creek, and Spring Fork Development Company? What I am driving at is, had those contracts been worked out in satisfaction and harmony, or had there developed friction and differences?

A. There had never been any difference that I knew anything about. As far as I know, the management of the Pond Creek Pocahontas Company, and the Island Creek Coal Company were pleased and satisfied with the work which we had done. In September, 1948, we received a letter from the Island Creek Coal Company asking us to take charge of their building program in West Virginia in connection with the construction of stores, churches, community buildings, beauty shop, lunch rooms, a great deal of work.

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By Mr. Robertson:

Q. Now, Mr. Bryan, I am coming in a moment to this contract of October 28, 1948. Simultaneously with the execution of that contract did you have any conversations with Mr. Salvati regarding it?

A. Yes, sir.

Q. What was the general import of those conversations?

Mr. Mullen: We object to that as conversation between people who are not parties to this suit.

Mr. Robertson: If Your Honor please, it is the same old matter in a slightly different aspect. One of the vital elements of our case here is that Laburnum had built up an exceedingly valuable business connection and had done work to the satisfaction of Island Creek Coal Company to such extent that when they entered this contract of October 28 and as part of the inducement to undertake that contract on account of the difficulties of the situation, they were promised and given assurance that they would have all the work in this territory and it all goes to the value of the business connection that Laburnum had built up and to the extent to which they had been wronged and damaged if these unions broke it up.

page 160 } Mr. Pollard: Your Honor, in the notice of motion for judgment the Plaintiff makes no allega-

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tion concerning any contracts it may have had with Island Creek Coal Company, and it limits its alleged losses to the state of Kentucky. Any other evidence should not be allowed to be brought in, sir.

Mr. Robertson: If Your Honor please, Mr. Pollard is a god enough lawyer to know that we don't have to allege our evidence and every bit of our evidence in the notice of motion for judgment. They called for an itemized statement of our losses in this \$500,000, and they have got it. We said we were out there to follow this master plan, and that we had it practically within our hands and had the promise and assurance of it, and they broke it up. They have had fair notice, and they have had the particulars of it, you remember, in these interrogatories. They made us itemize it.

Colonel Harris: May I add an objection, if the Court please. As I understand the cases, when a man comes in and wants to get damages on account of any contracts that have been interfered with, it must be with relation to existing contracts. If it is not with relation to existing contracts, the claimed damages are too speculative and remote and contingent, and he does not allege that he had existing contracts. He had an expectation of getting some contracts in the future, but he had not got them. We submit that under page 161 } the decisions that is not a recoverable element of damages, and testimony on what he expected to get is not admissible.

Mr. Robertson: If Your Honor please, this sounds to me like—

The Court: What is your authority?

Mr. Robertson: It is in your memorandum there, the trial memorandum that I passed up yesterday. I am saying it sounds to me like Colonel Harris hasn't read it. The whole point is—I am fully aware it is in the memorandum that Your Honor has the original of, and they had a copy of it overnight. It sounds to me that you haven't read it.

Colonel Harris: You didn't give me one.

Mr. Robertson: I gave your side one and you are all representing the same crowd.

Mr. Mullen: I haven't found it in there, and I read it.

The Court: We will recess for five minutes, gentlemen.

(Brief recess.)

page 162 } (The following proceedings were had in chambers.)

The Court: Suppose you proceed first, Mr. Robertson, because you are familiar with it.

Mr. Robertson: Judge, I turn first to page 14 of the notice of motion for judgment to see whether our allegations are broad enough to cover our proof. I am aware it is quite a long sentence, but I don't think I have to get up to the middle of it.

"—and did actually—"

Mr. Pollard: Where are you starting?

Mr. Robertson: About the middle of page 14 of the notice of motion for judgment, talking about "the said actions were willful, malicious, illegal and unwarranted and intended to and did actually greatly damage and injure the Plaintiff in and about its property and reputation and caused Plaintiff's work in Breathitt County, Kentucky, to be stopped and its said contracts to be cancelled, and further caused Plaintiff to lose other contracts for work which would have resulted in large profits to Plaintiff."

There is no limitation there to Kentucky.

I haven't finished yet and don't interrupt me, Mr. Pollard. I haven't finished.

The Court: We all want to be friends here. It is hard enough without getting upset. Let's all go along as coolly as we can.

Mr. Pollard: Mr. Robertson is the only one page 163 } who is getting upset.

The Court: It is tough on all of us, I can tell you.

Mr. Robertson: "—and caused Plaintiff's work in Breathitt County, Kentucky, to be stopped and its said contracts to be cancelled, and further caused Plaintiff to lose other contracts for work which would have resulted in large profits to Plaintiff."

As I said in my opening statement, this is the third largest commercial coal company in the United States and the largest one in the coal fields of West Virginia. Of course we were out there in the whole field, and there is no such limitation as they argued in the courtroom a moment ago to Your Honor.

If Your Honor please, I am coming to the long memorandum here in a moment. We are all familiar with the rule which prohibits the recovery of speculative and remote and contingent profits, but we are also familiar with the rule, *Townsend v. Atlantic Coast Railroad, Atlantic Realty Company*, which went up from Petersburg, and there is another one, the

Forbes case is one of them, which say that when you have an established builder who has built up a business relationship that has resulted in actual profits over a long enough period of time to show stability of operation and stability of profit and to show that the concern is soundly on its feet and soundly operated so that it has made these profits in the past and it has formed this business connection which so far as we can see would continue into the future, and you can show what the volume of work would be and what normally could be expected to result from it, it is admissible in evidence to show the measure of the loss from any illegal destruction of that business connection.

Now we come to page 13 and 14 of the trial brief. On page 13 there is the heading compensatory damages: "Compensatory or actual damages are by definition the damages in satisfaction of loss or injury sustained as a result of the wrongful acts of the defendants. Compensatory damages include all damages other than punitive damages."

Then quoting from 15 American Jurisprudence: "That the destruction or interruption of a business, or an injury thereto, by the wrongful act of another is a proper element of damage, provided, of course, it is the natural and proximate result of such act, and the injured person is entitled to recover for such damages as to the natural and proximate result of the wrongful act complained of."

"In the present case, the Plaintiff will show loss of profits from both existing and future contracts, damage due to the interruption of Plaintiff's business in Kentucky and damage to Plaintiff's reputation, all directly caused by the tortious acts of the defendants."

"The leading Kentucky case allowing these elements as proper elements of compensatory damage is *American Bridge Co. v. Glenmore Distilleries Company*, 32 Ky. L. R. 873, 107 S. W. 279, (1908). In that case, Glenmore was reconstructing an old distillery plant so as to make it a new and up-to-date plant. The American Bridge Co. contracted to build a larger tower which was an essential part of the new plant. Glenmore was out of business until the new plant was in operation. The defendant bridge company did not complete the tower in the specified time and Glenmore sued for damages for interruption of its business and loss of profits. The lower court awarded Glenmore \$10,950 which judgment the Court of Appeals of Kentucky affirmed and stated at 107 S. W. 284:

"The profits which the court permitted the jury to award

the appellee are not so speculative in their character as to preclude their recovery. The most conservative men invest countless thousands of dollars in the building and operation of distilleries in this state, and profits can as certainly be expected from their operation as from any other class of manufacturies;—’ ”

“The Glenmore case was cited and approved in the later Kentucky case of *Carson-Muse Lumber Company v. Fairbanks, Morse and Co.*

“The Plaintiff in the present case will prove page 166 } these elements of compensatory damage by the degree of proof which is required by Virginia law as set forth in the leading case of *Forbes v. Wyatt*, 143 Va. 802 (1925). The Forbes case was an action by a tenant against his landlord for damages due to the failure of the landlord to deliver certain premises on the day provided in the lease. The plaintiff was in the storage business and claimed damages for estimated profits based on the past results of his business. The court allowed the plaintiff to recover these future profits, stating at page 809.

“As a general rule the expected profits of a commercial business are too uncertain, speculative, and remote to permit a recovery for their loss. However, the loss of profits from the destruction or interruption of an established business may be recovered for if the amount of actual loss is rendered reasonably certain by competent proof; but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one, that it had been successfully conducted for such a length of time, and had such a trade established that the profits thereof are reasonably ascertainable.’ ”

I cite those other cases.

“Since the Kentucky law allows damages for the interruption of business and loss of future profits as a matter of substantive right, and the plaintiff can prove such page 167 } damages by evidence which will meet the Virginia procedural requirements, plaintiff will be entitled to these items as elements of compensatory damages.”

I don't know whether Mr. Moore or Mr. Allen want to say any more there or not.

Mr. Allen: If it please Your Honor, the rule about recovering speculative profits is based, first, upon the assumption that

you have suffered no actual damages that can be proved with reasonable certainty. It is based upon the further proposition that the business concern which it is claimed has been damaged was not an established business to the extent that you could expect reasonable profits from it.

Just picking up your digest here, which is not brought up to date, I was trying to run down some cases I had in mind. I find the old case here of *Dangerfield v. Thompson*, and *Peshine v. Shepperson*, in 17 Gratt 742, and they say: "Certain wrongful acts will necessarily injure the business of a person whose rights are violated, and when such is the case the jury may consider the injury to plaintiff's business in assessing damages and in such a case will ascertain the damages, the nature and the extent of the merchant's business, whether profitable or not, are proper subjects of inquiry."

There is a later case right up here in Law and page 168 } Equity Court No. 2 a few years ago in which Mr.

Golden represented the plaintiff, Golden and Golden. The case went to the Court of Appeals and it involved the damages of a mercantile business. A man was operating a grocery store and somebody else did something that violated his rights in connection with the operation of that store. The question was whether he could recover the profits that he would have made if his business had not been interrupted by this defendant. The court went on to say that you could take the man's past experience and the profits that he earned in the past and judge by that, that the jury had a right to have all that put before them to determine whether it was reasonable and proper to allow for profits in the future. There had been an established business and because there had been an established business and the man had shown that that business was interfered with or broken up, therefore he could recover the profits that he could reasonably have made if his business had not been interfered with. I think that is the latest case in Virginia, and they there went into the types of evidence that are admissible, and the door is just wide open.

Mr. Moore: I just want to clear up the conflict of laws point. Damages as a general rule are a matter of substantive law. Our main point is that Kentucky will allow these damages for the interruption of business, loss of page 169 } business, and damage to reputation, but of course the degree of proof is procedural and governed in this case by the law of Virginia. We simply say under the Kentucky law we are entitled to it and I think that Glenmore case shows that. Under the Forbes case, that sets forth what degree of proof you need. We feel that we can satisfy that

degree of proof to make these profits what the case calls reasonably ascertainable.

Colonel Harris: If the Court please, the gentlemen in their argument confuse two things. They have put on evidence up to this time of what the annual profits of the plaintiff were. That is a past fact. We can check on that and see if the figures are correct, and a jury in many jurisdictions is allowed to take the evidence of past profits and from that to calculate what he can reasonably expect to make from that business. That is one thing. That isn't the thing that we are objecting to at this moment. What we are objecting to is that he departs from that and wants to be allowed damages for contracts that he expects to get. He hasn't got any contract. He has a hope and an expectancy.

There have been many cases on the recoverability of profits in lawsuits, and from my jurisdiction there are three separate and distinct cases, and they discuss the right to recover profits on existing contracts. In Kentucky there are page 170 } many cases on profits. For instance, in the case of *Hines v. Denny*, 227 S. W. 567, 190 Kentucky 416, the Court said: "The law regarding the recovery of damages for loss of commissions or future profits, whether resulting from a breach of contract or arising out of a tort, is also well settled in this as in other jurisdictions. In all cases the damages claimed must be such as are directly and proximately caused by the breach or injury and also such as in the contemplation of the parties could reasonably have been anticipated. Moreover, the damages claimed should be capable of being definitely ascertained. Where they are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof, no recovery can be had." Citing 13 Sykes 36: "As already intimated, the evidence in this case as to the loss of commissions by appellee is based upon too many contingencies, is too general and indefinite to admit of a proximately accurate ascertainment of the character or amount of the damages claimed, and was wholly insufficient to show that they were or are of such a character as could have been contemplated by the parties, for it was not made to appear that the servant of the railroad company who received the appellee's baggage or any who had it in charge or by whom it was lost knew that it contained samples or the use that the appellee intended to make of it. We have frequently held that damages page 171 } of the character here claimed are peculiarly conjectural and speculative, and hence not recoverable."

Then in another case, *Weick v. Dougherty*, 139 Kentucky 528, 90 S. W. 966, 28 Kentucky Law Reports 930, 3 LRA New Series 348.

Mr. Allen: What is the last citation?

Colonel Harris: 3 LRA New Series 348. In this case the court said: "The instructions given by the trial judge correctly advised the jury as to the law of the case, except that one of them authorized the allowance to appellee of damages for the loss of profits in his business as a huckster alleged to have been caused by the negligence of appellant in permitting the destruction of his wagon. The jury should not have been allowed to consider such loss of profits in estimating appellee's damages, nor should he have been allowed to introduce evidence upon that question. This is not the character of case in which damages can be recovered for loss of profits. In an action to recover damages for injury to property by reason of the negligence of the defendant the plaintiff can not recover anything by reason of his inability to instantly supply himself with other property in lieu of that injured or destroyed. Such damages are too remote to be the subject of judicial ascertainment."

He wants to show the analogy of that case. He wants to show that he has lost profits because he could page 172 { have obtained contracts and to show what they were, but he didn't have a contract. Whether he gets the contract depends on too many contingencies.

In the first place, the company may call for bids. He may not be the low bidder. In the second place, the company may find that it is losing money on its operation and may decide to cease that operation. In the third place, something like a war may come along and make a shortage of materials, and the company doesn't give him a contract because they see they are going to have difficulty in carrying out their program.

There is a difference, clearly, it seems to me, between speculating on what a man might get by way of specific contracts and allowing a recovery on contracts which he actually had. No man ever knows until the contract is made whether somebody else is going to hire him.

In another Kentucky case there was a jockey who sued. That is the case of *Tucker v. Horn*, 103 S. W. 717, 31 Kentucky Law Report 806. In that case the Court said:

"We think the court erred in authorizing the jury to find for the plaintiff anything on the score of what he might have made by riding outside mounts. In the first place, it is neither alleged in the pleading nor established by the evidence, except

in his own opinion, that Earl Horn would have been employed by outside parties to ride for them. Secondly, page 173 { such damages—"That is the question of whether he would have been employed. "Secondly, such damages are entirely too remote and speculative in their nature to be susceptible of being legally established with the certainty to authorize the recovery, and a jury are not permitted merely to guess away the defendant's property. Prospective profits are not ordinarily recoverable in actions for breach of contract. It is difficult to lay down any general rule on this subject, and usually the cases are permitted to stand or fall upon the particular facts of each. Sometimes the question becomes so close as to make it one of great difficulty to say whether or not any given item of damages for breach of a contract is or is not too remote and speculative to authorize a recovery.

"But in this case it seems to us entirely unreasonable that a jury should be allowed to say at haphazard—" And that is what it would be in this case, a jury allowed to say at haphazard—"who might or might not employ the infant plaintiff to ride their horses during the contract period. Undoubtedly it is true that employees who have no jockey entering a given race will sometimes be engaged by other owners who are in need of riders, but that this will happen is entirely problematical."

That he would get the contracts is entirely problematical.

"In the case of *Koch v. Godshaw*, 12 Bush 318, page 174 { it was held that the prospective profits of conducting the business of a bakery were too remote and speculative to be recoverable as damages for breach of the sale of a bakery establishment. The case at bar comes within the principle thus announced. The outside mounts were merely collateral to the main contract sued on, and it must be uncertain whether or not Earl Horn would ever have been employed to ride an outside mount, his chance of such engagement is entirely too remote and speculative to constitute the basis of recovery for the breach of a main contract."

There was another Kentucky case of *Turpin v. Jones*, 227 S. W. 465, 189 Kentucky 635, in which the court held that a sharecropper that could not recover of the landlord by way of damages "conjectural profits they might realize from the cultivation of the land."

I mean the same conclusion is reached on a similar state

of facts in the case of *Smith v. Phillips*, 29 S. W. 358, 16 Kentucky Law Reports 615. And in the case of *Owens v. Durham*, 5 Dana 536.

In the more recent case of the *Kentucky Utilities Co. v. Warren Ellison Cafe*, 231 Kentucky 558, the court discussed loss of profits as damages and said:

"It is true that lost profits are a proper element of damage only when such loss is the direct and necessary result of the defendant's acts or in cases involving a breach of contract where the loss of profits may reasonably be supposed to have been within the contemplation of the parties when the contract was made as the probable result of its violation. It is always necessary, however, before there can be a recovery to show profits with reasonable degree of uncertainty."

You can't get a reasonable degree of uncertainty, if the Court please, out of the initial uncertainty whether he would ever have the contract.

The Court: Do you have any Virginia authorities there, Mr. Harris?

Colonel Harris: I briefed this from the standpoint of Kentucky because the Kentucky law as to the recoverability, the damages recoverable, governs in this case. The Virginia law is not the law to be applied. We stipulated, and it was also the doctrine of conflict of laws—we stipulated in this room that the Kentucky law governs the substantive rights of the parties, so a Virginia decision would not be the controlling decision on the recoverability of profits as an element of damages, if the Court please. The Kentucky law, it seems to me, would not under any circumstances allow the jury to guess at haphazard, allow entirely speculative recoveries to be made. For instance, there was a federal case of *E. H. Taylor, Jr. and Sons v. Julius Levin*, 274 Fed. 275. That went up from the Western District of Kentucky. The page 176 } court said:

"It is true that value of this whiskey did thereafter continue to increase, and that Sherwood, who bought it from Taylor, and Taylor who thereafter repurchased part of it from Sherwood, made large profits, but this can not affect the measure of damages. If profits are inherently too speculative for recovery, the fact that they happened to have materialized before the trial does not change the rule."

In that case the profits at the beginning and at the breach,

at the wrong, were inherently speculative. By the time they got to trial you could look back on the past and see what those profits actually would have been. But the point of view that the law took was, what was the nature of them at the time the wrong was done, and if it was speculative and contingent and remote and he didn't have existing contracts, if the Court please, we are violating the fundamental rules of substantive law as to the recoverable damages. We submit that the plaintiff can not show his expectations of getting contracts.

Mr. Pollard: Your Honor, I have a Virginia case, and I think it is certainly the latest case on the subject and probably the leading case.

The Court: What is it, please?

Mr. Pollard: It is the case of *E. I. Dupont de Nemours and Company* against *Universal Molded Products Corporation*, 191 Va. 525, decided November 27, 1950. It goes into an extensive discussion of the law, and the case is 56 pages long. What happened in this case was that the *Universal Mold Products* was building radio cabinets, and Dupont sent its engineers down and recommended a specialized formula with a specialized procedure of application to the cabinets for finishing. Without notice to the company, Dupont changed the formula because it was unable to get some of the ingredients of the original formula. The evidence was clear that it caused some several thousand cabinets to peel or blister and they were all rejected by the radio manufacturers. During this period of business interruption caused by Dupont's breach of warranty the company lost \$100,000 a month, and in the lower court there was the recovery of over \$500,000 for *Universal Molded Products*. The Court of Appeals reversed the case.

Mr. Robertson: I have talked that case over with Coleman Andrews. He was one of the witnesses in it.

Mr. Pollard: He was one of the witnesses for *Universal Molded Products*, I believe, Mr. Robertson.

"While Dupont might have seen some damage would result from the supply of unsuitable paint materials, it is difficult to understand how it could have reasonably foreseen the paint finishing failures on the occasions mentioned would probably cause an interruption of normal operation of the *Universal plant* for 6½ months, and the consequent loss of approximately \$100,000 per month."

The court says:

"Under the peculiar facts and circumstances in this case it is our view that the only practical way of ascertaining with reasonable certainty the extent of the liability of the defendant is to measure it by the amount of the reasonable cost of refinishing all cabinets shown to have been defective because of the failure of the paint finishing materials furnished by Dupont."

So all of the damages that the Supreme Court says should have been allowed was the actual cost of refinishing the cabinets and the damages for loss of business were so speculative and remote and could not be determined that they were all thrown out. The only thing that the company was entitled to was the actual cost of refinishing, which is about one-tenth of what was allowed. My recollection is that it was fifty-some thousand dollars.

Mr. Moore: That was a suit on a contract, page 179 } wasn't it?

Mr. Robertson: Do you have anything to say, Mr. Mullen?

Mr. Fred G. Pollard: The Court never made it clear. It said it was a suit for a breach of warranty. It sounds like a contract, but it could be either one. It never said whether it was a tort or a contract.

The Court: Mr. Mullen?

Mr. Mullen: Your Honor, the objection that brought on this argument was to the question that was asked as to whether the plaintiff had had any conversation with Mr. Salvati. I objected to it on the ground that conversations with third parties were not admissible in evidence. That is the law.

I was also struck by the way they laid their damages in this Notice of Motion. They said, "Willful, malicious, illegal and unwarranted, and tended to and did actually greatly damage and injure the plaintiff in and about its property, and reputation, and caused plaintiff's work in Breathitt County, Kentucky, to be stopped and said contract to be canceled, and further, caused plaintiff to lose other contracts for work which would have resulted in large profit to the plaintiff."

You can't lose what you don't have. We did page 180 } not have any contracts for other work. They expected and hoped to get contracts for other work. Their Notice of Motion isn't sufficient to cover expectations. It specifically states that it caused them to lose contracts; and you can't lose a contract unless you have a contract.

They had no contract in this. They were hopeful of it. There were a thousand different things that could interrupt and prevent them from getting it.

I think maybe it will be shown that the work was done a great deal cheaper than they thought they could do it. So I don't think even their Notice of Motion is sufficient. I don't think that they have a right to show by conversation with third parties, alleged promises to give contracts.

I was struck by the Law Governing Labor Disputes and Collective Bargaining, by Teller, who has this to say bearing on what has been said here:

"In tort actions generally malice is a ground for imposing exemplary damages. In cases involving alleged malicious prosecution, malicious abuse of process, and malicious actions for the enforcement of civil rights, malice means any motive other than that of a desire to bring the accused to justice. Malice under such circumstances does not mean ill will; the existence of an ulterior motive is sufficient to show

malice, as where a party utilizes the machinery of  
page 181 } the criminal law for the purpose of coercing the  
payment of a debt or the delivery of property.

Malice is also quite frequently employed in connection with assault, battery, and false imprisonment, yet in none of these torts does malice play any part in the ultimate facts necessary to establish a cause of action. In connection with third party interference with contractual relationships malice has been said to mean 'the intention to appropriate to one's self the promised advantages which another has secured by contract'."

Under that theory, the malice would have to be shown through showing that Hart intended to appropriate to himself the benefit of the contract that they had with Pond Creek and also the other cases hold that he must have intended to injure the plaintiff.

There was no desire to injure the plaintiff, but a desire to keep their jobs there. All these men who came there with him had jobs, and they were not trying to injure the plaintiff and were not trying to take jobs away from the workmen there.

The Notice of Motion itself is insufficient.

The Court: What about the conversation with third parties?

Mr. Robertson: Will you hear me through on this thing? I will be as short as I can, Judge.

I am not going to take the time of the Court to reply to

any such thing that Hart is not responsible for  
page 182 } his actions unless he appropriated some gain to  
himself.

I don't know why we are talking about malice here at this point. I don't know that there is anything about collective bargaining in this case at this time.

In the Bristol case—I haven't read the cases recently. I have had quite a discussion of it with Coleman Andrews, one of the experts in the case, and I understand that in that case they were claiming the loss of all profits from the business over a period of time. We are not doing that. We don't say that we are claiming here anything from operations anywhere in the United States with any other people except Island Creek and its subsidiaries, and we show definite contracts there.

Your Honor asked Mr. Harris a fair question, and that was: did he have a Virginia decision to sustain his position? And he never answered it, and he never cited one. Mr. Pollard came up with the Bristol case, which I have shown you is different from this case.

About recovery of future damages, it doesn't make any difference; we do not have to get into any difficulty here about whether the Kentucky law or the Virginia law controls in that phase of the case, because the rule is the same in both States.

As is said in all these cases which have been read here, it is a question of reasonableness, and it is a  
page 183 } question of the facts of each individual case. We are not engaged here in a horse race. I think he used a very unfortunate illustration, because if you get into a war, they are going to need all the coal they can dig from under the ground, and get to industry.

Everything they said goes to the weight of the evidence rather than to the admissibility of it.

If Your Honor please, one of the elements, the very heart of our case, is that they, through their unlawful acts, broke up our connection with the Island Creek Coal Company and its companies, and destroyed that business relationship; and under these decisions that we have here, and that Mr. Allen has referred to, anything that throws light on that is admissible.

What do we have here? We can only prove one phase at a time, of course. Now, they are getting ready to execute the contract of October 28. They are having discussions of that contract, both before and after it is executed; and the purport of those discussions is both before and after, everything that was said before was repeated after, but it is a part of the

consideration of the contract, just like you say "For \$10 and other good and valuable consideration," or whether you say it or not, if there is another consideration you are entitled to show it.

The other consideration here, as I have already page 184 } indicated in my opening statement, that Salvati said to Bryan, "I realize all the difficulties of this coal preparation plant in Breathitt County, and as an inducement and as a part of the consideration for your undertaking that, here is what you are going to get in the future." So Bryan went ahead and executed the contract; and in the future it came right along just like Salvati had said it was going to come along. They gave him the contract for the 25 houses; they gave him the contract to put the asbestos shingles on. It has been kind of thrown out here in the opening statement that it was a shoddy job and therefore they had to put shingles on it. It was built the way the contract called for. There is no reflection on Laburnum on that. They gave them the school house. I think they gave them a store building. My memory is not clear on that at the moment. They gave them some repairs to another coal plant, or an addition to it, or for the laying of the foundation of another one.

We have here—they have already seen it—Salvati's deposition in the case.

In the orderly presentation of our case, we propose now to show incident, surrounding, attendant to the execution of the contract of October 28, or before and simultaneous and afterwards, as additional consideration to it, he said, "If you will do this rough and difficult work out there, I will give you these other works."

page 185 } When Bryan finishes, we are going to put Salvati on the stand, or his deposition on the stand, where Salvati under oath said, "Here was our master plan that we intended to carry out. Here was over \$600,000 worth of work already authorized that I wanted to give you and have you do it."

Then we are going to come along and show that contract after contract after contract, they were asked to bid on by Island Creek, they did bid on it for Island Creek, and they did not get the jobs. Island Creek told them frankly, "The reason we can't give them to you, we are afraid we will get in bad with the United Mine Workers ourselves, and they will shut us down. Therefore, don't bid any more, because that is the situation we are in, and there is no use in your going to all that work when we cannot give you the contracts."

As I said here in the beginning, each case stands on its own facts, and it is a matter largely within the discretion of the

Court as to whether or not the expected contracts are reasonable. I didn't count the contracts he named, some 8 or 10 of them. They had been done highly satisfactorily. They had resulted in profits of \$25,000 a year in a period of 28 months. Here were additional contracts promised to them. They were invited to bid on them. They did bid on them. The testimony is perfectly overwhelming.

page 186 } I don't know what they are going to come in with. The testimony from our side is perfectly overwhelming that the reason they didn't get them was because they had run them out of there, and because they were afraid that they would pull down a strike of the United Mine Workers on the Island Creek Coal, and the fat would be in the fire for them. There is no question of collective bargaining anywhere in this case.

I am going to ask Mr. Allen and Mr. Moore to go on from there.

The Court: Who closes this argument?

Mr. Robertson: We led it, so I would think we closed it.

Colonel Harris: You asked a question of me a while ago that I want a chance to answer.

The Court: You go ahead, and then let them close.

Colonel Harris: You asked me if I had any Virginia cases, Your Honor, and I stated to you that I had briefed from the standpoint of the Kentucky law, but I went through the Digest from beginning to end, as well as I could, and I listed some Virginia cases and made a note that they were to the same effect as the quotations I have given you.

For instance, the case of *American Oil Company v. Lovelace*, 143 Southeastern 293, 150 Va. 624, Paragraph 5 of that opinion, which says: "Profits may only be re-  
page 187 } covered where they can be ascertained with reasonable certainty."

Other cases from Virginia which support our side are a milling company case from 171 S. E. 681, 161 Va. 642, and in another case of *Cricorian v. Dailey*, 187 S. E. 447, 171 Va. 16. I didn't quote from them because I didn't expect to have to argue. As I recall and as I have noted, they are like the Kentucky cases.

Mr. Fred G. Pollard: Your Honor, Mr. Robertson has referred to the situation of the Island Creek Coal Company and its subsidiaries. Pond Creek Pocahontas Coal Company is not a subsidiary of Island Creek Coal Company.

Mr. Robertson: It has the same management, I will tell you that.

Mr. Fred G. Pollard: Thank you for interrupting me, sir.

Mr. Robertson: You are welcome.

Mr. Fred G. Pollard: So whatever contracts Mr. Bryan may have had or may have expected to get, or whether he had done work in the past for Island Creek Coal Company, has nothing to do with this case. The part of the Notice of Motion which Mr. Robertson read says, "has caused plaintiff's work in Breathitt County \* \* \* to be stopped and its said contracts to be cancelled, and further caused Plaintiff to lose other contracts for work which would have resulted in large profits to Plaintiff." He says "other contracts for work which would have resulted in large profits." page 188 } It doesn't say other contracts that he could have gotten. It said other contracts that they have got.

To carry it further, the Notice of Motion says that the United Mine Workers, the said District 50, and the said United Construction Workers, each jointly and severally ratified and approved and confirmed the acts of the said William O. Hart and his mob against the plaintiff at Breathitt County, Kentucky, for the purpose of wilfully, maliciously and unlawfully attempting to destroy the Plaintiff's business and to prevent the Plaintiff from continuing lawfully to work within the State of Kentucky \* \* \*."

So when we get outside the State of Kentucky, it again becomes immaterial and outside the scope of the Notice of Motion.

To show also, when Mr. Bryan testified, he testified that he had made so much money, and it worked out to about \$25,000 a year, and that he had had a gross business of \$20 million over the last ten years.

I would like to call your attention to these questions which we asked in our interrogatories, and which were not answered by the Plaintiff, and which they objected to answering and which you ruled that they did not have to answer:

Question 18 asked by the Defendants: "What page 189 } was the total dollar volume of work performed by the Plaintiff in the State of Kentucky in 1949 and in each of the five years next preceding 1948?"

Mr. Robertson: I answered that.

Mr. Fred G. Pollard: You never served a copy on the defendants.

Mr. Robertson: I don't know about that, but it is answered, and it is up here and the Court ruled on it. It was answered.

Mr. Fred G. Pollard: "What was the value of the good will on Plaintiff's balance sheet as of December 31, 1949?"

"What was the net profit before taxes of the Plaintiff in 1949 and in each of the five years next preceeding 1949?"

"What is the net worth of the Plaintiff?"

"Furnish a copy of the Plaintiff's balance sheets for 1948 and 1949."

This is the same line of questions to which he is now testifying. If we couldn't get it before trial by interrogatories, and they objected to giving it then and you ruled they didn't have to give it, certainly he ought not now to be allowed to testify to it, because we haven't had a chance to prepare our case on that part of the matter.

Mr. Robertson: I am going to let these other page 190 } gentlemen answer.

Mr. Mullen: May I say one word, Judge?

There are two things I want to mention. First, Mr. Robertson says that this contract made in October, 1948, that a part of the consideration thereof was the promise to secure this other work, and therefore they have a right to show that. The contract itself expressly negatives that. It states that there are no understandings, no other agreements, nothing except what is expressed in this contract.

Mr. Robertson: Read what you are quoting. Read the statement in the contract that you are referring to. You don't have to read it. When you are through there, I can tell you what it is.

Mr. Mullen: I know what it is.

Mr. Robertson: Your Honor, the fee under this contract—

Mr. Fred G. Pollard: Please let us finish, will you, Mr. Robertson?

Mr. Mullen: "This agreement constitutes the entire contract between the parties, and there are no understandings, representations, or warranties of any kind not expressly set forth herein."

He has said that a part of this contract, a part of the consideration for this contract was this promise to give them additional work. It is negatived by their own page 191 } contract.

The second thing is, I go back to the question and the objection I made that started this, and Your Honor has asked them, and they have not answered it, how they could bring themselves under an exception to the rule that conversations with third parties are not admissible. They have not answered and have not attempted to answer that.

Mr. Robertson: Are you through?

If Your Honor please, he didn't read the other part of the

contract that the fee there is limited under that contract to \$12,000, and by any side agreement or anything else they couldn't get anything additional to that. That is what they meant there, and that is what the contract says. There was the promise of future work.

We might just as well go to that, too, as to how we get around that it was a statement to a third person. It is an exception to the rule and it does not apply here. It is an element in our damages, just as Mr. Mullen indicated in his opening statement that he was going to talk about what happened at the meeting at Tiptop.

The Court: I want to know how you get around that. You say it is an exception.

Mr. Robertson: I say it is an exception. I say it is an element of our proof, and that we can show it is a part of the consideration.

page 192 } Mr. Fred G. Poliard: That is a new one.

Mr. Allen: If Your Honor please, I think that these gentlemen on the other side are arguing entirely beside the question here, and the cases cited by them show that they are. The real issue here is not the recovery of profits as such, because they were prohibited from getting future contracts.

In the first place, the questions which Mr. Robertson asked—

Mr. Robertson: I knew I had one thing, and then I won't interrupt you any more.

Salvati promised the \$600,000 worth of work to Bryan at cost plus 5 per cent, regardless of anything else.

Now, go ahead.

Mr. Allen: I was coming to that.

The questions were designed to bring out the fact that Salvati had already agreed to give a good deal of this additional work.

In addition to that, you can read the Notice of Motion from beginning to end, a dozen times, and if there is anything in it, there is this in it: These people, by tortious wrong, not merely the violation of a contract but by a tort and an aggravated tort, destroyed a business connection. We have a right to show what that business connection was and leave it to the jury to say what it was worth if it could have been maintained.

page 193 } You asked Mr. Robertson about the hearsay rule in reference to Salvati, in Mr. Bryan's talking with Salvati. I think the hearsay rule can be completely satisfied there by asking Mr. Bryan questions something like this:

"What have you to say with reference to the connection established, and what you reasonably expected to do under it?"

He need not go ahead and report verbatim conversations with Mr. Salvati or anybody else, but he can certainly give the connection, the assurances, without quoting words, and the situation which had developed and grown up there between his company and Mr. Salvati's company and the subsidiary of Mr. Salvati's company.

As I say, it goes right back to the destruction of an established business which had been going on with those people for some two years or more, and in which these gentlemen admit substantial profits were made, an average of \$25,000 a year. The business was broken up, the connection was destroyed.

In telling about that connection and what it was and what the prospects were under it, the matter of these contracts comes in incidentally. It is just one of the ways of bringing in and telling the jury the whole story of what has happened to this Plaintiff as a result of this aggravated tort which was committed against him.

The Court: Do you contend he can tell what page 194 } Mr. Salvati told him?

Mr. Allen: Judge, you ask me frankly, and I am going to answer you frankly my own opinion about it.

According to the authorities, it is better, from our viewpoint, you understand, to let him give the description of the situation without quoting the words of Salvati and reporting conversations back and forth between him and Salvati. He can say he was assured of this and so; that he had been working for those people for two years; that his work had been entirely satisfactory, so satisfactory that not only a friendly relation had been built up between them, but a business relationship that was highly regarded by those companies. He can say, "I went into this business with the understanding that that relationship would continue, and that as a result of that relationship, other business would come."

He can tell the story like that, under the rules of evidence, without quoting verbatim anything that anybody said. I think that is absolutely permissible.

Mr. Robertson: I thought you were through, Mr. Mullen.

Mr. Mullen: I wanted to ask a question. He brought up a new matter now. He proposes to follow a different plan and have him testify as to what were his expectations.

That matter we are not considering. That is page 195 } just as inadmissible as the other.

Mr. Moore: Suppose it arose this way: suppose it arose that a third party induced a breach of an oral contract between A and B. In the trial of the case to determine the amount of the damages, you certainly would have to get to what was the essence of that contract. Under the rule that they are advocating, neither A nor B could come in and say what the contract was, because whatever conversation they had about the contract didn't take place in the presence of a third party.

From the point of speculative damages, you don't have to read many of these cases to find that the real heart of it is to show if there is an established business, then you can recover these future profits. The cases that Mr Harris cited, the case of the huckster, the second a jockey, and the third a sharecropper, I can't think of three more uncertain classifications than those. Mr. Bryan has done exactly the opposite. He has shown that he has had this \$20 million business over the last ten years, \$2 million a year, and I think he has laid the groundwork to show an established business, as set forth in these cases.

The Court: As the question is asked, I will sustain the the objection, but will allow evidence along the line that Mr. Allen suggested.

Mr. Robertson: I want to try to conform to page 196 } the ruling of the Court, Your Honor. I will go in there and say, "Incidental to your execution of the contract of October 28, were you assured by Mr. Salvati that you would be awarded additional work?"

The Court: Don't refer to any conversations.

Mr. Fred G. Pollard: He can't do that. The contract has been put in evidence.

The Court: Leave out Salvati's name.

Mr. Robertson: That is all right.

Mr. Fred G. Pollard: We might as well straighten that out right now. He is introducing, then, parol evidence to go beyond the contract he has already introduced in evidence.

Mr. Robertson: All right, it is an addition to it.

Mr. Allen: As a matter of fact, we have the agreements for other contracts.

Mr. Mullen: If you ask that, can't I come back with the same point as something showing a conversation with a third party?

Mr. Fred G. Pollard: If you allow testimony about any other agreement he had with Salvati, you are letting him introduce parol evidence in contradiction to the contract

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*Alexander Hamilton Bryan.*

which already has been introduced in evidence. This contract says that this agreement constitutes the entire contract between the parties and there are no undertakings, representations or warranties of any kind not expressly set forth herein.

So he would be introducing parole evidence.

The Court: It is related to that contract, is it not?

Mr. Allen: The parole evidence rule has no place in this case on that issue.

Mr. Fred G. Pollard: We note an exception.

Mr. Mullen: We note an exception.

page 198 } (The following proceedings were had in open court:)

By Mr. Robertson:

Q. Mr. Bryan, when you were on the stand before you mentioned a contract of October 28, 1948 between Laburnum and the Pond Creek Pocahontas Company. At about the time of the exclusion of that contract with them were you given any assurance of future construction?

Colonel Harris: Do I understand that our agreement gives us an objection to this question on all the grounds that we have previously asserted?

The Court: That is true.

Mr. Pollard: And runs to the entire line of questions.

The Court: It runs to the entire examination of this witness.

By Mr. Robertson:

Q. Do you remember the question?

A. Yes, sir.

Q. Answer it, please.

A. At the time we executed the contract with Pond Creek Pocahontas Company dated October 28, 1948, it was agreed with Pond Creek Pocahontas Company that Laburnum would perform additional work in Breathitt County amounting to approximately \$600,000 and that the work would be performed on a basis of cost plus a fee of 5 per cent.

page 199 } Q. Mr. Bryan, basing what you say upon the experience you had had with Island Creek Coal Company, the Pond Creek Pocahontas Company up to the time of the contract of October 28, 1948, what have

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you to say to the temporary or permanent character of your business connections with those two companies?

A. It was a permanent connection.

Q. What have you to say generally regarding the value of that connection?

Colonel Harris: May we offer an additional ground to that, that it calls for an unauthorized opinion and conclusion and speculation of the witness.

The Court: I will overrule the objection. Go ahead.

Mr. Pollard: We except.

The Witness: Based on our experience in doing work for Pond Creek Pocahontas Company, Island Creek Coal Company and their associate and subsidiary companies, we had earned approximately \$25,000 per year net job profits from those operations. Pond Creek Pocahontas Company had agreed that we were to perform additional work amounting to approximately \$600,000 in Breathitt County alone. Island Creek Coal Company had said they wanted us to handle their building program in West Virginia. Both of those companies continuously have worked in and around the mines. It never stops. There is no telling how much money we might have been able to earn—

Colonel Harris: We object to that as argumentative on the part of the witness taking the place of the lawyer.

The Court: I sustain the objection.

Colonel Harris: Will Your Honor exclude that argument?

The Court: Yes. Gentlemen of the jury, you will disregard the statement made by Mr. Bryan.

The Witness: Estimating \$25,000 is a conservative figure for what we might have made from our operations with that group of companies in East Virginia and Kentucky.

Mr. Mullen: No objection to this document.

By Mr. Robertson:

Q. I hand you a paper entitled "Construction Agreement between Pond Creek Pocahontas Company, Kentucky Division, Huntington, West Virginia, and Laburnum Construction Corporation Richmond, Virginia, subject, Construction of Coal Preparation Plant at Number 1 Kentucky Mine, Breathitt County, Kentucky, October 28, 1948, Copy No. 3," and ask you if that is an executed copy of the contract of October 28, 1948 that you have mentioned.

A. Yes, it is.

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Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 5.

(The document referred to was marked Plaintiff's Exhibit No. 5 and received in evidence).

page 201 } Mr. Robertson: I don't think it is necessary to  
read that contract at the present time, Your  
Honor.

By Mr. Robertson:

Q. Mr. Bryan, approximately how soon after the execution of that contract on October 28, 1948, did Laburnum go to work on the job in Breathitt County, Kentucky?

A. Almost right away, the first day of November 1948.

Q. Where did you get your labor?

A. Are you referring to any particular class of labor?

Q. I am referring to your carpenters.

A. In line with our practice as contemplated by the agreement which we had with the Richmond Building and Construction Trades Council, we got in touch with—

Colonel Harris: Judge, may we object to that statement. The question was very simple, where did you get your labor.

The Court: Suppose you answer the question and be as specific as you can, Mr. Bryan.

By Mr. Robertson:

Q. Mr. Bryan, you have a right to say where you got your labor and then state your reason or the circumstances under which you did get it.

A. We got in touch with the business agent of Paintsville, Kentucky, carpenters local union No. 646, affiliated with the American Federation of Labor.

Q. Did you get labor from that local?

page 202 } A. We got carpenters and millwrights through  
that local.

Q. Were other classifications of labor furnished you from other locals of the A. F. of L?

A. Yes, sir.

Q. State what they were generally and what local sent them to you, if you recall.

A. We got in touch with the Charleston, West Virginia, Iron Workers Local Union, and they referred to us riggers, structural iron workers.

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Q. Was that A. F. of L. labor?

A. Yes, sir. I don't recall the number of the local union right now. I have it in my files.

Q. Did you get any other labor through any other locals of the A. F. of L.?

A. We got in touch with the plumbers and pipefitters local union at Lexington, Kentucky, and made arrangements for pipefitters to be referred to us. We also got in touch with the electricians local union at Lexington, Kentucky, and made arrangements for electricians to be referred to us.

Q. Were all those locals A. F. of L. locals?

A. They were all affiliated with the A. F. of L.

We also were in touch with the laborers local union at Lexington, Kentucky.

Q. Were the locals that you contacted the locals with appropriate jurisdiction and the nearest locals, page 203 } so far as you know?

A. As far as I know, they were.

Q. At that time was there any A. F. of L. carpenters local at Salyersville, Kentucky?

A. When we started work in November 1948 there was no carpenters local union at Salyersville.

Q. Do you know whether it is or is not a fact that an A. F. of L. carpenters local was subsequently established at Salyersville on May 9, 1949?

A. I don't remember the exact date, but during May, 1949, the carpenters local union affiliated with the A. F. of L., known as Local No. 697, was chartered at Salyersville, Kentucky.

Q. When you first commenced work out there, do you know whether or not any of the laborers you employed were not organized in the sense that they were not affiliated with any local of any kind?

A. The closest local union for the laborers was at Lexington, which is about 150 miles away from the job. We employed local labor near the job site, with the approval of the business agent of the Lexington Laborers Local.

Q. You have stated that Laburnum commenced work upon this coal preparation plant very shortly after it signed this contract of October 28, 1948. Will you describe to the jury

page 204 } the location where this coal preparation plant was built, indicating what kind of country it is, how built up or otherwise it is, and was at that time?

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A. The first time that I went to the job site it was either in the latter part of September or the first part of October, 1948. We drove in an automobile to a place called Lambert, Kentucky.

Q. Where did you start from?

A. Mr. Menk, who was the General Engineer of Pond Creek Pocahontas Company drove us from Logan, West Virginia, over to Paintsville and from there to Salyersville and from there to a little store known as Lambert, and from there we may have gone a few miles further where the car had to be abandoned. We were met by a jeep and taken in a jeep four or five miles further into the wilderness to the job site.

Q. Approximately how far is it from Paintsville to the job site?

A. Along the road which is now used Salyersville is about 25 miles from the job site and Paintsville is about 18 miles east of Salyersville.

Q. If you got off the train at Huntington, West Virginia, and go to the job site, what is the best way to go?

A. The only way to go that I know of would be either on a bus or in an automobile. We usually rented a U-Drive-It car and would drive down there.

Q. How far is the job site, approximately, from page 205 } Huntington?

A. 85 or 90 miles.

Q. If you were going from Huntington to the job site, would you go first to Paintsville or near Paintsville?

A. You would drive from Huntington southwardly along the road leading to Williamson, West Virginia. Then you come to a turn off from that road, and you go over to Louisa, Kentucky, which is just across the Big Sandy River from West Virginia. From Louisa you drive about 30 or 35 miles to a little town—you wouldn't even call it a town. It is just a crossroads. You turn to the left and go to Paintsville, and you turn to the right and you go about 15 miles to Salyersville.

Q. How far is that cross road from Paintsville?

A. I would say about three miles.

Q. How far is it from Paintsville to the job site, approximately?

A. Along the highway it is about 43 miles.

Q. And approximately how far is it from Salyersville to the job site?

A. About 25 miles.

*Alexander Hamilton Bryan.*

Q. If you left Salyersville to go to the job site, would you pass through a place known as Royalton?

A. Along the road now used, you do.

page 206 } Q. How big a place is Royalton?

A. A couple of hundred people.

Q. Has the location of the road been changed since you first went out there?

A. The road has been considerably improved now.

Q. Is it on the same location, substantially the same or substantially a different location?

A. I think it is the same substantially, the same location, but it has been widened and improved. The road which branches off from the road going past Royalton and which leads over to the job site has been improved and its location has been somewhat changed.

Q. On the first occasion that you went out there, describe what was at the job site when you got there.

A. There was nothing at the job site where the tipple was to be built. There were one or two shacks that Pond Creek Pocahontas people had put up for its people to stay in in getting the work under way.

They were at the location, the place called Evanston, which is about a mile from the tipple.

Q. How big a place at that time was Evanston?

A. Just two or three houses out in the mountains.

Q. Were there any telephone communications to Evanston on the job site?

A. At that time there were none.

page 207 } Q. Was there any railroad in there at that time?

A. There was no railroad in Breathitt County.

Q. Was there any post office out there?

A. There was a post office at Royalton.

Q. Was that the nearest post office?

A. There may have been the post office address between Royalton and the job site but I don't know of any.

Q. What would you say was the general character of the country right there at the job site? Was it on the plains or in the mountains or at sea or what?

A. There were steep mountains thickly covered with trees. It was just wild and desolate. That is the only way I can describe it.

Q. Was the job site down along a small creek or was it up above the creek?

A. There was a little creek there.

*Alexander Hamilton Bryan.*

Q. Do you remember whether or not you had to blast out a level place for the foundation of the tipple?

A. Yes, we did.

Q. What kind of coal operation was this as compared with either digging in the ground for it or stripping it off the surface.

A. This was a coal preparation plant to service a strip mine operation. A strip mine operation involves getting the coal off the top of the mountain and dumping it  
page 208 } in a place called a head house at the top of the mountain, where it was taken down a long conveyor about a thousand feet in length known as a rope and button conveyor. From the rope and button conveyor the coal would be taken into the coal preparation plant, where it would be washed and sorted and screened according to size and made ready to be dumped into the coal cars when the coal cars were there.

Q. How was the coal stripped and brought to the head house and delivered to the conveyor to take it down to the tipple?

A. A contractor named Daniels had some enormous shovels up on top of the mountain. The coal would be blasted out. I might say first that the overburden would be removed, all the trees cut down and you get down to the seam of coal.

Q. You mean you would lay back the dirt from over the coal?

A. That is right. Then these huge shovels would scoop the coal up—

Colonel Harris: Judge, aren't we taking a lot of time on a matter that doesn't concern the issues of the case?

Mr. Robertson: To describe the nature of the work, the difficulty of the work. I am coming right along to it. One of my very next questions is going to be how much above the tipple was this head house at the top, just describing a wild, difficult situation out there.

page 209 } The Court: Let us not go into too much detail.

Mr. Robertson: I don't expect my friends to think it interesting. I think it is to the rest of us.

Colonel Harris: I might say that I think we ought to try the lawsuit and not go afield. It is going to take a long time anyway.

Mr. Robertson: You remember that the next time we go back in the Judge's chambers, will you?

Mr. Mullen: You did all the talking.

*Alexander Hamilton Bryan.*

The Witness: The coal would be put into big trucks and hauled to the head house and dumped into the head house and then taken on to the conveyor by them.

By Mr. Robertson:

Q. Do you know how much higher the head house was than the tipple?

A. Six or seven hundred feet.

Mr. Robertson: These are the same pictures that I used as illustrations in the opening statement, but I don't think it is necessary at this time to take the time of the jury to examine them again, since Colonel Harris is in a hurry, but I do want to introduce them so they will be in the record.

Colonel Harris: Judge, I am not in a hurry. I just don't want to waste time.

Mr. Robertson: I think we understand each other.

Mr. Mullen: No objection.

page 210 } The Court: Do you want to file those as one exhibit or separate exhibits, Mr. Robertson?

Mr. Robertson: Judge, I would think probably separate because they are likely to get separated anyway. I can do it very quickly.

The Plaintiff offers in evidence ten different instruments, five of which are individual photographs, and the others of which are one or more photographs attached to cardboard and ask that these exhibits be marked respectively Plaintiff's Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16.

The Court: Mark them now.

(The photographs referred to were marked Plaintiff's Exhibit 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 respectively and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, will you continue with the blueprint that I used to illustrate my opening statement to the jury. Are you familiar with that?

A. Yes, sir.

Q. Does that blueprint correctly show the layout there of the coal preparation plant and the little hamlet of Evanston and the school house?

A. Yes, sir.

*Alexander Hamilton Bryan.*

page 211 } Mr. Robertson: I offer the sketch in evidence  
and ask that it be marked Plaintiff's Exhibit No.  
17.

Mr. Mullen: No objection.

(The blueprint referred to was marked Plaintiff's Exhibit 17 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, what kind of equipment did you have to take to the job site for the execution of this contract of October 28, 1948?

Mr. Harris: May we have an objection to that question, Judge, as going too far afield?

Mr. Robertson: If Your Honor please, I am going to show the difficulties of this job and the reason why in undertaking this job he was given assurances of other jobs.

The Court: I will overrule the objection. Go ahead.

Mr. Mullen: Note an exception.

By Mr. Robertson:

Q. I think we can shorten it a little, Mr. Bryan. At my request have you made a tabulation of the equipment which was there?

A. Yes, sir.

Q. Without going through all the items, name what heavy equipment you had there that you would class as  
page 212 } heavy equipment.

A. We furnished a guide derrick with a 100-foot boom and a 150-foot mast which would be used to lift the heavy timbers into place for the tipple and also the heavy machinery such as a washer which would be installed in the tipple. We furnished a 3-drum hoist, a gasoline engine, a double-drum hoist gasoline engine. We furnished a number of concrete carts, electric drills, jackhammers, vibrators, log saws, wheelbarrows, skill saws.

Q. Did you have any trouble getting that equipment up there?

A. The roads were in terrible condition. Most of it was shipped out of Richmond, consigned to us at Carver, Kentucky.

Q. How far was that from the job site?

A. I think it was four or five miles, I am not positive about that.

*Alexander Hamilton Bryan.*

Q. How did you get it from Carver over to the job site?

A. It would be hauled on trucks when you could get over the road.

Q. Did you have to get any of it in there with a bulldozer?

A. After the bad weather set in during the winter, the roads were just a quagmire.

page 213 } Q. At my request have you made a tabulation of the equipment you took in there on that job and given an evaluation of it?

A. Yes, sir. This list shows the construction equipment—

Colonel Harris: May we object to the question of the evaluation of the equipment, Judge. There isn't any claim that the equipment was destroyed. I don't see how it possibly can come in.

Mr. Robertson: There is no claim that they took any equipment away from us. I think it is relevant, your Honor, the value of the equipment, certainly showing some indication of what kind of equipment they got in there. If I went in there with \$5 worth of equipment or one wheelbarrow, \$2.50, that would be one thing. If I went in there with \$16,000 worth of equipment it would show that I was operating in a more stable and dependable way.

The Court: I will allow the witness to go ahead.

By Mr. Robertson:

Q. Is that the list?

A. I prepared a statement showing the construction equipment, office equipment, and camp and commissary.

Q. What is the value of it?

A. It amounts to a total of \$16,047.90.

page 214 } Q. I notice that that tabulation is entitled "Statement of Construction Equipment, office equipment, and camp and commissary equipment furnished by Laburnum Construction Corporation in connection with job for Pond Creek Pocahontas Company in Breathitt County, Kentucky, under contract dated October 27, 1948." Is that date the 27th there or should it be the 28th?

A. What is the date of the contract, the 27th or the 28th? Whatever the date is.

Mr. Robertson: It is the 28th (showing the contract to the witness).

*Alexander Hamilton Bryan.*

The Witness: That is a typographical error. It ought to be the 28th.

By Mr. Robertson:

Q. Will you change it to the 28th?

A. Yes, sir (witness writing on document).

(Document exhibited to Mr. Mullen.)

Mr. Mullen: I believe Your Honor has already ruled it can go in.

The Court: I haven't ruled.

Mr. Mullen: I object to its going in. It has no bearing on this case.

Mr. Robertson: I offer it in evidence, Your Honor, for the reasons I have already stated.

The Court: I will overrule the objection.

Mr. Robertson: I offer it in evidence and ask page 215 } that it be marked Plaintiff's Exhibit No. 18.

Mr. Harris: Exception.

(The document referred to was marked Plaintiff's Exhibit 18 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, you stated that soon after you started to work under the contract of October 28, 1948, you contacted the carpenters local at Paintsville and arranged with that local to furnish you carpenters and millwrights, I think you said. Did you subsequently enter into a written contract with the Paintsville local carrying that arrangement into written form?

A. Yes, sir.

Mr. Mullen: No objection.

By Mr. Robertson:

Q. I hand you a contract dated December 14, 1948, which purports to be signed by Laburnum and the union, and ask you if that is the contract to which you referred.

A. This is a copy of our agreement with Paintsville Carpenters Local No. 646.

Q. An executed copy?

A. An executed copy dated December 14.

*Alexander Hamilton Bryan.*

Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 19.

page 216 } (The document referred to was marked Plaintiff's Exhibit 19 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, pursuant to the assurance you were given for other work when you undertook the contract of October 28, 1948, were you awarded by the Pond Creek Pocahontas Company a contract to build a telephone line?

A. Yes, sir; we were awarded a contract by Pond Creek Pocahontas Company to construct a telephone line extending eleven miles from Carver, Kentucky to the job site. That is the distance Carver is from the job. I had forgotten that.

(Document shown to Mr. Mullen.)

Mr. Mullen: This is the same one you heretofore furnished us, a copy of it?

Mr. Robertson: I think so.

Mr. Mullen: No objection.

By Mr. Robertson:

Q. I had you a construction agreement dated December 8, 1948, between Laburnum Construction Corporation and Pond Creek Pocahontas Company, entitled "Construction agreement, construction of approximately 11 miles of telephone line from Carver, Kentucky to Camp No. 1 at No. 1 Kentucky Mine, Breathitt County, Kentucky," and ask you if that is an executed copy of the contract you have mentioned.

A. Yes, it is.

page 217 } Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 20.

(The document referred to was marked Plaintiff's Exhibit 20 and received in evidence.)

Mr. Robertson: I don't want you to stop and go back to your records at this time, but do you remember approximately what the money was involved in that telephone contract?

The Witness: Yes, sir; I can tell you. It was \$4,591.55.

*Alexander Hamilton Bryan.*

By Mr. Robertson:

Q. Was that done on a cost-plus basis?

A. Cost plus 5 per cent.

Q. Also pursuant to this assurance of additional work, did the Spring Fork Development Company award you any contract there at Evanston, Kentucky?

A. Yes, sir.

Q. Is that the contract which has been mentioned here for the construction of 25 dwelling houses?

A. That is right.

(Document shown to Mr. Mullen.)

Mr. Mullen: No objection.

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of a contract dated December 15, 1948, entitled "Construction agreement between Spring Fork Development Company and Laburnum Construction Corporation, Richmond, Virginia, subject: Construction of 25 dwellings near No. 1 Kentucky Mine of Pond Creek Pocahontas Company, Breathitt County, Kentucky, Copy No. 2," and ask you if that is an executed copy of the agreement to which you referred about the construction of 25 dwelling houses?

A. It is.

Mr. Robertson: I offer the agreement in evidence and ask that it be marked Plaintiff's Exhibit No. 21.

(The document referred to was marked Plaintiff's Exhibit 21 and received in evidence.)

By Mr. Robertson:

Q. What was the amount of money involved in that contract?

A. The cost of the work up until the time it was stopped on July 26, 1949, amounted to \$41,282.05.

Q. Was that on a cost-plus basis?

A. That work was on a basis of cost plus 5 per cent, with a ceiling of \$2,500 on the fee.

Q. Something has been said about your 25 dwellings being subsequently covered with asbestos shingles. How did that happen?

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A. The 25 dwellings were constructed out of green lumber furnished by Pond Creek Pocahontas Company.  
page 219 } The cost of that lumber is not reflected in the figures which I gave you. After the dwellings were put up, the lumber dried out and some cracks appeared in the walls. Anyway, Pond Creek Pocahontas Company thought that it would be better if they were covered with asbestos shingles.

Q. You did that work. Were you given extra compensation for that work?

A. That was work which we were to get started on during August. We had been instructed to proceed. Pond Creek had purchased the asbestos shingles. But we never started on it because of the trouble which happened on July 26.

Q. Was that commitment for putting on the asbestos shingles a written commitment or a verbal commitment?

A. No, that was just a verbal commitment. It was a part of the additional work which it had been agreed we would handle.

Q. What was the estimated cost of that?

A. I have it here, I think. My recollection is now that it was about three or four thousand dollars. I have it.

Q. You can get it later.

A. I can't recall offhand. It wasn't a big job.

Q. Also pursuant to that assurance of additional work were you awarded any contract for the construction of a school house out near the job site?

A. Yes, sir.

page 220 } Q. What was that?

A. The Pond Creek Pocahontas Company wanted to have a school house constructed for children to go to who lived at Evanston. We were instructed to construct the school house. We commenced work during July, 1949, but did not complete it because of the interruption which occurred in our work on July 26.

Q. Have you got there the figure of the estimated cost of the school house, or will you have to get that?

A. I will have to get that.

Q. Do you remember whether that was on a cost-plus basis?

A. That was on a basis of cost plus 5 per cent.

Q. Now take the date of July 26, 1949, which was the date that Plaintiff claims the work was stopped, how near completion was the coal preparation plant at that time, in what per cent would you say, if you can estimate it?

A. I would say the coal preparation plant was about 95

*Alexander Hamilton Bryan.*

per cent complete, based on the work that we then knew about.

Q. Was it in operation?

A. Yes, sir. The coal preparation plant went into operation during the month of June.

Q. I believe you said, and it has been mentioned here, that the top fee that Laburnum would get out of the page 221 } building of that coal preparation plant as originally contemplated was \$12,000.

A. That is correct.

Q. Was that fee paid in full?

A. Yes.

Q. Did the C. & O. Railroad also build a railroad in there to take care of the coal that would come out of this mine?

A. Yes, sir. That was the only way to get the coal out.

Q. Was the tipple ready for the railroad or did the railroad have to wait for the tipple when they got ready to load the coal?

A. It was a sort of a race between ourselves and the C. & O. to see who would get the work done first. Of course the C. & O. was very anxious to have coal to ship as soon as it got the tracks in. The Pond Creek Pocahontas Company wanted to be able to ship coal as soon as the tracks were in. Neither side wanted to hold up the other.

Q. Who got ready for operation first, the railroad or Laburnum?

A. We were ready to ship coal about two days before they got the tracks completed in to the tipple.

Q. Who was the contractor building the railroad?

A. Codell Construction Company, I think.

Q. Was there another contractor doing work there for crushed stone for roadways around through the work?

A. Codell Construction Company was doing page 222 } some work on the railroad and was digging the shaft and slope for the No. 2 mine of the Pond Creek Pocahontas Company. Allen Codell had a job on what they called the rock crusher. He was crushing stone to be used in connection with the work.

Q. My own memory is not clear on this. Up to July 26, 1949, had you been given any work for any addition or enlargement or repair of coal preparation plant No. 1?

A. There had been talk about installing a heating plant at the No. 1 mine, and we had been requested to work up figures on that and to make suggestions as to how they could thaw out the frozen coal in the wintertime.

*Alexander Hamilton Bryan.*

Q. That was as far as that had progressed on July 26?

A. They had made some study of it and were prepared to make recommendations. They had said that we were to do that work.

Q. Prior to July 26, 1949, had you had any discussions with Island Creek or Pond Creek Pocahontas about the foundation of any other mine tippie?

A. We had been instructed to install concrete foundations for the No. 2 mine. They now call it the No. 3 mine.

Q. Now I hand you a photograph marked Plaintiff's Exhibit No. 9 and ask you if that shows substantially correctly the coal tippie with the conveyor and head house as it had progressed toward completion about July 26, 1949.

A. This is a picture of the tippie after it was page 223 } completed. At the time our work was stopped in July 26, 1949, a lot of the aluminum siding had not been put on.

Mr. Robertson: If Your Honor please, I have come to a phase of this testimony which is on July 14, 1949, which begins our controversy with Mr. Hart. I don't know whether you want to adjourn or start in on that after recess.

The Court: Let us adjourn until 2:15.

(Whereupon, at 12:45 o'clock p. m. the Court recessed until 2:15 o'clock p. m. the same day.)

page 224 } AFTERNOON SESSION.

(2:15 p. m.)

Colonel Harris: Judge, before we resume the direct examination, this morning when I asked about having the objection to questions along the same line, I inadvertently left off the word "exception," as I recall. Of course, what we wanted was both the objection and the exception to everything.

The Court: Let the record show that.

Colonel Harris: Thank you, sir.

Whereupon,

*Alexander Hamilton Bryan.*

ALEXANDER HAMILTON BRYAN

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

DIRECT EXAMINATION (continued).

By Mr. Robertson:

Q. Mr. Bryan, there are a few questions that I failed to ask you this morning which I should ask you before we get to questions about July 14.

During the progress of the work at the job site in Breathitt County, what arrangements did you make to house and feed the men who were working for you?

Colonel Harris: We object to that, sir. We don't see the materiality of that.

Mr. Robertson: If Your Honor please, I think we might as well—

The Court: What is the materiality of it?

page 225 } Mr. Robertson: The materiality of it, Your Honor, is to get the whole picture before us of the isolated, dangerous condition of this work, and the surroundings out there, and how those men were shut in there, and they had to live in these barracks and eating houses in those hills. I want so say, Your Honor, I think Your Honor knows me well enough to know that I am not stalling to prolong this case or to drag it out. I am just as anxious as anybody else to keep it moving and to press forward toward the conclusion of it.

We are suing here in all earnestness and good faith for the biggest lawsuit that I personally have ever been in, and we can't belittle it and pooh-pooh it by trying to hasten it and hurry it and hustle it to deny us an opportunity to put all the details that we think are necessary to paint this picture to the jury. I am doing that in good faith, and in all sincerity.

The Court: Counsel for the defendants have a right to object at any time, and the Court will rule.

Mr. Robertson: I am saying when you get the number of men that this crowd had out there, out in the bushes out there, 100 miles or so from Huntington and out in the kind of country that they were in out there, and then got them herded up into a barracks and a bath house and an eating house  
page 226 } and a commissary there, and everything, they were just isolated out in the mountains and at the mercy of the United Mine Workers. That is the materiality of it.

Mr. Fred G. Pollard: Your Honor, I would like to ask that

*Alexander Hamilton Bryan.*

Mr. Robertson's remarks be stricken, because he is just arguing the case on a lot of stuff that hasn't been put in evidence. It is entirely improper.

Mr. Robertson: We can't put it in but step by step, Your Honor.

The Court: Under the circumstances, I will allow the question to be answered.

Colonel Harris: Will you note an exception?

Mr. Robertson: Do you agree that it is a continuing one to this entire line of testimony?

Colonel Harris: That is agreeable, with the approval of the Court.

The Court: That will be all right.

By Mr. Robertson:

Q. Mr. Bryan, while this work was under way at the job site in Breathitt County, Kentucky, what did you have to do to feed and house the men who were working for you?

A. There were no facilities at the job site whatsoever. Under our agreement with Pond Creek Pocahontas Company, they were to reimburse us for the cost of barracks, mess halls, bath houses, and other temporary buildings which  
page 227 } we were to put up to provide for our workers.

On the other hand, the cost of kitchen equipment, cots, bedding, refrigerators, and other things like that, which were necessary to have in order to take care of these men and to feed them, we had to furnish, and of course, we charged the men something for board, \$2 a day, to take care of the cost of food and other things.

During the winter months, particularly, it was impossible for the people to go back and forth every day. They had to live in these barracks and to eat in the mess halls. We engaged cooks and bought the food and did everything that was necessary to take care of them, just like you would have to do if they were living in your home. Of course, it was rough, but we did the best we could.

Q. Did you build the barracks there?

A. Yes, sir.

Q. How many men did it accommodate?

A. I think we had facilities to take care of close to 100 men.

Q. Did you build a mess hall?

A. Yes, sir.

Q. Was that to take care of substantially the same number?

A. Yes, sir.

*Alexander Hamilton Bryan.*

page 228 } Q. Did you build a bath house for them?  
A. Yes, sir.

Q. What wages did you pay your common labor?

A. Ninety cents an hour.

Q. Was that to the satisfaction of the A. F. of L., with which you are dealing?

Colonel Harris: We object to the question of whether the A. F. of L. was satisfied or not, if the Court please. It is wholly immaterial whether the A. F. of L. was satisfied or not.

Mr. Robertson: If Your Honor please, here is the materiality of it: We were under a contract, as has been shown here, with the A. F. of L. to employ A. F. of L. labor. I think it goes to whether we were supposed to work in harmony to the extent that we could with the A. F. of L. They have already said here in the opening statement, I think, or intimated that they were going to develop here that we were chisling our laborers and not paying them what they ought to get, and that they were thoroughly dissatisfied with it, so much so that they were having these meetings with Hart and organizing a strike to get \$1.50 an hour. That is the materiality of it. We are showing that they were getting 90 cents an hour and thoroughly satisfied.

The Court: I will overrule the objection.

Colonel Harris: Will you please note an exception.

The Witness: May I state how the 90-cent rate  
page 229 } came into being?

The Court: No. Just answer the question.

By Mr. Robertson:

Q. Was that rate of 90 cents an hour satisfactory to your common laborers, so far as you know?

A. We never had any complaint.

Q. Did you ever hear any complaint about it until you heard Mr. Mullen's opening statement here yesterday?

A. No.

Q. What rate were you paying your carpenters?

A. \$1.75 an hour.

Q. Was that satisfactory to the A. F. of L. people?

A. That was the rate which was agreed on between our company and the Paintsville Local 646.

*Alexander Hamilton Bryan.*

Q. Was that rate satisfactory to your carpenters, in so far as you know?

A. We never had any complaints.

Q. What was the rate for your common laborers for overtime?

A. They were paid time and a half.

Q. Was everybody on the job, rated as carpenters or laborers, paid time and a half for overtime?

A. Carpenters were paid time and a half for overtime during the week, and I believe for work performed on Saturday. Work on Sunday, I think they got overtime.  
page 230 } I would have to check that—I mean, they got double time. I am not positive.

Q. In your position as the President of Laburnum Construction Company, was it ever reported to you at all that any of your laborers wanted the United Construction Workers to represent them?

A. I never heard the United Construction Workers mentioned in connection with the job at Kentucky until July 14.

Q. As President of the Laburnum Company, did it ever come to your attention during the progress of the work that your laborers were contemplating a strike against Laburnum Company?

A. We never had any complaints from the laborers whatsoever.

Q. When was the first time any such intimation as that came to your attention?

A. It never did come to my attention.

Q. You heard Mr. Mullens' opening statement yesterday, did you not?

A. We never had a strike.

Q. I mean, did you ever hear anything about a strike until you heard his opening statement yesterday?

A. That is the first time I heard it. I wasn't thinking about that.

Q. As you became more intimately acquainted  
page 231 } with Breathitt County, Kentucky, did you learn whether or not it was commonly spoken of in Eastern Kentucky as "Bloody Breathitt"?

A. The first time I went to the job site, I heard it referred to as "Bloody Breathitt," and heard it referred to as "Bloody Breathitt" repeatedly afterwards.

Q. Do you know how it got that name?

A. Its reputation for violence and killings.

Q. There is going to be some reference here later to Beaver

*Alexander Hamilton Bryan.*

Creek. Do you know what the reputation of Beaver Creek is for being law abiding and peaceful or otherwise?

A. Beaver Creek has a reputation for being a very rough section on Beaver Creek in Floyd County, Kentucky. It has a very bad reputation for violence in connection with labor disturbances, shootings and killings.

Q. How far is Beaver Creek from the job site, approximately, if you know?

A. I would say about 25 miles over the mountains.

Q. Is Wheelwright, Kentucky, located on Beaver Creek?

A. Yes.

Q. About how far is Wheelwright from the job site?

A. By road it is a pretty good ways. You go to Salyersville and then to Paintsville, and then to Prestonsburg. Prestonsburg is about 15 miles from Paintsville. Then you would go about 10 or 15 miles from Prestonsburg down to Beaver Creek.

Actually, by skyline it is much closer to Breathitt page 232 } County than is indicated by the road.

Q. About how big a town is Wheelwright, if you know?

A. That is where the Inland Steel Company has a big tippie. It is a small town, a coal town.

Q. Do you know a man named William O. Hart?

A. Yes, sir.

Q. Who is he? What is he?

A. William O. Hart is a field representative of the United Construction Workers and District 50 of the United Mine Workers of America.

Q. What was your first contact with him?

A. On July 14, 1949, at about 11 or 11:30 a. m., we received a telephone call in Richmond from Pikesville, Kentucky. Mr. Hart was on the telephone, and I talked to him.

Q. Did he tell you who he was?

A. Yes, sir. He said that he was a field representative of the United Construction Workers and District 50 of the United Mine Workers of America, and that he worked under Mr. David Hunter, who was Regional Director of Region 58 of the United Construction Workers and District 50, with headquarters in Pikesville.

Q. Did he tell you whether or not his own, Hart's territory and Hunter's territory, included Breathitt County, Kentucky?

A. He didn't say that at that time, but he did page 233 } say that he was calling us about the work which we were performing for Pond Creek Pocahontas Company in Breathitt County.

*Alexander Hamilton Bryan.*

Q. Did he tell you what the purpose of his telephone call was?

A. Yes. As I said, he said he was calling about the work which we were performing for Pond Creek Pocahontas Company in Breathitt County, and that he understood that Pond Creek Pocahontas Company had awarded to us a lot of additional work, including about 500 dwellings, some stores, and other buildings. Mr. Hart said that we were working in United Mine Workers territory, and that he was going to take over our work.

Q. What did you tell him?

A. I told Mr. Hart that he was correct; that Pond Creek Pocahontas Company had awarded to us a lot of additional work in Breathitt County.

Mr. Hart said that he had just closed down, or rather, United Construction Workers had just closed down a job which the Beckett Construction Company and the Link-Belt Company were performing for Inland Steel Company at Wheelwright, and that unless we recognized United Construction Workers, they would do the same thing to us on our work in Breathitt. Mr. Hart said that he thought we might like to discuss the matter with him and negotiate an agreement with United Construction Workers.

I told Mr. Hart that we had an agreement with various A. F. of L. local unions and the Richmond Building Trades Council, and that I didn't see how we could make an agreement with United Construction Workers.

Mr. Hart then said that he was intending to organize all of our workers, including the carpenters, electricians, pipefitters, iron workers, millrights, laborers, and everybody else.

He said that if we didn't make an agreement recognizing the United Construction Workers, he would close down our job.

Q. Did he tell you that before you told him about your contract with the A. F. of L., or after that?

A. He told me that afterwards.

I told Mr. Hart that I didn't see how we could make an agreement with his organization; and he said that he intended to organize all of our workers; that he was thinking mainly about the additional work which was going to be performed in Breathitt County.

I told Mr. Hart that I just didn't know what we could do, but that I would think about it. I asked Mr. Hart please to let me hear from him again before he did anything. Mr. Hart said that he would do it.

*Alexander Hamilton Bryan.*

Q. In that conversation, did he say anything to page 235 } you about anything of your laborers being dissatisfied with their wages or working conditions?

A. No. He simply said that we were working in United Mine Workers territory, and that we had to recognize his organization. If we didn't do it, he would close the job down.

Q. Did he say anything to you about a strike by your laborers?

A. No, sir.

Q. Did he make any distinction between United Construction Workers and United Mine Workers? Whose territory did he say you were in?

A. He said we were working in United Mine Workers territory. At that time I wasn't very familiar with the set-up except that I had, of course, heard of the United Mine Workers.

Q. At the time of that telephone conversation on July 14, who was your superintendent on the job site in Breathitt County?

A. Mr. C. M. Delinger.

Q. Who was your field clerk out there?

A. Mr. Maynard C. Ragan.

Q. After Hart telephoned you as you say he did, what did you immediately do that same day?

A. I immediately telephoned Mr. Delinger, and page 236 } I asked Mr. Delinger if he knew anything about United Construction Workers organizing our employees on the job in Breathitt County.

Q. What did he tell you?

A. Mr. Delinger said that he didn't know anything about it. I then told Mr. Delinger about the conversation which I had had with Mr. Hart.

Colonel Harris: We object to that, the conversation between him and Mr. Delinger, if the Court please.

Mr. Robertson: If Your Honor please, my suggestion is—I am quite willing to argue it here before the jury, but we are going to get into a field now whether it comes in as reports gotten by Mr. Bryan in the regular course of his employment or in the discharge of his duties as president of the corporation. We have it covered in our trial brief, and I suggest that we have it out in the absence of the jury.

The Court: The Court will now recess for a few minutes, gentlemen.

(Short recess.)

*Alexander Hamilton Bryan.*

(The following proceedings were had in chambers.)

Mr. Robertson: If Your Honor please, Mr. Bryan is on the stand now and under examination. I don't know whether we have any objection to his producing those papers or not. I haven't had time to confer with him. We have no objection to revealing any proper information pertinent to page 237 } this case, but I just ask the Court to defer your ruling on that until I can confer with Mr. Bryan after he gets off the stand this afternoon.

The Court: I thought maybe we might adjourn, say, about 4:30 and come in and take up this other matter, and we can act on this at the same time, rather than go into it at this point.

Mr. Fred G. Pollard: That will be entirely satisfactory.

Mr. Robertson: Now, if Your Honor please, who wants to open and close on this testimony that is offered now? We are offering the testimony and they are objecting to it.

The Court: You go ahead.

Mr. Robertson: If Your Honor please, the whole basis of our case is that we were run off the job out there by intimidation and threat. They have indicated in their opening statement that they are going to claim that our men were organized by Hart or were in the process of being organized by Hart as members of the United Construction Workers, during this critical time of this whole case; that they were dissatisfied with their wages; and that Hart had brought that knowledge home to Bryan; and that the real trouble here was that Laburnum wouldn't pay these men fair wages; that they resented it; struck; set up a picket line; and that other laborers were going to respect the picket line and refuse to cross page 238 } it because it was a peaceful, legal picket line, and it was a matter of honor between unions not to ignore a picket line.

That is a fair statement of what Mr. Mullen laid down in his opening statement.

That being the field within which he chooses to pitch the battle, we are entitled to take the offensive and go to it. We are entitled to show that we knew nothing about this UCW organization; that we knew nothing about any threatened strike; that we knew nothing about any dissatisfaction with wages. And we have already shown that in Bryan's version of the telephone conversation.

Now, we are entitled to show that he is the president of that corporation, charged with the responsibility of running the

*Alexander Hamilton Bryan.*

business. According to what Mr. Mullen has intimated in his opening statement and entirely also independently of that, when Hart made that telephone conversation to him, it was up to Bryan to do something, not sit there inertly and let nature take its course. It was up to him to take all action necessary to defend the legal rights and interests of Laburnum. How else could he do it but by communicating with the superintendent on the job? As the head of this company, which can act only through its agents, we are entitled to show what he said and what he did and what his agents said and did, and what action he took there on that particular day to try to safeguard this situation and find out what was what.

Following right along the same line, I think, of course, that they have the right to take the same broad scope. I think that unless they stultify themselves and go back on what they have already said, they have made it just as manifest in their opening statement as it can be made at that stage of the case, that they propose to bring in what happened and was said and done at these union meetings where they said that our laborers were being organized, and somebody took charge and called for a strike vote, and that they were doing this, that, and the other. I think they have a right to do that. I think it goes to the very heart of the whole case.

I think that whatever came to Bryan's knowledge, it was his duty to receive and get and act upon as president of this company, and it is properly admissible in evidence here; and also it is properly admissible in evidence here for him to tell this jury what he did and what instructions he gave and what he said and what actions he took for the reasons that I have already stated, and also so that this jury can determine: Were you really in a jam and were you honestly trying to work out a solution the best way you could, or was it just a sort of flim-flam proposition, and this strike proposition and chiseling your men out of wages and all, and now you are trying to magnify it into a case against these three unions?

page 240 } The Court: Wasn't there an objection to a question about a conversation Mr. Bryan had with his superintendent?

Mr. Robertson: Yes, sir.

The Court: I think that is the question, whether or not that is admissible.

Mr. Robertson: I think I covered that. I claim it is admissible. I thought that was what I was addressing myself to.

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The Court: What have you gentlemen to say?

Mr. Fred G. Pollard: It is pure and simple hearsay, Judge.

Colonel Harris: There were two things that occurred to me, Judge. One is that it is hearsay; and the other is that it is a self-serving declaration. They have practically proven that Bryan is the alter-ego of the Laburnum Construction Corporation, over our objection. Now he is making evidence. If he comes in and violates the hearsay rule and can testify as to what he said to somebody else, it seems to me that absolutely the world is their parish and there are no rules of evidence.

Mr. Allen: If Your Honor please, you have to approach the question from this standpoint: Beyond per-adventure of doubt, we have a right to show what happened following that telephone call. If the Court be of the opinion that page 241 } Mr. Bryan can't repeat verbatim conversations, undoubtedly we have a right to ask him, "Mr. Bryan, what did you do?"

"Well, I called my superintendent."

"What did you learn?"

"Well, I learned that he had received no information at that time, of any efforts on the part of Hart to close the work down."

"Well, did you give any instructions on the subject?"

"Yes. My instructions were to let me know if anything turned up."

There can't be any doubt about that. It is nothing on earth but a part of the history of the case, just exactly as we have in every personal injury case, and a doctor is permitted to take the witness stand and tell what the plaintiff said to the doctor when the plaintiff came to see the doctor to receive treatment.

The Chairman: Do you contend that Mr. page 242 } Bryan can tell what his superintendent told him?

Mr. Robertson: I think he can, yes, sir. It is in the regular course of business.

Mr. Allen: I am inclined to the view that we can get at the same result in a way that in my opinion will not be questionable, that Mr. Bryan can tell—he will have to do a little thinking instead of repeating, trying to tell verbatim conversations—he will have to do a little thinking and say what he did. He can say that he called him. He can say that he got information thus and so. He can say that he gave instructions. He can cover the field pretty much in that way just about as well as he can by repeating verbatim conversations.

The Court: I don't think he can repeat conversations.

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Mr. Robertson: I have no desire to repeat the conversations, Your Honor.

The Court: I think the objection is good. I sustain the objection. There may be some other way you can get it. I don't think Mr. Bryan can state what conversation he had with this or that man in his employ, but he can say what he did as a result of this conversation with Mr. Hart.

Mr. Robertson: That is all I want to do. If I understand Your Honor's ruling he can say that "I called my page 243 } superintendent and made inquiry as to whether any attempts to organize hour laborers in the UCW had come to his attention," and his answer is that they had not.

I had another thought there. "Then I instructed him to keep close watch on the situation and advise me if anything developed." That is all I am driving at

Mr. Pollard: Your Honor, it is a little belated, but I raise the question of the propriety of Mr. Bryan being in here in this hearing with you in as much as he is the witness on the stand.

Mr. Robertson: I think that is within the discretion of the Court, and I don't see any use—I would think that this Court, and I will ask Mr. Mullen on that—that this Court knows Mr. Bryan, and I don't see any reason to affront Mr. Bryan in that way. I don't see anything improper here. Their people are coming in here. I see Mr. Owen in here and I don't know whether he is going to be a witness or not.

Mr. Pollard: We are discussing what he has said and how he can say it. It tells the witness how to answer.

The Court: I think your objection is good when we discuss Mr. Bryan. When he is not being discussed—

Mr. Pollard: I agree with that.

The Court: It would be all right. But I think as long as we are talking about what can and can't be said page 244 } with respect to Mr. Bryan he should not be here.

Mr. Robertson: I will ask Mr. Owen to go out too. He is not a lawyer in the case. He was sworn as a witness and I will ask that he go out.

The Court: The Court rules require him whenever the time comes to discuss anything that he testifies that he leave. He may stay just as Mr. Bryan, but when the time comes for us to discuss matters—

Mr. Robertson: I don't know what he is going to testify to.

The Court: You have summoned him as a witness.

Mr. Robertson: I know what I am going to ask him.

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The Court: If you inform the Court that there is anything being discussed that might affect Mr. Owen, I will excuse him.

Mr. Robertson: I don't want to whisper to the Court and tell the Court something I won't tell them and I don't care to disclose my hand to them.

The Court: I mean in this conference here. If we discuss anything in our conference that might affect his testimony we will excuse him.

Mr. Mullen: Mr. Owen is not going to be a witness put on by us. He is a lawyer.

Mr. Robertson: You have said over and over again that he was not here as a lawyer.

page 245 } The Court: Let us go on with the other subject. We will take that up when we get to it.

Mr. Robertson: It is the end of the subject as far as I am concerned. I think I understand the Court's ruling.

The Court: Is there anything that you visualize coming up in the next two or three minutes that we can dispose of right now?

Mr. Robertson: I think this question is coming up. It is coming up, first, of course with us. That is going to be the matter of a labor union meeting at Paintsville on the night of July 26 and all that was said there about the danger of going back to the work. I think it is admissible as throwing light on whether or not these men were actually in fear of going back. I gather from Mr. Mullen's opening statement that he proposes exactly the same kind of testimony in his union meetings where they say our laborers were organizing and preparing to strike.

Mr. Mullen: I would like to confer with my associates on that.

The Court: All right. Will you confer now so it will save us from recessing again. I don't like to recess too often. I don't think it helps either side to do it too often.

Mr. Robertson: In reference to that conference, I say as far as I am concerned you can throw the door wide open and tell everything that happened there provided the same rule is applied to both of us.

Mr. Mullen: The point you are making is that you want to be able to tell just what occurred and was said at that meeting at Paintsville when Mr. Bryan was present urging these men to go back, and it is assumed we would want to tell what happened in these other meetings that we have referred to.

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Mr. Robertson: That is right. In all fairness to you I think it is relevant all the way around. I think it goes to the very heart of the case on both sides.

Mr. Mullen: Let me confer with my associates.

(Counsel for defendants withdrew for separate conference, after which they returned to Chambers and the following proceedings were had:)

Mr. Mullen: Judge, we don't see how we can cover that question until we come to see what the evidence is that they propose to offer. If it is a lot of conversation and so forth, we don't see how ahead of time we can accept that.

Mr. Robertson: I will ask the question and ask the Court to rule on it when we get to it.

The Court: Is that what you prefer to do?

Mr. Mullen: I don't see how we can do anything else.

page 247 } (The following proceedings were had in open court:)

By Mr. Robertson:

Q. Mr. Bryan, there is one question I failed to ask you. How was that rate of 90 cents an hour for laborers, with time and a half or overtime determined?

Colonel Harris: We object, if the Court please. It is immaterial.

The Court: I overrule the objection. I think I passed on that a while ago.

Colonel Harris: We reserve an exception.

The Witness: That was the rate which Pond Creek Pocahontas Company was paying to its laborers at the job site when we went there. We investigated what laborers, that is, common laborers in that section were getting at the time and found it to be from 60 to 75 cents an hour. 90 cents an hour was the rate approved by the Pond Creek Pocahontas Company. As a matter of fact, it had the right to approve all the wage rates which we used for all classifications of labor. Afterwards, the matter of the wage rate was discussed with the business agent of the laborers local union in Lexington, and we understood that it was satisfactory.

By Mr. Robertson:

Q. Mr. Bryan, after Hart phoned you on July 14, which

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was a Thursday, did you telephone Delinger, your superintendent on the job?

page 248 } A. Yes, sir.

Q. What instructions, if any, did you give him?

Colonel Harris: We object to that as hearsay and a self-serving declaration by the Plaintiff.

The Court: I will overrule the objection.

Colonel Harris: We reserve an exception.

By Mr. Roebtson:

Q. Don't repeat any verbatim conversation between yourself and your superintendent, but just state what instructions, if any, you gave him.

A. May I say what I called him about?

Q. Yes.

A. I called Mr. Delinger about the telephone conversation which I had just had with Mr. Hart, in which Mr. Hart said that he was going to close down our job unless we recognized United Construction Workers. I wanted to know what had been done about organizing our laborers at the job site by United Construction Workers.

Q. What did you learn?

A. I learned—

Colonel Harris: May we have the same objection and exception.

The Court: The same objection and exception will follow through to this line of question.

The Witness: No efforts had been made as far page 249 } as our supervisory officials at the job site knew, about efforts of United Construction workers to organize any of our employees.

By Mr. Robertson:

Q. Did you give any instructions as to what should be done with reference to the miners?

A. Yes. I instructed Mr. Delinger to watch the situation closely and to keep me fully informed. I also gave instructions for him to make an effort to arrange for the laborers to be taken in to the Salyersville Carpenters Local Union or Paintsville Carpenters Local Union as carpenter apprentices or carpenter helpers.

Q. And those were with what national organizations?

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A. Affiliated with the American Federation of Labor.

Q. After you had telephoned Delinger on July 14, did you communicate with the Richmond office of the A. F. of L., the Carpenters Union?

A. No. I called Mr. Jack Joinville, President of the Richmond Building Trades Council.

Q. That is what I meant. Was he the chief officer of the Richmond Building and Construction Trades Council with which you had the contract of April 15, 1947?

A. Yes, sir.

Q. What was your purpose in calling Mr. Joinville?

A. To report to him the conversation which I had just had with Mr. Hart about our job and about the United page 250 } Construction Workers.

Q. Did you request Mr. Joinville to do anything to compose the situation?

A. Yes, I asked Mr. Joinville for suggestions and I asked for their help in case trouble occurred.

Q. Did he express a willingness to be helpful if he could?

A. Yes, he did.

Q. Was he able to help and compose the situation or not?

A. It was suggested that I get in touch with Mr. Herbert Rivers, Secretary-Treasurer of the Building Trades Department of the American Federation of Labor in Washington.

Q. Did you get in touch with him that day?

A. I called Mr. Rivers that day.

Q. What was your purpose in calling him?

A. To make a report about the pending trouble with the United Construction Workers, to tell him about my conversation with Mr. Hart, to ask for their help.

Q. Were they willing to be helpful if they could?

A. Yes, I was asked to keep them informed.

Q. Were they able to compose the situation and prevent the trouble which developed thereafter?

A. No.

Q. Mr. Bryan, the next date that I am going to call to your attention is Friday of the following week, which page 251 } was July 22. What generally happened in this situation during the week between July 14 and July 22?

A. On July 18—I will have to get my calendar—July 14 was a Thursday. July 18 was the following Monday. On the night of July 18 Mr. E. I. Hathaway, who is a vice president of Laburnum, and I, left Richmond on the C. & O. night

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train for Huntington. We arrived in Huntington the next morning on July 19, got a U-Drive-It automobile and drove down to Salyersville, arriving there in the afternoon, but too late to go to the job site.

The next morning Mr. Hathaway, Mr. Delinger and I went out to the job site. We went over the entire job. Everything seemed to be going smoothly. There had been *on* interference from the United Construction Workers. I discussed with Mr. Delinger the matter of the United Construction Workers, and after that we returned to Huntington, took the train on the night of the 20th, and got back to Richmond on the morning of the 21st.

Q. While you were at the job site did any report come to you that the laborers were dissatisfied with their rate of pay?

A. No. The report came that the laborers were going to make application or had made application to become members of the Salyersville Carpenters Local No. 697.

Q. Was there any report made to you that they  
page 252 } were going to join the United Construction Workers?

A. No, sir.

Q. Was any report made to you of any of your laborers attending any United Construction Workers meetings?

A. No, sir.

Q. Was there any report made to you of the danger of any kind of strike among your laborers or any of your other employees there?

A. It was reported to me that some United Construction Worker organizers had been to the job site to see some laborers, but that the laborers had all decided to join the Salyersville Carpenters Local 697.

Q. When you were not at the job site during that week between July 14 and July 22, did you keep in touch with the job site by telephone?

A. Oh, yes. I was in touch with the job site daily.

Q. With reference to Hart, did you receive any telephone call from your Superintendent Delinger on July 22, which was Friday?

A. I don't know whether I called him or whether he called me. We were in touch with each other almost daily. If it wasn't with Mr. Delinger, it would be with Mr. Ragan, who was there at the office most of the time. But on July 22 I did have a telephone conversation with Mr. Delinger.

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Q. In that telephone conversation did he make page 253 } any report to you as president of your company regarding Hart?

A. Mr. Delinger said that he had been informed—

Mr. Pollard: I object to that, Your Honor. It is hearsay.

Mr. Robertson: Don't repeat the direct quote.

The Court: I sustain the objection.

By Mr. Robertson:

Q. Don't go into the conversation but just state the substance of what you learned from Delinger, what report Delinger made to you.

A. That on the following Monday, which would be July 25, 1949, the United Construction Workers would come to the job site with a large group of men for the purpose of stopping the job, stopping our work and closing down the job.

Q. In that conversation did your superintendent request that you come to the job site immediately?

A. Yes, sir.

Q. Did you go that day, the 22nd?

A. It was impossible for me to return at once to Kentucky. I had other things to do, and I didn't think that anything was going to happen.

Q. Did you give any instructions to Delinger or Ragan as to what they should do regarding the situation over the week-end?

A. Yes. I gave instructions that they should page 254 } watch the situation closely and keep me informed of any developments.

Q. Did you get any further report about that situation between Friday and Monday?

A. I may have had some telephone conversations. I am not positive. I know I did have a conversation on Monday, but I am not sure about over the week-end.

Q. In that conversation on Friday the 22nd, what was reported to you about what time Hart was expected the following Monday?

No, I don't think there was any time. It was just that they were coming to the job with a large group of men to stop the work and close down the job.

Q. On Monday, July 25, did you have a further telephone conversation with your superintendent, Mr. Delinger?

A. Yes, we had a telephone conversation. I wanted to know

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if the United Construction Workers crew had come to the job and had closed it down, what had happened.

Q. What information did you get along that line?

A. That nobody had come to the job.

Q. Do you know about what time that conversation occurred?

A. I think it was in the morning.

Q. Then did you have any further telephone conversation with Delinger later that day?

A. Mr. Delinger called me at my home at about page 255 } 7:30 p. m. that night while I was at the supper table.

Q. What did he report to you in that conversation?

A. That the next day, July 26, at noon, the United Construction Workers were coming to the job with a large group of men, that they would be armed, and that they were coming to stop our employees from working and to close down the job.

Q. Did he make any request that you come to the job site?

A. He begged me to come that time.

Q. Did you go?

A. I told Mr. Delinger that I would do my best to get there.

Q. Then what did you do toward getting there?

A. It was too late to take a train which would get me to Huntington in time to get to the job by noon. I made inquiry to find out if I could get a plane that would fly me out in that section. I couldn't make arrangements that night. There were no commercial lines that I could use, and I couldn't charter a special plane. My automobile was out of commission. It wasn't running well. I went to see one of our superintendents named Tony Meli and asked if he would go with me, that we would go in a company truck, that we would drive all night and see if we couldn't get there by noon.

Q. Did you go by truck?

page 256 } A. We left Richmond a little bit after ten and took turns driving and got to Huntington the next morning at about seven o'clock.

Q. When you got to Huntington did you make any attempt while you were in Huntington to communicate with Hart?

A. We stopped at a gas station to fill up with gas, and while there at the gas station I placed a telephone call to Mr. Hart over a pay station. I was in Huntington and I placed the call for Mr. Hart in Pikesville. I was told that Mr. Hart was out, but that I could talk to Mr. David Hunter, Regional Director.

Q. Did you talk to Mr. Hunter?

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A. Yes, I talked to Mr. Hunter.

Q. Now tell what you said to Mr. Hunter and what Mr. Hunter said to you.

A. I told Mr. Hunter who I was, and I told him that I had been informed that Mr. Hart planned to lead a large group of men to our job in Breathitt County for the purpose of stopping our work and closing down the job. I told Mr. Hunter that I was trying to get to the job site because of the situation just as fast as I could and that I would appreciate it if he could get a message to Mr. Hart not to interfere with our men until I had an opportunity to talk to him at the job site.

page 257 } Q. Did you tell Mr. Hunter of the conversation you had with Hart on July 14?

A. I think that I did.

Q. What did Mr. Hunter say in response to your conversation with him and request to him? What did he say to you?

A. Mr. Hunter said that he would try to get a message to Mr. Hart.

Q. Then did you start on out toward the job site?

A. Yes, sir. We started toward the job site a little bit after that.

Q. What happened?

A. We got about 10 or 12 miles from Huntington and the truck just stopped running. We had plenty of gasoline. We didn't know what the trouble was. We finally got a mechanic, who said that something had happened to the distributor and that he could fix it very easily but that it would be necessary to go to Huntington to get a new distributor. So he started back to Huntington and we expected him back in anywhere from a half hour or so, 45 minutes. The mechanic just never did come back. We were expecting him any minute. We couldn't leave the truck. We didn't know what to do. Finally we just gave up on the man and telephoned to Huntington and made arrangements for somebody to come out and pull the truck back to Huntington to have it repaired. We also made arrangements to get a U-Drive-It car

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so we could continue on to the job site.

Q. What time did you actually get to the job site?

A. We finally got a U-Drive-It car a little bit after noon, between 12 and 12:30. I called the job and informed them that we were having car trouble and we would get there as

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soon as we could. We finally got to the job between about 2:30 and 3 o'clock.

Q. After you got to the fork of the road, one fork going to Paintsville and the other fork going to Salyersville, after you went to Salyersville and went through Royalton and got out toward the job site, did you meet any considerable group of automobiles coming back in the opposite direction toward Salyersville?

Mr. Fred G. Pollard: Objection. It is immaterial, Your Honor.

Mr. Robertson: We are just going to show that part of Hart's crowd was leaving the job site. We are going to connect it up.

The Court: The objection is overruled.

The Witness: After we left Royalton headed toward the job site we passed from 15 to 18 automobiles, jeeps and trucks, all filled with men and all headed in the opposite direction from the way we were going.

By Mr. Robertson:

Q. How many men would you estimate were in that group?

A. From four to five in a vehicle. There must page 259 } have been—if there were 15, and multiply it by 5, it would be about 75.

Q. Did you ascertain afterwards who those men were?

A. They were the United Construction Workers crowd led by Mr. Hart, who had been to the job site and who were then going away again.

Q. When you got to the job site was Delinger there?

A. He was there.

Q. Was your field clerk, Maynard Ragan, there?

A. Yes.

Q. Were your carpenters and laborers there or had they left?

A. On July 26 we had men working at four locations on the job. Some were working on top of the mountain at the head of it. Most of the men were working on the tipple. About seven or eight men were working on the school house. We had one painter apprentice who was working on the 25 houses.

And the men on the head house at the top of the mountain were still working.

Q. I don't believe they were ever involved in this matter at all, were they?

A. Mr. Hart and his crowd never went there. The men on

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the school house had all stopped working. The painter apprentice was still working. He had not been—  
page 260 } nothing had been done to him. Everybody on the tipple had stopped working except maybe one or two.

Q. Did you make inquiry of Delinger and Ragan as to why the work had stopped and come to a standstill?

A. Yes.

Q. What was the report that you received?

A. I received the report that about 12 o'clock noon a group of men estimated at from 75 to 100 persons had come to the job site, headed by Mr. Hart, that they had stopped our people from working at the school house and at the tipple, and had stopped the employees of Allen Codell. As far as our own workers were concerned, they had been threatened, intimidated; that a lot of the crowd were drunk; that a lot of them were armed; that our employees were outnumbered, and that they didn't have any choice; that Mr. Hart and his crowd said that all of our people had to joint the United Construction Workers or stop work.

Q. Mr. Bryan, did Laburnum have an office there about where your bunkhouse and eating house are shown on this sketch?

A. Yes, sir.

Q. About how far would you say it was from your field office there down to the tipple?

A. I would say it is about 300 or 350 yards.

Q. How far would you say it was from the  
page 261 } school house to the tipple?

A. To go from the tipple to our little office and camp, which consisted of barracks and messhalls and bath houses, would be about 350 yards, and then you would go up the road about a mile to Evanston where the 25 houses were located and the Pond Creek Camp, and then you would continue further up the road about a quarter to a half mile to the school house.

Q. When you reached the job site there around 2:30 on the afternoon of Tuesday, July 26, did you go to the school house?

A. The first place I went was to the office to see Mr. Delinger. I don't think that we went to the school house that afternoon. We may have later on.

Q. Did you go down to the tipple while you were there or just to the office, if you recall?

A. I am not positive that we went to the tipple. I think that we did. I think that I just talked mostly to Mr. Delinger

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and Mr. Ragan at the office to get the details on what had happened, but we may have gone down there.

Q. After you had talked to Delinger and Ragan there at the office what did you do?

A. We talked at the office for some time.

The Court: What did you do after you talked to him? That is the question.

The Witness: Mr. Delinger and Mr. Meli and  
page 262 } and I got in a truck and drove back from our of-  
fice toward the Pond Creek camp.

By Mr. Robertson:

Q. Is that where the 25 dwellings were?

A. That is right.

Q. On your way over there did you meet Hart?

The Court: What is that question?

By Mr. Robertson:

Q. On the way over there did you meet Hart?

A. Just before you get to Pond Creek camp we crossed over the railroad tracks, and at that point there were three or four men standing on the side of the road by a parked car. They waived at us. We drove the truck in to the Pond Creek camp, which was just across the tracks, parked the car, and then I walked back to these three or four men. I asked if they knew where Mr. Hart was. One of the men said, "I am Mr. Hart." So I introduced myself and told him that I would like to talk to him some. He had with him three men, I believe, or four men. Two of them had on buttons showing that they were United Construction Workers stewards. Some of these men had obviously been drinking. They were not what you would call falling down drunk or anything like that, but they were not sober. Mr. Hart and his men rolled up the windows of this parked automobile and locked the doors, and Mr. Meli  
page 263 } and Mr. Delinger and I and Mr. Hart and these  
fellows with him walked away from the car maybe  
about 10 or 12 feet to talk.

Q. Mr. Bryan, did you say anything to Hart about your efforts to reach him that morning from Huntington?

A. Yes. I told Mr. Hart that I was very sorry that he had decided to come to the job with a large crowd of men and stop our people from working. I told him that I had tried to reach him early that morning a little bit after seven o'clock

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by telephoning him in Pikesville from Huntington, that I had been told that he was out, but that I could talk to Mr. Hunter. I told Mr. Hart about my conversation with Mr. Hunter and that I had asked Mr. Hunter please to ask Mr. Hart not to interfere with our workers until I could talk to Hart at the job site. I told Mr. Hart that Mr. Hunter had said he would try to get a message to Hart. Mr. Hart said that he had received the message, but that he had already made all his plans and arrangements and couldn't stop them.

Q. Did you say anything to him or—

page 264 } Colonel Harris: We object to the witness reading from a document. I notice he keeps looking at a document and then turning the pages.

Mr. Robertson: If Your Honor please, the witness is referring to a memorandum which was prepared at my request, for the purpose of refreshing his memory and guiding his memory in telling the sequence of these events. We had all that out this morning; that he cannot testify by reading his memorandum, but he has a perfect right to guide his memory by a memorandum and refer to his memorandum to refresh his memory, and keep the thing in sequence, and then testify from his memory as refreshed, and it is perfectly obvious that is what he is doing here. Mr. Allen covered all that this morning.

Colonel Harris: I respectfully submit that a man would not need anything to refresh his recollection on any such happening as Mr. Bryan is relating. A man would remember, if things like that had happened; he would remember it. He wouldn't need to write it out and come here and read it to the jury.

The Court: Are you referring to dates there, Mr. Bryan, or do you have it all written out?

Mr. Robertson: He has a full memorandum, if Your Honor wants to see it.

Colonel Harris: He has it all written out.

page 265 } Mr. Robertson: He is not testifying from the memorandum.

Excuse me. I didn't mean to interrupt you. Are you through?

Colonel Harris: Go right ahead.

Mr. Robertson: If Your Honor please, my friend is just simply not right, and I speak from bitter experience when I say that it is humanly impossible to keep the sequence of these dates and hours and different people that you meet,

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when and where, and on the particular dates, without some thing to guide your memory, just like—I hadn't finished—just like I guided my opening statement by notes I had here. I challenge anybody in this court room, Mr. Bryan or anybody else—you cannot keep the sequence of these dates and hours in mind without something to guide your memory. That is why the law permits you to do precisely what Mr. Bryan is doing.

It seems to me, Your Honor, that the real purpose of my friend here is to break in on this story and destroy the effectiveness of the testimony.

Colonel Harris: My purpose is to protect the rights of the defendants that I represent, and there are rules of law governing the trial of lawsuits that the experience of the

Anglo-Saxon world has developed in hundreds of years. This witness sitting up here and telling this account to the jury, doesn't have dates written down alone there. He has a narrative account that he keeps looking at, and on the pages are words underscored in red pencil so his eye can catch them.

I ask the Court to look at the page he has open right there now. He is not referring to dates.

Mr. Robertson: The Court is perfectly welcome to do it.

The Court: May I see it?

Mr. Robertson: I challenge everything he said. We are strictly within our rights in doing what the law says we ought to do.

(Court examining document.)

Mr. Robertson: We would be glad to give Your Honor a copy of the thing here, if you want it. I have one here to guide my memory.

Mr. Fred G. Pollard: Your Honor, I think the defendants are entitled to a copy of that, and for the purpose of the record, we would like it to be copied in the record.

Mr. Robertson: You can't have it except under a court ruling.

The Court: Mr. Pollard has the floor, Mr. Robertson.

Go ahead, Mr. Pollard.

Mr. Fred G. Pollard: I would like for you to page 267 } rule that we are entitled to examine it and have it copied in the record.

Mr. Robertson: We would be very glad to do that at the conclusion of this witness' testimony, if you want it, Your

*Alexander Hamilton Bryan.*

Honor, and they are welcome to it for all purposes of cross-examination if they want it. But I call to Your Honor's memory that under *Robinson v. Commonwealth*, they have no right to call for it at this stage.

Mr. Mullen: If Your Honor please, I have the law right here, decided in *Fant v. Miller*, 17 Gratt., which is still the law.

The Court: I guess we had better not discuss this in the presence of the jury.

Gentlemen, we will recess for a few minutes and go in chambers.

(Short recess.)

page 268 } (The following proceedings were had in chambers:)

The Court: I would like at least some authority for your position, Mr. Robertson. It does appear that his testimony is written down in narrative form.

Mr. Robertson: If Your Honor please, I could bring you the authorities. We have them here. I will let my associates take that up, but just let me before that say this:

I happen to know how Mr. Bryan handled this situation, that while these events were transpiring he made very full notes on them at the time. You might call them notes in the field. He wouldn't make them out there while he was talking to Hart, but when he would get back to the hotel that night he would write them down. He made up a memorandum. He has that now to guide his memory. When he came to write those things up in permanent form they came to this (indicating), at my suggestion and at my initiative.

What we are doing here now, Your Honor, is not reading any statement into the record. If you have watched Bryan, he hasn't been reading this thing and testifying from that. You have seen the way he has referred to it to check his memory. I have mine underscored, too—

Mr. Fred G. Pollard: To lead him on.

Mr. Robertson: Don't interrupt me, please.

Mr. Fred G. Pollard: Excuse me.

Mr. Robertson: Not to mis-question him on page 269 } something. He has a perfect right to do it, and there is no sanctity in whether it is written out in a full sentence or whether it is a skelton outline. The question

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is whether he is referring to it as a guide to his memory. I won't offer the affront to Your Honor's intelligence to say that he is using it there to remind him of the vivid occurrence there, the substance of the conversations between him and Hart, but he is using it to safeguard and check his memory on the date and the hour and to give him the cue as to what transpired there at that time, which is exactly the reason the law allows him to do it. We are doing precisely what we have a right to do and what I submit is our duty to do if under oath we are going to keep this thing as accurate as we can.

I thought we had that out this morning and that it was settled under Mr. Allen's argument this morning.

Mr. Allen: May it please Your Honor, Mr. Wigmore, who we all know is the greatest authority on evidence in this country, in the Second Edition, Second Volume, begins a discussion of this subject at paragraph 758 under the title "Present Recollection Revived." After some discussion he says this, quoting from another case:

"Where the object is to revive in the mind of the witness the recollection of the facts of which he once had knowledge, it is difficult to understand why any means should be excepted to whereby that object may be obtained. Whether  
page 270 } in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances. If in truth the memory has been refreshed, and he is enabled in consequence to speak to facts with which he was once familiar, but which afterwards escaped him, it cannot signify, in effect, in what manner or by what means these facts were recalled to his recollection. Common experience tells every man that a very slight circumstance, and one not in point to the existing inquiry, will sometimes revive the history of a transaction made up of many circumstances. \* \* \* Why, then, if a man may refresh his memory by such means out of court, should he be precluded from doing so when he is under examination in court?"

Then he has a title, "Writing not made by Witness himself."

"That the paper was not written by the witness himself is therefore no fault in it. The witness may or may not, in a given instance, with propriety make use of it; but the aid may equally be a legitimate one even though another person prepared the writing."

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Then quoting from another case he says:

"If upon looking at any document he can so far refresh his memory as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum is not written by himself, for it is not the memorandum that is the evidence but the recollection of the witness."

Wigmore continues:

"This concluding expression of Lord Ellenborough's concisely states the principle, and has become a classic phrase in judicial quotation. Occasionally, the paper has been required at least to have been written under the witness' direction, or to be known by him to be correct; but this is generally due to a confusion of this subject with the subject of past recollection."

He goes on here and says, "Write not Original, but a Copy." He says that doesn't make any difference.

"That the paper is a copy, not an original, is also no essential fault. The only question is whether in fact it is genuinely calculated to revive the witness' recollection; and for this purpose a copy may conceivably be entirely satisfactory. The radical difference of principle between this use and that of a copied record of past recollection is plain; there is here no necessity of accounting for the original in any way."

Then he cites another case here:

"(the witness refreshed his memory as to the contents of a return by looking at the copy of it in the declaration): 'It was competent for him to use the declaration or any other paper for the purpose of refreshing his memory upon the subject.'"

Quoting from another authority, he said:

"(the witness used a newspaper report): 'It is well settled that he is permitted to assist his memory by the use of any written instrument; and it is not necessary that such writing should have been made by himself, or that it should be an original writing, providing after inspecting it he can speak the competency of the testimony.'"

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Then citing another case:

"(the witness, testifying to the amount of damage, used a copy made recently by K. from a copy of original contemporaneous memoranda; the other papers having become defaced): 'This kind of evidence is open to more or less suspicion, because \* \* \* it may lead him to suppose he recalls facts when he really does not. But this affects the credibility rather than the competency of the testimony.'"

Wigmore continues:

"That the paper was not drawn up about the time of the events is not a fault. The recollection may be equally refreshed by a recent note as by some contemporaneous record. It might, in fact, be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment where the paper was one confessedly having no value as a contemporaneous record of past recollection."

page 273 } The newest work of Wigmore out is a small  
book which contains his Code of Evidence. That  
was out in 1942. There he has the rule succinctly stated.

(Off the record.)

Mr. Allen: I think that is sufficient to show the rule. As I stated this morning, the case cited by Mr. Mullen deals with just reading the memorandum to the jury. A witness can hold the memorandum in his hand, he can look at it, refresh himself, and raise his head and testify. That is what the witness is doing. The witness is not reading the memorandum. As a matter of fact, the witness did make a contemporaneous memorandum of all these things. Every trip that he made out there he made it as he went along.

The Court: Anything else?

Mr. Moore: No, I have nothing.

The Court: Mr. Mullen?

Mr. Mullen: If Your Honor please, I have been watching the witness for some time, and it is very evident that he has a running written story and uses it. The matter is settled by the Supreme Court of Appeals of Virginia in 17 Gratt., page 196,

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in the case of *Fank v. Miller*, and it has not been overruled or changed. The headnote says: "A witness ought not to write his deposition or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person, but he ought to answer the questions orally and page 274 } from memory as they are propounded to him." The full statement of the Court on that is:

"A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his deposition; nor may he transcribe such notes verbatim. Thus the law is laid down in 2 Dan. Ch. Pr. 1062. A witness ought not to write his deposition or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person, but he ought to answer the questions orally and from memory as they are propounded to him. Parties or their counsel may, orally or by writing, previous to the examination, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books and papers, and make memoranda from them and otherwise, especially of dates and amounts, and use such memoranda, for the purpose only of refreshing his memory, at the time of giving his evidence. The memoranda themselves are not evidence, and, *a fortiori*, what he says of their contents is not, unless he remembers the facts after his memory is refreshed."

Mr. Robertson: That is exactly what we are doing here. There is no quarrel between us and that case. He is guiding his memory about these dates and hours and is testifying from his memory as refreshed. I think I have page 275 } tried enough cases, Your Honor, to know that that is permissible and is done all the time.

The Court: Is the following verbatim that statement?

Mr. Robertson: No, he is not following it verbatim.

Mr. Mullen: As he goes on he turns over the page and it shows he is following it very closely.

The Court: I think it is all right and proper if he is just glancing at it and refreshing his memory; but if he is reading it as a deposition—

Mr. Robertson: Mr. Harris is looking over his shoulder, and he doesn't like what he is saying. Your Honor, watch him.

Mr. Allen: Your Honor can have a copy of it and can tell whether he is testifying.

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Colonel Harris: For the last fifteen or twenty minutes Mr. Robertson has been using the memorandum to lead the witness, and the witness has the narrative account to respond to the lead. Mr. Robertson has been looking at a narrative form. He says he can't remember it, and he says that he wouldn't stultify himself by telling Your Honor that Mr. Bryan has to refresh his recollection on these vivid acts, but he has been turning page after page. When he started off on page 2 and I got where I could sort of look to see what the document was, he turned it up like that (indicating) so it would be impossible for me to see what he was page 276 } reading from. It was never contemplated so far as I know, and in nearly four decades of court room work I have never seen a witness allowed to bring in something that he and somebody else have concocted and get up on the stand and, using language that is probably more graphic than his own, read a narrative account. It is the contemplation of the law, as I understand it, that the jury must pass on the credibility of the witness, that they are entitled to form an opinion of him from his method and manner of testifying, and that he is supposed to hear questions and give answers from his brain. All he can do with reference to documents is to refresh his recollection. What is happening is that the substance of that thing, in my judgment—although that is a guess because they wouldn't let me see it, but watching what he is doing, he is giving Your Honor and that jury not what he remembers but what is written down there for him.

Mr. Robertson: If Your Honor please, that is simply not the fact.

The Court: Go ahead, Mr. Mullen.

Mr. Mullen: Mr. Robertson is holding one copy and asking questions from it, and he is following it in his copy and answering.

Mr. Robertson: I do it in every case I try.

Mr. Fred G. Pollard: Mr. Robertson, we were supposed to finish before you butted in.

page 277 } The Court: Go ahead, Mr. Pollard.

Mr. Mullen: I have finished. I rely on this case which I have quoted. I think it is clear and simple.

The Court: Does that case hold that you can't refresh your memory?

Mr. Mullen: It says:

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"A witness ought not to write his deposition or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person, but he ought to answer the questions orally and from memory as they are propounded to him. Parties or their counsel may, orally or by writing, previous to the examination, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books and paper, and make memoranda—"

That is beforehand.

"—from them and otherwise, especially of dates and amounts, and use such memoranda, for the purpose only of refreshing his memory, at the time of giving his evidence. The memoranda themselves are not evidence, and, *a fortiori*, what he says of their contents is not, unless he remembers the facts after his memory is refreshed."

Mr. Robertson: If you will just let me know when they are through, I will go ahead.

The Court: We will let you know.

page 278 } Mr. Fred G. Pollard: We would like an opportunity to examine that memo.

Mr. Robertson: You won't have it.

Mr. Fred G. Pollard: We ask that Your Honor rule on that.

Mr. Allen, the judge has asked you all to wait until we are through.

Mr. Allen: I am in favor of what you said, if you will listen. I think you have a right to see it if you want to see it, under Mr. Wigmore's rules.

Mr. Fred G. Pollard: You and Mr. Robertson had better get together on it, then.

Mr. Allen: Let me read the rule. It will take but a minute. You are entitled to what Mr. Wigmore says you are entitled to. These rules in the new book are in condensed form.

"For the purpose of refreshing and improving a dormant recollection, a witness may use any artificial aid which under the circumstances is appropriate and does not seem improperly suggestive. In particular any writing may be used subject to the following provisions:

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"The writing is not required to be one made by the witness himself.

"The writing is not required to be an original.

"The writing is not required to have been made freshly after the time of the event.

page 279 } "The writing must be shown to the opponent on request.

"The writing is not a part of the testimony.

"The writing does not become a part of the witness' testimony, and therefore the party offering the witness is not entitled to read or show it as evidence to the jury, but he is compellable to show it to the jury on the request of them or the opponent pursuant to" another rule which he cites.

If you demand to see it, then you have a right to see it.

Mr. Robertson: If they are through, let me say one thing to show that they don't know what they are talking about. I am perfectly willing for them to look at it. We have no secrets in here. But I am not going to give it to them. To show you that they don't know what they are talking about, when Bryan was out in the field and got these reports there that afternoon, we have here six pages of what was reported to him that had happened, reported by these men, which he wrote out in detail. I turned all of those over and didn't ask him anything about it at all. The reason I didn't do it is that I knew I would precipitate a fight as to whether it was hearsay or not, and I am going to have those men here, either in person or by deposition, to prove it. So, I am not even following the thing slavishly myself.

If they want to take it and read it and give it back to—

The Court: Under the rule laid down by Wig-  
page 280 } more it looks as if they are entitled to see it.

Mr. Robertson: They can see it and then give it back to me.

Mr. Fred G. Pollard: We would like the copy that Mr. Bryan is using.

Mr. Mullen: Wigmore has some very strange theories that our courts do not follow.

Mr. Allen: These are rules, though.

The Court: I understand he is not to read from that paper. He can refer to it as he testifies.

Mr. Robertson: That is right.

The Court: The Court rules that he can't read that paper.

Colonel Harris: Judge, we want that paper to take home

*Alexander Hamilton Bryan.*

with us, and we want to go through it and take the transcript of his testimony and see if it is word for word and in how many places it is word for word with that memorandum, with **that narrative form** of his testimony. The whole purpose of testimony and of cross-examination would be destroyed if every witness who came in could reach in his inside pocket and pull out a narrative and start reading it.

Mr. Robertson: Your Honor, let me tell you this. They are at perfect liberty to look at Mr. Bryan's copy or any other copy of it now. They are not at liberty to take it page 281 } away from here. When we finish examining this witness and before they cross-examine him, we are perfectly willing to give them a copy of this thing. They can make any use of it they want and put it in evidence if they want to.

The Court: They are entitled to see it now.

Mr. Robertson: We offer it to them now, but we are not going to say they can take it home. They can see it now. I don't understand those rules to say you can take it *hom* and take it out of the possession of the party.

The Court: Does it say there to furnish them a copy, Mr. Allen?

Mr. Allen: It says, "The writing must be shown to the opponent on request, as provided on Rule 93(a), Article 5." Let's see what that is.

Mr. Robertson: Of course, this is a contemporaneous note.

Mr. Allen: It says in Article 5: "An expert who has made a report based on written information furnished by the co-operation of several persons and used for a common purpose, such as a \* \* \* hospital attendant, may testify by introduction of the report, subject to the right of either party to cross-examine the persons who have furnished any of the information."

Nobody furnished this information to Mr. Bryan. He got it himself. It is his own.

page 282 } The Court: As I understand it, Mr. Bryan prepared this statement himself.

Mr. Robertson: That is correct.

Mr. Lowden: At the time. This was not prepared recently. It was prepared within a week's time of the happening.

The Court: I understood that he made notes.

Mr. Robertson: That is right.

Mr. Fred G. Pollard: Judge, these are not the notes.

The Court: But this is made from the notes taken at the time, as I understand it.

*Alexander Hamilton Bryan.*

Mr. Robertson: That is right.

Mr. Lowden: When he got back to his office.

Colonel Harris: We are entitled, when the time comes, to develop who wrote them, who went over them and criticized them and deleted and blue-pencilled, and all that. We can't do it just by glancing at it and then handing it back and saying, "Thank you."

Mr. Robertson: If Your Honor please, if they want to see it, they are welcome to see it now. When we have finished with Mr. Bryan we will very gladly give them a copy of it to make whatever use they think proper on cross-examination.

Colonel Harris: We don't want it merely for cross-examination, if the Court please.

Mr. Allen: Wigmore notes that all the courts page 283 } don't agree that they have a right to see it, but most of them do.

The Court: I think so.

Mr. Robertson: We don't object to their seeing it.

Mr. Robert N. Pollard, Jr.: In all the testimony that he has given so far, when he has used this memorandum there has been no distinction between what he remembers and what has jogged his memory by the memorandum. So, the jury can't test his credibility. They don't know what he testifies from memory and what the memorandum has refreshed.

The Court: You can cross-examine him as to that and bring that fact out.

Mr. Fred G. Pollard: Couldn't he lay the memorandum aside and call for it when he needs it?

The Court: I think I have ruled that he can't read that memorandum.

Mr. Robertson: He is not reading it.

The Court: If he wants to refer to it, to a sheet, to a word here and there, a date that reminds him of certain events, I see no objection to that.

Colonel Harris: Will Your Honor inform Mr. Bryan of your ruling when you get back on the bench?

Mr. Robertson: I would be very glad to do it in the presence of the jury and to caution Mr. Bryan and tell the jury about it.

page 284 } The Court: All right. I will do it.

(The following proceedings were had in open court:)

The Court: Mr. Bryan, in regard to the paper you have in your hand, the Court rules that you cannot read from that

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paper. You may refer to it to refresh your memory and then answer the question, but do not read what is written on the paper.

The Witness: All right.

By Mr. Robertson:

Q. Before I come back to the conversation you were having with Mr. Hart, may I ask whether during these occurrences you made notes? I don't mean right while you were talking with Mr. Hart, but contemporaneously with the occurrence did you make notes from which that memorandum was subsequently prepared?

A. Each night I spent most of my time writing up what had happened that day.

Q. The ruling of the Court, as I understand, is that you may refer to the memorandum to refresh your memory as to dates and hours and personages and occurrences, and then not to read the memorandum but to testify from your memory as refreshed.

We had reached the point where Hart and his associates, two of whom were partially drunk, had locked the car and had come over, and you and Hart were engaged  
page 285 } in a conversation. I think you had told him of your effort to reach him that morning, and he told you that before he got your message all his arrangements were made and it was too late to stop.

In that conversation did you remind Hart of your conversation on July 14 about your hearing further from him before he did anything? Did you say anything to him about that?

A. He started off and said something to me. He said that he had called our office in Richmond about two weeks before and had said that if we didn't recognize United Construction Workers he was going to close down our job. Mr. Hart said that he hadn't heard any more from us, and so he decided to close the job down. He said that we were not the only people whose job had been closed down, and we didn't have any reason to complain.

Q. Did he name any other job that he had closed down?

A. Not at that time. He did in a conversation on July 14. He mentioned the job of the Link-Belt Company and Beckett Construction Company at Wheelwright.

Q. While you were talking to him on the 26th down at the railroad crossing did he say anything to you about your bucking the United Mine Workers?

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Colonel Harris: Judge, I believe that is leading, if the Court please. I think we are entitled to have him  
page 286 } ask what happened.

The Court: I think that question is leading. I sustain the objection.

By Mr. Robertson:

Q. Go ahead. You have a right to refresh your memory from the memorandum, and then testify from your memory as refreshed. Take it up there and tell what happened, what was said by you and Hart to each other throughout that conversation at the railroad crossing.

A. I told Mr. Hart that I had understood in my conversation on the telephone with him on July 14 that he would get in touch with me again before he did anything. Mr. Hart said that he didn't understand it that way. I then asked Mr. Hart why he had brought a large group of men to our job for the purpose of closing it down. Mr. Hart said that we were working in United Mine Worker territory and that we could not continue to work unless we recognized United Construction Workers. I told Mr. Hart that almost all of our employees were members of A. F. of L. unions, were members of local unions affiliated with the A. F. of L., or had made application to become members of those local unions, and that I didn't see how we could make an agreement with the United Construction Workers without breaking our agreements with the A. F. of L. unions.

I told Mr. Hart that we were already using  
page 287 } union labor and that I didn't see why he didn't direct his efforts to trying to organize the workers of people who were not using union labor.

Mr. Hart's response to that was that our laborers were not organized. I told Mr. Hart that all of our laborers had made application to become members of the Salyersville union as carpenter helpers. Mr. Hart told me, he said that made no difference to him, that we were working in United Mine Worker territory and he was going to take over, and that we could not continue to work unless we recognized his organization. He said it would be necessary for us to recognize United Construction Workers and to pay laborers at the rate of \$1.36 an hour and to pay carpenters at the rate of \$1.86 an hour.

page 288 } I asked Mr. Hart why it was that he had brought a group of men to the job and had threatened and intimidated our workers. Mr. Hart said to that, he said

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"You already seem to know so much, I don't see why I should answer your questions." He then went on and said, "I bet you \$500 right now that you will never finish your job unless you use United Construction Workers men."

I told Mr. Hart that I was going to finish the job and I wasn't going to use United Construction Workers men.

He said to that, he says, "Nobody has ever been able to buck the United Mine Workers yet, and you can't do it, either."

I told Mr. Hart that I didn't know about the other people, but that I was going to hold him and the United Mine Workers responsible for what they had done to us, and I didn't mean maybe. I told him that I expected to have men back on the job the next morning if I had to go to work myself. I told Mr. Hart—Mr. Hart's response to that was that he made some jeering remark about I had never done a day's lick of work in my life and then he went on to say that our men would be afraid to work and that if they did try to work he would have men there to stop them. He also said that if our men tried to work he was going to stop the coal company people from working and close down the mine operations.

I told Mr. Hart that I didn't think he could do  
page 289 } that. But he said, "Just wait and see. I have already made arrangements. I can do it."

We had it out pretty hot and heavy. I wasn't mad, as Mr. Mullen said in his statement, but I tried to be as firm as I could.

Q. After you finished your conversation with Mr. Hart what did you do?

A. We went over to the Pond Creek office and talked to Mr. Haslam, their mine superintendent.

Q. Did you inform Mr. Haslam of the remark that Hart had made about shutting down the Pond Creek Pocahontas Company mining operation?

Colonel Harris: Am I correct in assuming that our objections and exceptions cover questions of that kind?

The Court: Is there any question about that?

Mr. Robertson: No, sir.

The Court: Very well.

The Witness: I told Mr. Haslam what Mr. Hart had said.

By Mr. Robertson:

Q. You have no right to tell what Mr. Haslam said back to you, except the substance of his response.

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A. I don't see how you can tell the substance of the response without telling what he said.

Q. On cross examination they can let you say page 290 } anything you want, but I will leave it at that.

After you had talked to Mr. Haslam, did you return to Paintsville that night?

A. We intended to stay at the Carpenter Hotel in Salyersville. Tony Meli and Cecil Delinger and I went back to Salyersville and had supper. Then we went over to Paintsville to a meeting of Carpenter Local Union 646, which had been called for the special purpose of discussing and considering what had occurred at our job site that afternoon.

Mr. Robertson: If Your Honor please, we have arrived at the point where we are going into the union meeting. I think that is going to precipitate another row between Colonel Harris and me. You said you were going to adjourn at 4:30. It is 4:26 now. I don't know whether—I am perfectly ready to go ahead. I don't feel tired. It is all right me just to keep right on.

The Court: I believe that the jury would probably like to adjourn at this time, and we will adjourn until tomorrow morning, gentlemen, at ten o'clock.

(Whereupon, at 4:25 p. m. the jury was excused and the following proceedings were had in Chambers:)

Mr. Robertson: If Your Honor please, as I understand, Mr. Fred Pollard's request is that they be shown extracts from our records showing in substance that we did \$20 million worth of construction, approximately, in the page 291 } last ten years. We have here a booklet which has been prepared entitled "Laburnum Construction Corporation, Richmond, Virginia, Construction Record." It doesn't purport to cover everything. There are a number of small operations that are not included in there. I think it shows what they want. Mr. Bryan is prepared to make oath to its substantial correctness either now or tomorrow as preferred, and in the meantime there it is.

The Court: Suppose you take it.

Mr. Fred G. Pollard: We will examine it and see if that is what we want.

The Court: All right. We will just hold this in abeyance, the *subpoena duces tecum*.

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(Off the record.)

Mr. Fred G. Pollard: Your Honor, we would like to ask the Court to let us have until tomorrow morning the memorandum which Mr. Bryan is reading from.

Mr. Robertson: I don't think there is any such ruling as that.

Mr. Allen: I didn't hear you.

The Court: I don't know that I should let you have the entire memorandum at this point. It may be that the Court could order a copy of the memorandum according to the testimony so far. I am not advised on that.

Mr. Allen: You mean the memorandum he is page 292 } testifying from and refreshing his memory with?

Mr. Fred G. Pollard: After he has finished his testimony our problem is that it would take quite some time to examine it. If we could have a short adjournment for the purpose of examining it before we cross-examine Mr. Bryan it would satisfy our needs.

Mr. Robertson: We told them we would give them a copy of it. We told them we would give them a copy.

Mr. Allen: I think they have a right to it before we cross-examine, to look at it. I have insisted on that right myself in cases and the Judge has given me the right.

The Court: I will rule that you will be entitled to that memorandum before cross examination and that you have ample time to review it before cross examination.

Colonel Harris: Is that satisfactory with you?

Mr. Mullen: That is entirely satisfactory with me. I wouldn't give a cent whether I ever see it or not.

(Whereupon, at 4:50 o'clock p. m. the Court recessed until 10:00 o'clock a. m. Wednesday, January 24, 1951.)

\* \* \* \* \*

(End of Volume I.)

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**Supreme Court of the United States**

**OCTOBER TERM, 1963**

**No. 188**

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**UNITED CONSTRUCTION WORKERS, AFFILIATED  
WITH UNITED MINE WORKERS OF AMERICA,  
ET AL., PETITIONERS,**

**vs.**

**LABURNUM CONSTRUCTION CORPORATION**

---

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF APPEALS OF  
THE COMMONWEALTH OF VIRGINIA**

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**WRITING FOR CERTIORARI FILED JULY 10, 1963**

**CERTIORARI GRANTED JANUARY 12, 1964**

## Vol. II

page 293 }

\* \* \* \* \*

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Sneed, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 24, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

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\* \* \* \* \*

### ALEXANDER HAMILTON BRYAN

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

### DIRECT EXAMINATION (continued).

(Counsel conferring.)

Mr. Mullen: If Your Honor please, I would like to have—

Mr. Robertson: I haven't offered it yet. You have had it overnight.

Mr. Mullen: But I had some other things to do overnight, too.

The Court: What is the situation, gentlemen?

*Alexander Hamilton Bryan.*

Mr. Robertson: I will develop that right now, Your Honor.

By Mr. Robertson:

Q. Mr. Bryan, I hand you a booklet entitled, "Laburnum Construction Corporation, Richmond, Virginia, Construction Record," and ask you what that is?

A. It is a list of the various jobs that we have performed from May, 1942, to December, 1949.

I should correct that. It is not all of the work, but the major jobs.

Q. What total volume of construction does it show during that period?

A. \$20,253,965.49.

Q. Was that data compiled under your supervision and direction?

A. Yes, sir. I personally compiled a large portion of it.

Mr. Robertson: I offer it in evidence and ask that it be marked Plaintiff's Exhibit No. 22.

The Court: Mr. Mullen?

Mr. Mullen: If Your Honor please, there may be objection or there may not be objection, I can't say. I haven't had a chance to read it.

Mr. Robertson: I would suggest that I just offer it.

The Court: The Court will withhold decision.

Mr. Robertson: Mark it, please.

(The book referred to was marked for identification Plaintiff's Exhibit No. 22.)

The Court: I have marked it, and will withhold admitting it into evidence.

page 296 } By Mr. Robertson:

Q. Mr. Bryan, your field clerk at the job site on July 26, 1949, was who?

A. Mr. Maynard Ragan. His title was Chief Clerk.

Q. When you got to the job site on the afternoon of Tuesday, July 26, did Mr. Ragan give you a picket sign?

A. When I got to our office at the job site on July 26, 1949, Mr. Ragan handed to me a placard, a piece of cardboard, sometimes called a picket sign, which had been placed on a barrel just outside of our office, which Mr. Ragan had taken down—

*Alexander Hamilton Bryan.*

Mr. Fred G. Pollard: I object to that, Your Honor, as hearsay.

Mr. Robertson: It is a report Mr. Ragan made to him in the ordinary course of business. We are going to follow it up with Ragan himself when we get to it. It is admissible as a report made to the President of the Company by his Chief Clerk on the job.

The Court: I will allow him to answer.

(Object exhibited to Mr. Mullen.)

By Mr. Robertson:

Q. Is that the picket sign which Mr. Ragan delivered to you on the afternoon of July 26?

A. Yes. I marked it "7/26/49—AHB."

Q. Read it, please, out loud.

page 297 } A. "UWA Pickett Line." The word "picket" is spelled "p-i-c-k-e-t-t." "Contractors—Laburnum."

Mr. Robertson: I offer the picket sign in evidence and ask that it be marked Plaintiff's Exhibit No. 23.

Mr. Mullen: Read the answer after you have marked it, please.

(The picket sign referred to was marked Plaintiff's Exhibit 23 and received in evidence.)

. . . . .

page 298 } By Mr. Robertson:

Q. Now, Mr. Bryan, on the afternoon of Tuesday, July 26, when you left the job site and started over to the 25 dwellings and met Mr. Hart at the railroad crossing and had the conversation with him about which you testified, were any of your men with you, present during that conversation?

A. Cecil Delinger and Tony Meli.

Q. When you left the stand yesterday you had testified that after talking with Mr. Hart you went to the Pond Creek Pochontas Company office there at the 25 dwellings and reported your conversation with Mr. Haslam, the top Pond Creek man

*Alexander Hamilton Bryan.*

at that place. I think you testified that you and Mr. Delinger and Mr. Meli then went to Salyersville and ate supper and then that the three of you went on to Paintsville.

A. That is correct.

Q. When you got to Paintsville what did you do?

A. A special meeting of Paintsville Carpenters Local No. 646 had been called for the purpose of discussing and considering what had occurred at our job that afternoon. The meeting was held in the Town Hall at Paintsville at 8 p. m. Mr. Meli, Mr. Delinger and I went to the meeting.

Q. Was there a man at that meeting named Monroe Sublett?

A. Monroe Sublett was president of the local  
page 299 } and he called the meeting to order.

Q. Did you and Mr. Delinger and Mr. Meli go to the meeting?

A. We had asked if we could attend the meeting and were informed that we could, and we went.

Q. About how many men would you say attended that meeting?

A. About 50.

Q. Did you make a talk at the meeting?

A. The president, Mr. Sublett, asked me if I had anything to say, if I cared to say anything, and so I got up and went to the front of the meeting and made a talk.

Q. I am going to ask you to tell the jury the substance of what you said.

A. I told the group that we had an agreement with the Richmond Building and Construction Trades Council and with various A. F. of L. Unions, and that we used A. F. of L. labor on all our jobs throughout the country. I told them that we had worked in Chicago and Detroit, as far south as Mobile, that we had worked in Ohio and Pennsylvania, North Carolina and Georgia, and that the work which we had in Breathitt County, Kentucky, was the first job that we had ever had in Kentucky. I told them that I sincerely appreciated the efforts of all our people, our employees, in helping to make the job a success. I said that I had done my best to  
page 300 } try to get to the job by 12 o'clock noon that day  
and had driven all night from Richmond and  
would have been there if it hadn't been for the  
fact that we had a car breakdown. I said that based on my experience with the United Construction Workers that afternoon I didn't care to make an agreement with that organization or to use any of the men. I told them that I thought that

*Alexander Hamilton Bryan.*

what had happened that afternoon was nothing short of disgraceful, first in what the United Construction Workers did in coming to the job in force and in threatening and intimidating our workers, and next in what our workers did in letting themselves be bullied and bluffed without making an attempt to keep the jobs that they had. I told them that I told Mr. Hart—I mentioned the conversation that I had with Mr. Hart that afternoon—I told them that I told Mr. Hart that I expected to have the men on the job the next morning and that I hoped all of our people would return to work, that I was then trying to make arrangements for police protection at the job and hoped that I could do it, and that I thought it was of the utmost importance that all of our people return to work the next morning and to keep on working until they were made to stop work and not just stop because of some threats that might be made.

In short, I did my level best to try to persuade those people to return to work.

Q. What was the reaction of the meeting to your talk?

A. The business agent, Mr. Bert Preston, got page 301 } up and in effect he said that I just didn't know what I was talking about, that the United Construction Workers meant business, and he knew it, that we didn't have any police protection, that our people were defenseless, were hopelessly outnumbered, that if he hadn't stopped the argument in the toolhouse between Johnnie Arnett and Mr. Hart that afternoon guns would have been used and some of our people would have been shot and maybe killed. He said that the people—

Mr. Fred G. Pollard: I object to that, Your Honor. He is now testifying to what Mr. Preston said and not what was reported to him. It is hearsay.

Mr. Robertson: If Your Honor please, as shown in our trial brief, what he is saying here is relevant and admissible on the question of putting the men in fear and whether or not they were actually afraid to go back or whether there is a subterfuge here to make out like they were afraid when they weren't. Also, Your Honor will recall that Mr. Mullen in his opening statement said they were going to show everything that happened at these United Construction Workers meetings that we know nothing about. We submit that everything that transpired at this union meeting this night is relevant certainly on two grounds: One, the jury in all the cir-

*Alexander Hamilton Bryan.*

circumstances of the case can make up their minds whether they think that those utterances were in truth made or whether it is just a story out of Mr. Bryan's imagination, and second, whether or not, along with everything else in the case, it tends to show whether these men quit the job because they were scared or whether they quit it for some other reason.

The Court: The Court is of the opinion that the utterances in this connection are admissible.

Mr. Fred G. Pollard: An exception.

By Mr. Robertson:

Q. Go ahead.

Mr. Mullen: Note an exception, please.

The Witness: That the people in Breathitt, Knott and Floyd Counties, Kentucky, had the reputation for shooting on the slightest provocation, and that experience had shown they would do so. That Mr. Hart and the United Construction Workers had excited those people in the hills and that in his opinion they would shoot at our workers, hide in the hills and shoot at our workers using high-powered rifles, or would shoot at them from ambush along the roads leading to and from the job site.

Mr. Preston said it was too dangerous to go back to work and advised against it.

By Mr. Robertson:

Q. Did he say anything to you that they would put you on the spot about leading them?

page 303 1/2 A. Well, after Mr. Preston finished talking there was a general discussion. Some of the people thought they should go back to work and some of the people thought it was too dangerous. Finally Mr. Sublett, president of the local, sounded for order and asked me a question: "Mr. Bryan, will you put on a pair of carpenter overalls and lead us across the picket line tomorrow morning?" I told him, Mr. Sublett, "Yes, I certainly will." Mr. Sublett said, "I think we ought to go back to work."

After that, a vote was taken, and it was agreed unanimously, I think, that the men would return to work in the morning. It was agreed that we would meet at Salyersville,

*Alexander Hamilton Bryan.*

Kentucky, at a gas station across the street from the Carpenter Hotel at six o'clock, so we would go to the job together.

page 304 } Q. After that decision was reached, did Mr. Bert Preston have anything to say about whether the men would go back armed, or not?

A. After the vote was taken, Mr. Preston got up and said, "Anybody who goes back to the job ought to carry not less than a .38." I got up and advised against that. I said I didn't want any of our men to be hurt; that if there was a display of guns, we could stop and go home, and please not to carry any guns; that we would try to settle our differences another way.

Q. What was the purpose in meeting the next morning at Salyersville?

A. We all wanted to go to the job together in a group. We couldn't get in the same automobile. There were too many. We went in a kind of caravan, one vehicle behind the other.

Q. That was on Tuesday night, the 26th. Did you meet at Salyersville the next morning, Wednesday, the 27th, as planned?

A. Yes, sir.

We had carpenters, iron workers, electricians, quite a crowd of men who met there.

Q. How many men would you estimate were there, altogether?

A. Twenty-five or thirty.

page 305 } Q. How many conveyances did they use to go from Salyersville to the job site?

A. That would be just a guess; I don't know.

Q. Did they pretty much stay together on the way over there?

A. They sort of went off intermittently, and gradually all caught up with each other, one behind the other. There might have been ten cars, I don't know.

Q. Did you hear Mr. Mullen's opening statement Monday?

A. Yes, sir.

Q. In that statement, you will recall that he said that Mr. Hart was not at the job site on Wednesday, the 27th, because he had duties elsewhere. Is that correct or incorrect?

A. I didn't see Mr. Hart at the job site when we got there. In fact, I didn't see him that day at all.

*Alexander Hamilton Bryan.*

Q. Who was with you when you reached the job site in your conveyance, if you remember?

A. I went out with Tony Meli, and perhaps Cecil Delinger was in the car. I am sure I was with Tony.

Q. About what time did you get to the job site?

A. About 7 o'clock, maybe a little bit before; it took roughly an hour to drive from Salyersville to the job.

Q. State what the situation was when you got there at the job site?

page 306 } A. We found a picket sign on a barrel or rock near the office, and I went over there and pulled the picket sign down and threw it over in the bushes.

Q. Was that a different picket sign than the one which has been introduced here?

A. Yes, that was another picket sign.

Q. Have you got that picket sign?

A. No. Unfortunately, I threw it over in the bushes and just didn't ever get it again. I looked for it afterwards. I forgot to get it again that day. I was busy doing other things. When I went back to the job site again, I couldn't find it.

Q. When the whole group arrived there at the job site, about how many of your men were there, altogether, would you say, that is, leaving out yourself and Mr. Delinger and Meli and Maynard Ragan?

A. About the same number as went; around 25.

Q. Then what did you do when you first got there, after you pulled down the picket sign and threw it over in the bushes?

A. There wasn't any picket line there.

Q. Let me interrupt you there one minute.

At any time during any of the period about which you have testified or will testify, were there ever any men walking a picket line?

page 307 } A. There never was a picket line.

Q. After you pulled the picket sign down, tell what you did.

A. I didn't put on overalls, because there wasn't any picket line. I did pull the picket sign down and threw it in the bushes. Then I said, "Come on, boys, let's go to work." So I led a group of about 7 or 8 men down to the tippie.

Q. How far was that?

A. Between 3 and 4 hundred yards.

*Alexander Hamilton Bryan.*

Q. All right, sir. When you got down there, did those men go to work? What did they do, and what did you do?

A. There were two men sitting on a pile of lumber, who were spotters for the United Construction Workers. The men went into the carpenters' shanty and got their tools, and some of them went on to work. I went back to the office, where there were some more men, and by that time Mr. Harvey J. Robinson, who was another field representative of District 50 and the United Construction Workers, had gotten to the job. Also, there were some men with Mr. Robinson. Mr. Monroe Sublet, the president of Local 646, was there. He was talking to Mr. Robinson. Some of our men had not gone down to the tippie. They seemed to be rather nervous.

I said, "Come on, let's go down to the tippie; I am not going to pay you for standing around," and the men  
page 308 } wouldn't go. I asked them again to go.

Q. In the meantime, what about the men who were already down at the tippie, that you had taken down there?

A. They had gone to work, as far as I knew. I had left them and they had gone to work, and I had come back up to the tippie to get another batch of people. I couldn't persuade anybody else to go down there with me, so I went back to the tippie to see what was happening.

When I got there, I found that most of our men had stopped work, if not all, and they were gathered together in the carpenters' tool house.

Q. Let me interrupt you there one moment. At that time, was the tippie in operation? Were they putting coal through the tippie?

A. The tippie was running that morning. At that time, it was a 3-day week affair, but they were running then the first three days of the week.

Q. Did you have anything to do with the actual delivery and processing of coal in the tippie? Did Laburnum have anything to do with that?

A. No. Our men were putting siding up on the sides of the tippie, and were doing some final adjusting work in connection with it. The tippie was in operation.

Q. Was that operated by United Mine Workers?

A. Yes. The employees of Pond Creek were  
page 309 } members of the United Mine Workers.

Q. Operating the tippie?

*Alexander Hamilton Bryan.*

A. Running the tippie and processing the coal.

Q. How high would you say that tippie was, from the ground up to the top where the coal was delivered into the tippie?

A. I would guess 100 feet, that is, from the top of the tippie to the ground. Where the coal came into the tippie, it wasn't that high, I don't think.

Q. I mean, about how high was it from the ground to where the coal came into the tippie?

A. It was a good ways up. I couldn't—

Q. If you were working up where coal came into the tippie, and I was working down near the ground, would it be difficult for you to drop a piece of coal on me?

A. No.

Q. When you got down there to see what the men were doing, what did you find the situation to be?

A. They were all coaggregated together in the tool house. I walked in, and the steward, Jack Patrick, was there. I said, "What's the matter, why aren't you working?" Jack Patrick said, "I am steward on the job."

Colonel Harris: We make objection and reserve an exception to all this line of testimony.

The Court: Objection is made to this question.

Mr. Robertson: I understand there is a con-  
page 310 } tinuing objection to this line of testimony, Your Honor.

Colonel Harris: And a continuing exception.

The Court: There is a continuing exception.

The Witness: He said the job was unsafe, in his opinion; and that he had ordered the men to stop work.

By Mr. Robertson:

Q. Go ahead.

A. I said, "Why have you stopped work? You thought it was all right to go to work last night. What has changed your mind?"

He said some of the people up in the coal tippie had said they were sympathetic with the United Mine Workers, and that if these men knew what was good for them, they would get out; and if they didn't, there would be 100 men there within an hour to stop them.

*Alexander Hamilton Bryan.*

I said, "I don't see anybody except those two men sitting over there on a pile of lumber."

They said that I just didn't understand; that I was from the city and didn't know the ways of Eastern Kentucky; that they didn't want to be targets. Some of the men said they had their wives and children to think about. Some of the men said that they were afraid people would hide in the hills and shoot at them with a rifle, and that they had had enough; that they didn't want to work under those conditions, and nobody could make them. They weren't going to work; that it was too dangerous.

Q. What did you do then?

A. The men left and went on home. That was about 10:30 in the morning. Mr. Delinger and Mr. Meli and I went on back to Salyersville.

Q. About what time did you get to Salyersville?

A. Oh, 11:30 or a quarter of 12.

Q. Do you know a Kentucky police officer named Homer Howard?

A. After we got back to Salyersville we had lunch, and I was standing on the sidewalk in front of the Carpenter Hotel and this man was pointed out to me in a police officer's uniform, and said, "That is Homer Howard, a State Trooper." I was taken over there by Mr. Delinger and there introduced to Mr. Howard.

Q. Did you try to get Mr. Howard to go to the job site for police protection?

A. I talked to Mr. Howard and told him about what trouble we had had and asked him if he would go out there to the job site and try to help us out. I told him I would like to have State Troopers for protection, that even if we had but one, his presence at the job would help the morale of our men. I asked him to go.

Q. Did he consent to go or decline to go? Just say what he said to you and what you said to him.

A. Mr. Howard said he wouldn't go, that he had orders not to take part in any labor dispute except on express instructions from the Governor of Kentucky.

Q. Did you discuss with him the danger of anybody getting shot out there at the job site?

A. I did.

Q. State what the conversation was between you and him.

*Alexander Hamilton Bryan.*

Mr. Fred G. Pollard: Your Honor, I understand the continuing objection runs to this too.

The Court: Yes.

Mr. Robertson: We understand.

The Witness: I asked Mr. Howard if he thought there was any danger of our people being shot by persons hiding in the hills and using high-powered rifles, and Mr. Howard pulled up his pants leg or sleeve and showed me some of his own bullet wounds.

Q. Did he say whether or not he had been present at any shooting affairs in these circumstances?

A. He said he knew there was danger, that he had not only seen them shot but had picked them up after they were shot.

Q. Then did he show you the bullet scars where he had been shot himself?

A. Yes.

Q. Did he *ver* go to the job site, I mean for protection, during the period of time that we are talking about, as far as you know?

A. As far as I know he didn't.

Q. Did any other police officer go there as far as you know and give any protection?

page 314 } A. No.

Q. Did you and Mr. Meli go to Huntington that night or stay at Salyersville?

A. After we talked to Mr. Howard, Tony and I got in the truck and drove to Huntington.

Q. What happened to Mr. Delinger?

A. Mr. Delinger continued to stay in Salyersville. I gave instructions to him to keep his ear to the ground and to see if he couldn't get together some carpenters who wouldn't be afraid to work, and we would make another try at it the following morning, which would be August first.

Q. That was Wednesday night, July 27. Do you know a man named W. P. Freeman?

A. Yes, sir.

Q. Who is he?

A. He is an international representative for the International Brotherhood of Carpenters and Joiners, affiliated with the American Federation of Labor.

Q. Where were his headquarters in July, 1949, if you know?

*Alexander Hamilton Bryan.*

A. The United Brotherhood had its headquarters in Indianapolis. Mr. Freeman lived in Louisville.

Q. Did you have a telephone conversation with him during the day of Thursday, July 28?

A. Yes.

page 315 } Q. Where was he when you phoned him?

A. I was in Huntington and received a telephone call from Salyersville and talked to both Mr. Freeman and Mr. Delinger. I don't know which one placed the call, but it was a joint call.

Q. How did Mr. Freeman happen to be in Salyersville, if you know?

A. He was there to investigate the trouble.

Q. What was your telephone conversation with him?

A. I asked Mr. Freeman to please make every effort to get our carpenters to go back to work, that I would appreciate anything he could do to help us.

Q. Did he agree to make the effort or not?

A. Mr. Freeman said that he didn't blame our carpenters for not wanting to be targets, that it was too dangerous out there in his opinion, that is, in Breathitt County, and that neither he nor his union were going to require those men to go back to Breathitt County and expose themselves to danger.

Q. In that telephone conversation did he mention any threat that had been made against the life of Delinger, your man on the job?

Mr. Fred G. Pollard: Your Honor, does our objection still run to this line of testimony?

The Court: I understand it does.

Mr. Robertson: Yes.

page 316 } Mr. Fred G. Pollard: An exception?

The Court: An exception.

The Court will recess for five minutes. I would like to see counsel in my office.

(The following proceedings were had in Chambers:)

The Court: Gentlemen, I would like to hear from counsel for the defendants in regard to this line of questioning as far as hearsay is concerned.

*Alexander Hamilton Bryan.*

Mr. Mullen: I think it absolutely violates the rule of hearsay, Your Honor. I think it also violates Your Honor's ruling that he should not give specific and exact language as the result of reading the memorandum.

I would think in every way it violates the ruling. Take the last question. He is undertaking to ask something really third-hand. He is undertaking to ask what this representative of the A. F. of L. said somebody had told Delinger or said to Delinger.

Mr. Fred G. Pollard: That is fourth-hand.

Mr. Mullen: It is all through this. They have done exactly what Your Honor ruled they couldn't, namely, that they couldn't give the conversations. They have been giving them right along.

Mr. Robertson: If Your Honor please, this is not the first case I have tried where this thing has come up. My firm and I handled the matter in the trial before the National Labor Relations Board where there was a dispute between the Home Beneficial Life Insurance Company here in Richmond and an union, and that transcript ran to more than 3,000 pages. The taking of testimony consumed more than 30 days. The same arguments that they are making here came up time after time after time again. That case was carried right on up to the Supreme Court of the United States and the correctness of those rulings letting in the same sort of testimony that we are letting in here, was sustained by every court right on up through.

I was in charge of the injunction proceeding hearing in the Virginia Oak Leaf Tannery case at Luray, where Judge Crosby sat, and the same arguments that were made here were made everywhere through that case. You remember, that was a case where every device known to counsel was used to upset the rulings of the trial court. They forced Judge Ford to disqualify himself. They came before our court of appeals and sought a writ of prohibition to prevent Judge Crosby from sitting in the case. They tried to run me out of the case as counsel. Those things were all denied and the case was appealed to the Supreme Court of Virginia. All these points made here were made and all said the trial court had ruled correctly in a case of this sort. Then petition was presented to the Supreme Court of the United States and *certiorari* was denied.

*Alexander Hamilton Bryan.*

page 318 } I am not trying to evade or dodge any ruling of the court. I am trying to comply with its rulings, and I am trying at the same time to develop my case just as fully as is permissible under the law.

The whole idea of this thing is that our men were intimidated and threatened and put in fear illegally, and were illegally run off the job. Whatever tends to show that, in my opinion, is admissible in evidence, and whether it is true or not goes to the weight of the evidence. What I gathered from Mr. Mullen's opening statement was that that was his understanding of the law when he announced what he was going to do. He may have changed his theory, but I do what I am doing advisedly. Of course, whatever wide latitude I follow, I throw the door wide open for them. I think that under the brief that we have filed here and under the law, just as I stated in there, this evidence and this testimony is admissible because, one, as to whether or not it is truthful, and two, and the real guts of the whole thing, whether or not all these facts and circumstances tend to show that these men were put in fear and that that was the reason they stopped, or—and here will be the issue when their case goes in—or is this a mere pretext and the work was quit because they were being chiseled on their wages and that they were already striking and under the etiquette between unions they wouldn't cross

page 319 } picket lines and that this whole thing about the fear is a smoke screen to make out like something existed that didn't exist.

That is my theory of this phase of the case, Your Honor, and I am going to ask these two gentlemen here to continue.

The Court: Mr. Allen?

Mr. Allen: If Your Honor please, I think the testimony is admissible upon the ground that it shows the state of mind of these people and the state of mind of their superiors in the union who control them. It isn't admissible necessarily to prove particular facts, but evidence that is admissible on any ground can't be kept out.

We have to prove a state of mind on the part of these workers. We have got to prove a state of mind on the part of those who control these workers, their superiors in the union above them. I don't know how you are going to prove the state of mind of anybody without proving utterances on the subject that is pertinent. We have to prove that these people through fear, intimidation, failed to go back there to work, and if we fail to prove that, then our case goes out the window.

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How are we going to prove it? How are you going to prove the men were afraid unless you prove it by a statement that he is afraid? He didn't go back to work. They attribute that to something else. So you have to go into the page 320 } man's mind, as I see it, and I don't know any other way to get in his mind. You have got to go into the mind of the superiors in the union who control these men.

Even in criminal law when you have to go into the man's mind and prove what is in his mind, you can prove all sorts of utterances made by the man.

page 321 } The Court: Then you feel that these various conversations that Mr. Bryan has had with different people, quoting them is admissible as evidence?

Mr. Allen: That is right, sir. What would be the difference—there can't possibly be any objection to Mr. Bryan's using his imagination, his descriptive powers, so to speak, and describing the situation of fear. Then these gentlemen would come back on cross-examination and ask, "What did you base that on?" He would have to say that he based it on the utterances of the people. There is nothing else on earth that Mr. Bryan can base his testimony of fear and intimidation upon except the utterances of these people.

The Court: Mr. Moore?

Mr. Moore: I would just like to add that the Court ruled in a similar manner to the way Your Honor has ruled in this case, in the case of *Harkins v. United States*, that we cite in our trial brief, which was also a case involving fear and intimidation such as this, and the witness was allowed to testify to facts told him showing that fear and intimidation, along the same lines that Mr. Allen was just talking.

The Court: Mr. Harris?

Colonel Harris: May I add a word?

As I get this testimony, it is hearsay based on hearsay.

Mr. Bryan is testifying to what somebody else page 322 } told him as to what the men felt.

For the moment let us assume, and merely for the sake of argument, that they have to prove a state of mind. Then the proper way to prove it is not by hearsay, but to take the deposition of or put on the stand the man who has the state of mind. It seems to me that they are just throwing the rules of evidence behind them and paying no attention to them, in their effort to get all kinds of testimony before this jury.

As I see it, we can't throw away the rules of evidence. We have to go ahead on the accepted rules and the law that governs.

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Mr. Robertson: Judge, what is the difference—they have already put the Court and us on notice that they are going to tell about these United Construction Workers meetings, as I think they have a right to do, where none of the representatives of the Plaintiff were present, about what was said, the orders that were given, and this, that, and the other.

This man Freeman, for instance, which is the one we are talking about right now, is one of the high ranking men in the A. F. of L. I think it would be a very legitimate argument to say, "Why didn't you get in touch with some higher ranking man and ask him to order your men back to work?" The answer is that, "I was in touch with him and he

page 323 } wouldn't order them back to work."

Mr. Mullen: That isn't what he asked. The last question was: "Did Mr. Freeman tell you that somebody had told Mr. Delinger that he was going to threaten them, or something of that kind?"

Mr. Robertson: No; wait a minute.

Mr. Mullen: Yes, that is your question.

Take another one that just occurred to me. "Did Mr. Jack Patrick tell them that somebody on the tippie told some of the men that they were in sympathy with the Mine Workers, and they were liable to get hurt if they went to work?" If that isn't third-hand hearsay, I don't know what is.

We don't know what the circumstances were in those cases that Mr. Robertson talked about. We don't know what the questions and the rulings were. They have given the substance of what happened in those meetings, and all that. They have gone now far afield, and have gone into what is clearly condemned by the laws of evidence.

Mr. Robertson: Just so the Court may know what I am developing, I don't remember the precise wording of the question, but I think I asked him: Here is Freeman out there investigating the situation, trying to ascertain the facts and trying to solve the difficulties. He goes and talks, as of course he should do, to Delinger, the superintendent in

page 324 } charge of the job, and in the course of his talk with Delinger, Delinger tells him that his life has been threatened. If that isn't relevant, I don't know what is. That is what I am trying to develop, that came out in that telephone conversation. And when I get to Delinger, I am going to put Delinger on the stand and have Delinger testify how his life was threatened.

Mr. Mullen: There is another objection. You can't relate

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a telephone conversation unless you can identify that the man on the other end was the man he represented himself to be.

Mr. Robertson: Bryan said he knew him.

The Court: Do I understand you to say that these same points were passed on in the case that went to the Supreme Court of Appeals of Virginia?

Mr. Robertson: Yes.

Mr. Fred G. Pollard: What was the style of that case?

Mr. Robertson: Virginia Oak Leaf Tannery—that was an injunction case. There was no jury in that case. But the evidence was all admitted by Judge Crosby, and every ruling he made was upheld as substantially correct by the Supreme Court of Virginia, and a writ of *certiorari* was refused by the Supreme Court.

Mr. Mullen: Did you have third-hand conversation page 325 } tions in that?

Mr. Robertson: Yes.

Mr. Mullen: I think it would be advisable to get the case and see what is in it.

Mr. Robertson: There is a 3,000-page transcript in it, if you want to read it.

The Court: I will allow these gentlemen to continue, and it is understood that you all have the same objection and exceptions.

Mr. Fred G. Pollard: To all the testimony that has been made today?

The Court: The Court may rule differently later on, but I want to see how the case develops.

Colonel Harris: Judge, when you say "the same objection," some of this is hearsay and other is hearsay on hearsay, as Mr. Mullen said; it is hearsay thrice removed. We would want both those objections added.

Mr. Robertson: It is all right with me.

The Court: It is understood that you have done so. I just wanted to talk with you gentlemen about that point and hear some argument on it.

Mr. Robertson: We had it back and forth in all those other cases.

Mr. Mullen: We don't know what happened in those cases.

Colonel Harris: The decision wouldn't be 3,000 page 326 } pages long. Where is the decision?

Mr. Robertson: The decision would be very brief, because the writ of error was refused.

The Court: While we are in here, gentlemen, we might take

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care of this order that the Court indicated on yesterday it would enter today. This is an order allowing the filing of amended answer to Question 85 addressed to District 50, United Mine Workers of America, and amended answer of United Construction Workers to Question 83.

Mr. Lowden: I didn't check them both, but it looks as if in one of those there isn't any change that I could see. I looked at it about five times, and what the change is, I can't find.

Mr. Fred G. Pollard: That is correct, but I think it is immaterial whether we filed it or not, as to one of them. Since we have already filed it, we might as well leave it filed.

May I take up one other thing?

The Court: All right.

Mr. Fred G. Pollard: Yesterday, we filed an affidavit for a *supoena duces tecum*—

The Court: Is it necessary that that be passed on right now? Do you anticipate any argument on the proposition?

Mr. Fred G. Pollard: Just this, that the Plainpage 327 } tiff gave us a statement of what we wanted, through sometime in 1949, and we would like to have that brought up through 1950, and that would be satisfactory.

Mr. Robertson: I think if you look in that, it is brought up to '50.

Mr. Fred G. Pollard: No, sir, it is not.

Mr. Robertson: I will check that up. If it is not brought up, we will bring it up, of course.

Mr. Fred G. Pollard: Then I would like to file a further affidavit.

Mr. Robertson: Can we read it later?

Mr. Fred G. Pollard: Yes.

Mr. Robertson: Judge, I have my mind on this—

Mr. Fred G. Pollard: I just want you to have a copy of it.

Mr. Robertson: I will read it later.

The Court: I will enter this order.

(The following proceedings were had in open court.)

By Mr. Robertson:

Q. Mr. Bryan, in the course of that conversation with Mr. Freeman, did Mr. Delinger come to the phone?

A. Yes, he did.

Q. Did he make any statement to you about any threat against his own life?

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page 328 } A. I told him that I understood that his life had been threatened, and asked him if it was correct, and he told me what had occurred.

Q. What did he tell you had occurred?

A. That the night before, a prominent businessman in Salyersville had come to see him as an emissary on behalf of some other people, and delivered a message to Mr. Delinger that under no circumstances should he return to that job site after Sunday, July 31. If Mr. Delinger wanted to go out of Kentucky under his own power, he had better not go back to the job.

Q. After what date?

A. July 31, which was Sunday.

Q. Did Delinger tell you what he wanted to do about it?

A. He said he wanted to be relieved of all further duties, and to be replaced; that he didn't want to go back up there.

Q. What instructions did you give him?

A. I told him to report to our Richmond office and I would replace him.

Q. So far as you know, has Mr. Delinger ever been back to Kentucky since he left out there prior to July 31, 1949?

A. Let's see. That was on Thursday. Mr. Delinger went back to the job to get his clothes, and then he went  
page 329 } back to Richmond. He has never been back since, so far as I know.

Q. That was on Thursday, July 28?

A. Yes, sir.

Q. Did you return to Richmond that night?

A. I went back to Salyersville, and then came back and went to Richmond that night.

Q. Why did you go back to Salyersville?

A. I was informed there was a storekeeper at Royalton, Kentucky, who might help us get some carpenters together who would go to work on Monday, August 1st. So Mr. Meli and I drove from Huntington, first over to Salyersville, where we saw Mr. Ragan and Mr. Delinger, and then we went to Royalton to find a storekeeper named Salyer. We couldn't find any storekeeper named Salyer, so we talked to a carpenter who had been working for us, named Homer Salyer. We told him about our plans to try to resume work on the following Monday, August 1st, and asked Homer Salyer to try to get together some carpenters.

Q. Did he agree that he would undertake to do that?

A. He said he wanted to go back to work, and that he would

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try to talk to some of the boys around Royalton and try to get them together for us.

Q. That would be to go to work Monday, August 1st?

A. That is right.

Q. Then after you had made that effort at page 330 } Royalton, did you go back to Huntington and catch a train back to Richmond that night?

A. Yes. Tony and I drove back to Huntington in a company truck. I took the train that night to Richmond. He drove the truck back.

Q. Where were you on Friday, July 29?

A. I had to come back and go over to the Solvay Process Plant in Hopewell, and of course, I was also in Richmond doing some things; and while in Richmond, I talked to Louis Veltry, who was another one of our superintendents, and told him that I wanted him to replace Mr. Delinger on the job in Kentucky, and please to be out there not later than Sunday, July 31.

Q. Where were you on Saturday, July 30?

A. I took a plane from Richmond about 7:00 o'clock and flew to Louisville, and was in conference with some lawyers out there about this trouble.

Q. While in Louisville, did you make any effort to get police protection at the job site?

A. I talked to them about it, and they advised that it was highly unlikely that any arrangements could be made.

Q. Where were you on Sunday, July 31?

A. After leaving Louisville, I drove with some lawyers over to Lexington, and there took a train and went to page 331 } Ashland, and spent the night; and took the 6:00 o'clock train the next morning out of Ashland for Paintsville. I arrived at Paintsville around 9:30 or 10:00.

Q. Where did you get breakfast in Paintsville that morning?

A. Mr. Ragan, our Chief Clerk, drove over from Salversville to get me, and took me first to the home of Henry Starr. He was the general carpenter foreman for us on the job.

Q. Did you eat breakfast with Ragan and Starr at Starr's home in Paintsville?

A. Henry Starr and his wife were eating breakfast, and they gave me some breakfast. Maynard Ragan had already eaten.

Q. Did you try to get Starr to go back to work the next morning, Monday?

A. I asked him to go back.

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Q. What was his reaction to that request?

A. He said he was afraid to do it, and he didn't think any of the other Paintsville carpenters would do it.

Q. Then after you finished breakfast, what did you do?

A. Mr. Ragan drove me to Salyersville, and then he had to leave. He and his wife were going some place.

Q. Do you know a man named Charlie Williams?

A. Charlie Williams is a contractor in Salyersville. I had met him out there, and I got to talking to him.

Q. After you got to Salyersville that Sunday—what time did you get out there to Salyersville?

A. I got in Salyersville about noon, 11:30.

Q. Then did you go from Salyersville to the job site?

A. I told Charlie Williams I wanted to go to the job site, but didn't have a car, and asked him if he could make arrangements for me to do it. He said he thought he could. So he got a fellow named May—I don't remember his first name—who was a carpenter and had worked for us. He asked Mr. May if he would drive out to the job site and take us. So we all went out there.

Q. At about what time did you get to the job site?

A. I think we left Salyersville about 1:00 o'clock and must have gotten to the job site about an hour later, around 2:00.

Q. Did you go to the schoolhouse when you got out there to the job site?

A. The first place we went was to the schoolhouse.

Q. Was there anybody there?

A. Nobody was there, but there was a picket sign.

Q. What happened to the picket sign?

A. I took the picket sign down and took it with me.

(Object exhibited to Mr. Mullen.)

page 333 } By Mr. Robertson:

Q. Is that the picket sign that you have mentioned?

A. (examining) Yes, sir.

Q. Read it out loud, please. What is written on it?

A. Faintly, in pencil: "District 50 UMW of A, Local 778-A—Picket Line." The word "picket" is again spelled with two "t's".

Mr. Robertson: I offer this picket sign in evidence, and ask that it be marked Plaintiff's Exhibit No. 24.

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(The sign referred to was marked Plaintiff's Exhibit No. 24 and received in evidence.)

(Jurors examining Plaintiff's Exhibit No. 24.)

By Mr. Robertson:

Q. Mr. Bryan, where did you go from the schoolhouse?

A. We went up toward the tippie and past our office.

Q. How far would you say it is, in fractions of a mile, from the schoolhouse to your office?

A. Between a mile and a quarter and a mile and a half.

Q. When you got to the office, was there anybody there?

A. We didn't see a soul at the job site at all. There was another picket sign at the office.

Q. What happened to that?

A. I took it down and took it with me.

(Object exhibited to Mr. Mullen.)

page 334 } By Mr. Robertson:

Q. Is that the picket sign which you took down there at the office that Sunday afternoon?

A. Yes, sir.

Q. Read it out loud, please.

A. It is a large multi-colored sign in red and black. The top line: "On Strike." The next line: "Local Union No. 778-A." The next line: "Carpenters." The next line: "Helpers and Laborers." "District 50 UMW of A."

Mr. Fred G. Pollard: He didn't read that entirely correct, Your Honor.

The Court: You may check it.

Mr. Fred G. Pollard: There is an arrow for "Carpenters" that brings it down in front of "Helpers," so it is "Carpenters Helpers." He read it as "Carpenters, Helpers and Laborers."

Mr. Robertson: I will introduce it in evidence.

He also didn't mention that it is on cardboard or that it is in crayon instead of an oil painting.

The Court: The jury will observe what it is.

Mr. Robertson: I offer the picket sign in evidence, and ask that it be marked Plaintiff's Exhibit No. 25.

(The sign referred to was marked Plaintiff's Exhibit No. 25 and received in evidence.)

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Mr. Robertson: I believe the jury can see this page 335 } if I hold it here, rather than passing it around.

(Plaintiff's Exhibit 25 shown to the jury.)

page 336 } By Mr. Robertson:

Q. After you had looked over the situation at your office, did you go on down to the tippie or not?

A. Yes, we went down to the tippie and walked all through it.

Q. And nobody was there?

A. I didn't see a soul.

Q. Then what did you do?

A. I got in the car and drove back to Salyersville. We drove back towards Salyersville, and on the way we passed a car headed in the opposite direction. We stopped and the other car stopped. In the other car was Robert Poe, business agent of the Salyersville Carpenters Local No. 697, and—let's see—Fred Howard was in the car and Elmer Howard. Either Elmer Howard or Ed Howard. I was told it was Elmer Howard, but afterward I learned it might have been Ed Howard. They were two brothers of Homer Howard, the State Trooper.

Q. Did you have any conversation with Robert Poe regarding the United Construction Workers meeting which had been held at Tiptop or Carver that day?

A. Mr. Poe said that he had just returned from a meeting at Tiptop, that there were about 250 persons present, that Mr. Hart had conducted the meeting, that at the meeting there was discussion about our work and the work of page 337 } the Codell Construction Company, which had also been stopped, and that arrangements were being made to have persons act as stewards at the job site the next day. Mr. Hart had made a speech and had called for volunteers for people to act as stewards.

Q. Did you make any arrangement that afternoon for Poe to come to the job site the next day in an effort to get the men to work?

A. Since the Pointsville Carpenters Local looked like it wouldn't do anything about supplying men, I turned to Robert Poe, the business agent of the Salyersville Carpenters Local and asked him to please get some carpenters, and Bob Poe said that he had made an effort in that direction and was trying to get some Breathitt County carpenters to go to report to work the next morning.

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Q. While you were with Charlie Williams during the day Sunday did you explain to him that Delinger was leaving and Veltry was going to replace him as superintendent on the job?

A. Yes, I did.

Q. Did you offer Charlie Williams any job as assistant to Veltry?

A. Yes, I told Mr. Williams that Mr. Delinger had gone back to Richmond and he was being replaced by Mr. Veltry. I asked Charlie Williams if he would like to be an  
page 338 } assistant to Mr. Veltry.

Q. What response did you get from him?

A. He said he might take the job. He would like to think about it, though.

Q. Then after you left Robert Poe where did you go?

A. We went back to Salyersville. I just stayed around there, around the hotel that afternoon, and later on Charlie Williams came to see me and said he thought he had better not take the job. Then that night about 7:30 Louis Veltry got into Salyersville. He drove in in his truck.

Q. Did Charlie Williams tell you why he decided not to take the job?

A. He said it made his wife nervous.

Q. Did Tony Meli come back out to the area or did he stay in Richmond?

A. Tony came back. He left Richmond on the afternoon of Sunday, July 31, and drove a truck all night. He got to Salyersville about 5:30 the next morning, Monday, August first.

Q. Now state what happened on August 1, Monday morning.

A. Louis and I drove out in his truck together. As we passed through Royalton on the way to the job there were a number of men standing around, including Homer Salyer and Fred Howard. Homer Salyer got in the car with us and drove  
page 339 } out. Fred Howard came along later with some-  
body else. We must have gotten to the job at  
about seven o'clock. At the job we found a number of carpenters standing around.

Q. Let me interrupt you one minute. When you got to the job had any picket signs been put up to replace the ones you had pulled down?

A. I didn't see any picket signs that morning.

Q. Was there anybody walking the picket line?

A. Oh, no. There never was any walking of picket lines.

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Q. All right, go ahead.

A. Some of the carpenters there were new. So we took them in to a barracks building which was across the road from the office to talk to them. Louis Veltry was a member of the Staten Island Carpenters Local and he asked these men if they were A. F. of L. carpenters and they all looked at each other's card and got to know each other. Then we sent these men from the barracks building one or two at a time over to the office, where Mr. Ragan would get them to make out history records and get them signed up so that they could start to work.

As time went on the men appeared to get nervous. They were in little groups. They seemed to want to go to work, and yet nobody wanted to take the lead. Mr. Veltry and I did our best to persuade them. They wanted a leader, as I said, and there wasn't anybody there. They wouldn't accept us. They were looking for a union man. Then they said they would like to wait until Robert Poe got to the job at about ten o'clock. They understood he would be there at ten, and they would like to wait until he appeared. So we decided we would wait until Mr. Poe arrived.

At about that time I placed a telephone call for Jack Joinville, the President of the Building Trades Council in Richmond, to make a report to him on what was happening. While I was talking to Mr. Joinville, I think Mr. Poe came at about ten o'clock with Mr. Patrick—that is the way it was—and Mr. Patrick was a man in the Salyersville Local. Whether he was an official or not I don't know, but anyway he was with Mr. Poe. Mr. Poe said that he thought he had some carpenters who would go to work and he would go out and talk to the men.

After that my call to Mr. Joinville came through, and at about that time Mr. Hart arrived on the job. I told Mr. Joinville about our trouble and asked Mr. Hart if he would like to speak to Mr. Joinville. So Mr. Hart got on the phone. Of course I didn't hear what Mr. Joinville said, but I did hear Mr. Hart tell Mr. Joinville that we couldn't do any more work unless we used United Construction Workers men.

Q. Did you have any conversation with Hart there at that time about the meeting that Poe had mentioned at Tiptop or Carver? Are Tiptop and Carver the same place?

A. I think so.

Q. Did you have any talk with Hart about the meeting there at Tiptop that Poe had mentioned to you the day before, on Sunday?

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A. Yes, we had quite a talk there. Apparently Mr. Hart had gotten word that we were making arrangements to go back to work, and he was very emphatic in his statements that we could not go back to work unless we recognized his organization and used his men. I told Mr. Hart that I understood that they had had a big meeting at Tiptop the day before, about 250, people and that he had made a speech to the meeting and made arrangements to have people act as stewards and to stop our job again. Mr. Hart said, yes, he had had that meeting and that he was in a position to get as many people as he needed to stop it.

Q. Was that a nice, even conversation with Hart, or did both of you get mad?

A. Well, at the time I talked to Hart about the meeting at Tiptop, I talked to him some outside the building, and I had quite a talk with him inside the building. While we had the discussion inside the building we got a little hot under the collar.

Q. Do you know a man named Thomas Davis?

A. I talked to Thomas Davis on the phone that day. What happened is that after I talked to Hart I placed  
page 342 } a call for Jimmy Codell at Winchester, Kentucky,  
to see what he was doing about his men, and through him I learned of Mr. Tommy Davis as being a person who had David Hunter's superior. I went out and asked Mr. Hart if he knew how I could reach Tommy Davis, and Mr. Hart went and got an official paper of District 50 and United Construction Workers and said that Tommy Davis' name was listed there and gave his address and telephone number, and said I could get him on the telephone.

(Document shown to Mr. Mullen.)

Mr. Robertson: I am going to introduce the whole thing, Mr. Mullen, and call attention to the place where it shows Hart's telephone number. That is the only part that is relevant.

Mr. Mullen: If Your Honor please, if the only part relevant is the telephone number, it is improper to put in a whole newspaper in evidence in the record.

Mr. Robertson: If Your Honor please, I brought it here—of course if I had brought one sheet they would have said that looked might fishy. I will just get him to read the relevant part of it and won't offer it if they object.

Mr. Mullen: That will be all right.

*Alexander Hamilton Bryan.*

By Mr. Robertson:

Q. Is that the paper that Mr. Hart gave you?

A. Yes, it is a paper entitled "The News, of-page 343 } ficial publication of District 50 and United Construction Workers, UMW of A," between the word "The" and the word "News" there is a seal, "United Mine Workers of America, organized January 25-90," which is the abbreviation for 1890.

Q. What is the date of that issue?

A. Volume 2, No. 14, dated July 20, 1949.

He handed me this whole newspaper.

Mr. Robertson: Do you object to the first page going into the record to show what it is? I would rather leave it out than wait for you to read it all. I haven't read what is on the first page. I would rather forego introducing it than to read it.

Mr. Mullen: No, I don't mind the first page going in.

Mr. Robertson: We will tear that off, then.

The Court: Do you want to introduce that in evidence?

Mr. Robertson: I will introduce the two pages together as one exhibit, Your Honor.

By Mr. Robertson:

Q. I call your attention to page 9 of that issue of the News and ask you what that is entitled.

A. Page 9 is a statement of names and addresses under the heading "Addresses of our regional offices." Then there is a list of numbers under the word "Region," there being three columns of those, and opposite each number for page 344 } the region there is the name of a town and the name of a man, with his address and telephone number.

Q. Does it give the name and telephone number of Thomas Davis?

A. I will have to find it here. Just a minute (examining document). Opposite Region 31 there are the following words: "Kingsport, Tennessee"—I am sorry. Take that out. "Knoxville, Tennessee, Thomas Davis, 932 North Central Avenue, Telephone 3-4195."

Mr. Robertson: Do you object to that page?

Mr. Mullen: No.

Mr. Robertson: I offer page 1 of that issue of The News

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and page 2, the back of it, page 9 and page 10 and ask that they together be marked Plaintiff's Exhibit No. 26.

(The document referred to was marked Plaintiff's Exhibit 26 and received in evidence.)

By Mr. Robertson:

Q. What was Mr. Thomas Davis' connection? What is his union affiliation, if you know?

A. He is the regional director of Region 31 of the United Construction Workers, and District 50 of the United Mine Workers of America, with headquarters in Knoxville, Tennessee. Mr. Davis is also one of four assistant chairman to Mr. Denny Lewis, Chairman of the Organizing Committee of District 50.

page 345 } Q. What is his function as one of the assistant chairmen of the Organizing Committee of District 50?

A. He acts as a coordinator of regions in the southeast, including Region 58.

Q. Does that include Breathitt County, Kentucky?

A. Mr. Hunter said it did.

Q. Is Thomas Davis the boss of David Hunter?

A. He was described to me as being David Hunter's superior in the organization.

Q. Did you succeed in getting Thomas Davis on the telephone that Monday morning from the job site?

A. I called Mr. Davis at Knoxville and found that he was over at Kingsport, Tennessee. The call was transferred there, and I got him.

Q. What was your conversation with him?

A. I told Mr. Davis that I had a talk with Jimmy Codell, whose work had been stopped by these same people, and that Jimmy Codell had told me that Mr. Davis was going to issue instructions to David Hunter and to Mr. Hart not to interfere with our employees, meaning his employees and the employees of Laburnum. I asked Mr. Davis if he wouldn't tell Mr. Hunter and Mr. Hart to leave us alone. Mr. Davis said he wouldn't do that. I said, "We already are working A. F. of L. labor, organized labor. We have agreements with A. F. of L. unions." Mr. Davis said, "We don't recognize the A. F. of L."

page 346 } I told Mr. Davis the A. F. of L. is a pretty big organization. Mr. Davis said, "and so are we." He said,

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"We don't recognize the A. F. of L. any more than they recognize us."

Then Mr. Davis said that he felt sorry for people in our position, that we were just being caught in a fit between two big unions.

I told Mr. Davis that I was trying—that it occurred to me that it might be a good idea to have a meeting between some A. F. of L. officials and officials of the United Mine Workers and the United Construction Workers, and Mr. Davis said that he thought that was a good idea. I asked him if he couldn't meet me over in Salyersville the next day. He said he was busy and couldn't do it. He said it was a good idea to have the meeting and that he thought that I ought to invite David Hunter to come. I said I would try to do that. That is as far as I got with Mr. Davis.

Q. After you had that conversation with Thomas Davis, did you talk to Hart about the proposed meeting at Salyersville the next day?

A. Hart was sitting out in the bushes with some men, and I went outside and told him that I had just finished talking to Tommy Davis and that I was going to call some A. F. of L. people in Lexington and ask them to come over to Salyersville for me the next day at the Carpenter Hotel, page 347 } at ten o'clock, and that Mr. Davis had suggested that Mr. Hunter be invited to come to the meeting, that I would like to have him come. I told Hart I wanted him to come. I said "We will all get together here and see what we can do."

Mr. Hart said that he would come and that he would give the message to Mr. Hunter. I did not telephone Mr. Hunter, but relied on Mr. Hart to get the message to him.

Q. What was the upshot there that morning of Poe's efforts to get the men to go to work?

A. Robert Poe came back in the office and said that he thought that some of his men would go to work that afternoon after lunch or the next morning. I told him that we would like to start signing the men up. I asked Mr. Poe if he had some people who were capable of acting as Carpenter foremen. He wanted to know how many foremen we needed and I told him we wanted about three, depending on the number of men we had. He said that he would go out and talk to the men again.

After that, Mr. Poe came back and said that the men had taken another vote and that they didn't want to go to work and that he didn't think he could get his men to go to work

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until after the trouble with the United Construction Workers was straightened.

Mr. Hart at the job that day left no doubt in anybody's mind that he was going to have people to stop any men from working who tried. For the first time that morn-  
page 348 } ing he said that if we would recognize them for the laborers, we would work.

Q. Did he say anything about what he was going to do if you declined to recognize his union and use United Construction Workers Labor—what he was going to do then if you worked other men?

A. Before July first he had always taken the position with all of our men—

Q. You say July first?

A. I mean before August first it had always been his position that all of our people would have to become members of the United Construction Workers. At the meeting—when I talked to him on August first he then said that if we would recognize them for the laborers, others could work, but that if we didn't nobody could work.

The Court: Gentlemen, at this point let us recess for five minutes.

(Brief recess.)

By Mr. Robertson:

Q. Mr. Bryan, after the men finally decided that they would not go to work on Monday, August first, did you go through with your arrangements for the meeting you have mentioned at Salyersville for the next morning, Tuesday, August 2? I don't think it is necessary to go through the details of everybody you called up and everything, but did you  
page 349 } arrange the meeting?

A. Yes. I called Lexington and asked for the business agent of the laborers local, if he couldn't come over and bring as many A. F. of L. officials and representatives with him as he could.

Q. Did the meeting take place as planned on Tuesday, August 2, at the Carpenter Hotel in Salyersville?

A. Yes, it did.

Q. Did Mr. Thomas Davis come to the meeting?

A. No.

Q. Did Mr. David Hunter come to the meeting?

A. No.

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Q. Did Mr. Hart come to Salyersville and make himself available for the meeting if wanted?

A. Yes, he came and was outside the Carpenter Hotel. He said he would come in any time we wanted to see him.

Q. Have you got a record of who attended that meeting?

A. Yes, sir.

Mr. Robertson: I ask that the witness be permitted just to state from that who was there. I don't think he can possibly remember it without referring to his records.

By Mr. Robertson:

Q. Refer to your records, please, and state who was at the meeting and what their official capacities were.

A. John Humphrey, Business Agent, Labor-page 350 } ers Local Union 189, Lexington.

Q. Virginia?

A. Kentucky.

James Lockhart, Consultant and Conciliator, Laborers International Union.

C. M. Deatherage, Business Agent, Plumbers and Fitters Local Union No. 452, Lexington, Kentucky.

Joseph S. Daly, Business Agent, Painters Local Union No. 768, Lexington, Kentucky.

Buryl Travis, Business Agent, Operating Engineers Local Union No. 181, Lexington, Kentucky.

J. Roger Jones, Assistant Business Agent, Electricians Local Union 183, Lexington, Kentucky.

W. P. Freeman, International Representative of the United Brotherhood of Carpenters and Joiners, Indianapolis, Indiana.

R. T. Baxter, President, Building Trades Council, Lexington, Kentucky.

Robert Poe, Business Agent, Carpenters Local Union No. 697, Salyersville, Kentucky.

Henry N. Arnett, President, Carpenters Local Union No. 697, Salyersville, Kentucky.

B. E. Preston, Carpenters Local Union No. 646, Paintsville, Kentucky.

P. L. Trumble, Vice President, Carpenters Local Union No. 646, Paintsville, Kentucky.

C. H. Patrick, Carpenter Foreman, being a page 351 } member of Local Union No. 646, Paintsville.

M. F. Sublett, President, Carpenters Local Union No. 646, Paintsville, Kentucky.

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Representing us were: Mr. Meli, Mr. Veltry, and myself.

Q. Now, Mr. Bryan, tell us what happened at that meeting. Just as you have described the other meeting that happened on the night of the 26th at Paintsville, will you tell us what happened at this meeting?

A. The meeting lasted for about two hours. We discussed the whole situation, and Mr. Freeman, Mr. Baxter—was the president of the building Trades Council in Lexington—thought that we ought to take steps to bring an injunction suit. That matter was discussed. I told them—

Colonel Harris: May I interpose an additional objection. I don't think we have. That is immateriality, and relating the conduct of third persons who are in no ways connected with any of the defendants and for whose statement or conduct none of the defendants is responsible.

The Court: Very well.

Colonel Harris: Also, as Mr. Pollard suggests, on the grounds that it is unauthorized expression of opinion.

The Court: Very well.

Colonel Harris: May we have that as a continuing objection?

page 352 { The Court: That will be included in your objection and exception, yes, sir.

By Mr. Robertson:

A. All right, go ahead, Mr. Bryan.

A. I pointed out that we used A. F. of L. men on all of our jobs and had agreements with A. F. of L. unions, that I thought the men ought to go back to work.

Mr. Freeman wanted to know why I didn't do anything about it to stop the trouble. I said I had done everything that I could do. Then he said, "What do you want, do you want somebody to be killed before you do something, before you try to bring an injunction?"

The result was that they just said it was too dangerous out there and they were not going to advise their men to go back to work. I told them if they wouldn't get men to go back to work I would try to get other men to go back to work. Then after the meeting had been in progress for about 45 minutes I found that Mr. Hart was there, outside. So I asked the crowd, the group, if they would like to talk to Mr. Hart. They went into a kitchen—we were seated in the dining room at the Hotel. They went back into the kitchen and talked. They

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came back and said they had no business to talk to Mr. Hart about.

After that I went outside to see Mr. Hart and told him what the A. F. of L. business agents had said, and Mr. page 353 } Hart said he didn't have anything to talk to them about. I told Mr. Hart I was sorry that I had wasted his time.

By Mr. Robertson:

Q. Did Hart say his position regarding whether you could or could not work there was the same or different from what it had been?

A. He said his position was unchanged, that we could not go to work out there again unless we recognized United Construction Workers and made an agreement with the United Construction Workers and used his men, that if necessary he would bring a thousand men there and hold a picket line.

Q. After the meeting was over there on August 2 did you return to Huntington?

A. Yes. Mr. Meli and I drove back to Huntington.

Q. Did you report the results of your efforts to get the men back to work to the Island Creek Coal people and the Pond Creek Pocahontas Company people and the Spring Fork Development Company?

A. Yes. I told them everything that had happened, what I had tried to do to get the men to go back to work, and about the conversations and about the meeting at the Carpenter Hotel in Salyersville.

Q. I forgot to ask you one question: When you talked to Hart there at Salyersville at the time of the meeting on August 2 did he say anything about closing down the page 354 } Pocahontas Mine operation if necessary to keep your men off the job?

A. Yes, he did. He said that if we went back to work he was going to close down the mine operations by stopping the United Mine Workers men from working for Pond Creek.

Q. Did you report the whole situation to the three companies that I have mentioned?

A. You mean Pond Creek Pocahontas Company, Island Creek—

Q. Yes.

A. Yes, I made as full a statement as I could. I felt that I should do it.

Q. Do you remember whether you made that report to them on August 2 or on August 3?

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It was on August 3 because we didn't get back to Huntington until well along into the afternoon of August 2. I spent the night there and then went over to the Pond Creek offices the next morning.

Q. In consequence of what you told them about your inability to get men back on the job, what action, if any, did they take on your contracts for the work there at the job site?

Colonel Harris: We object to that on the additional ground that it calls for an unauthorized opinion of this witness. He uses the phrase in the question "in consequence of" and this witness wouldn't be the one to tell the motives, page 355 } but it would be the people who took the action.

The Court: You can ask the question whether he did get a reply to his report.

Mr. Robertson: Yes, sir.

By Mr. Robertson:

Q. After you told them that did you get any reply from them verbally to your report?

A. I was told that a Mr. Foster, a labor relations man for Pond Creek and Island Creek was down in Mingo County and would not be back until the afternoon, and that they wanted to talk to him about it. Later on in the afternoon I was told by representatives of Pond Creek and Island Creek that the situation out in Breathitt County had become so tense that they wanted to stop our work.

Q. When they gave you that—

A. That they were going to stop our work.

Q. When they gave you that information what instructions, if any, did you give Veltry as to what he should do?

A. I called Louis up after that and told him—

The Court: Louis who?

The Witness: Veltry.

—that Pond Creek had said they were going to stop our job, stop our work. I said I wanted a letter, that they had a right to terminate the contract if they wanted to, but I wanted a letter doing it and they said they would page 356 } give it to me the next day. I told Louis to try to get some men to get together the tools and equipment so that they could be moved to Richmond.

(Document exhibited to Mr. Mullen and Colonel Harris.)

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Colonel Harris: We want to add the additional ground to this letter that it is a self-serving declaration invited by the *alter ego* of the plaintiff subsequent to the alleged commission of the wrongs complained of.

The Court: Let the record show that objection and exception.

Colonel Harris: That is in addition to all the other grounds of hearsay of course.

The Court: Very well.

Mr. Robertson: I seem to have misplaced the original. I will use a copy.

The Court: Isn't the original attached to the notice of motion for judgment?

Mr. Robertson: No. I think Mr. Bryan gave me the original this morning with a photostat attached to it. I can use a copy and substitute the original later just to keep from delaying the proceedings.

Mr. Mullen: We don't raise any question about the copies, Your Honor.

The Court: All right.

page 357 } By Mr. Robertson:

Q. Is that the letter that Pond Creek Pocahontas Company wrote you that you have mentioned?

A. It is a letter dated August 4, 1949, from Pond Creek Pocahontas Company to Laburnum Construction Corporation, signed by Mr. R. E. Salvati, President.

Mr. Robertson: I offer this letter in evidence and ask that it be marked Plaintiff's Exhibit 27, and I will substitute the original.

Colonel Harris: May we have the same objection and a continuing objection and exception to all documents *long* this line?

The Court: That is understood.

(The letter referred to was marked Plaintiff's Exhibit 27 and received in evidence.)

Mr. Robertson: If Your Honor please, I would like to read this letter to the jury. Pond Creek Pocahontas Company, Huntington, West Virginia, R. E. Salvati, President, August 4, 1949, Laburnum Construction Corporation Richmond, Virginia, attention Mr. Hamilton Bryan, President.

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"Gentlemen:

"Please refer to Article 6 in our construction agreement with you dated October 28, 1948, covering the construction of a coal preparation plant at our No. 1 Mine in Breathitt County, Kentucky.

page 385 } "About noon on July 26, 1949, we understand that your men were prevented from continuing to work on the tippie by threats and other action of representatives of the United Construction Workers, a branch of District 50 of the United Mine Workers of America. Since that time, no further work has been done on the tippie.

"I am sure that you realize that it is necessary for us to complete the construction of the tippie at the earliest practicable date. Therefore, under the provisions of Article 6 above referred to, you are hereby notified that said contract and your employment thereunder is terminated. It will be appreciated if you will remove all your tools and equipment from the site of the work at the earliest practicable date.

"Yours very truly, Pond Creek Pocahontas Company, by R. E. Salvati, President."

By Mr. Robertson:

Q. Did you reply to that letter on the same date?

A. Yes, I did.

Q. I hand you what appears to be a carbon copy of your reply and ask you if that is your reply?

A. Yes, sir; this is the reply from us to Pond Creek Pocahontas Company dated August 4, 1949, signed by me.

Mr. Robertson: I offer the reply in evidence and ask that it be marked Plaintiff's Exhibit No. 28.

page 359 } (The letter referred to was marked Plaintiff's Exhibit 28 and received in evidence.)

Mr. Robertson: August 4, 1949. Pond Creek Pocahontas Company, Guaranty Bank Building, Huntington, West Virginia Mr. R. E. Salvati, President.

"Gentlemen:

"Receipt is acknowledged of your letter dated August 4, 1949, referring to Article 6 of our construction agreement with you dated October 28, 1948, covering the construction of a coal preparation plant at your No. 1 Mine in Breathitt County, Kentucky.

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"In the last paragraph of your letter, you notified us that the contract and our employment thereunder was terminated, all in accordance with the provisions of Article 6.

"While you did not give us ten days' written notice to terminate the contract as provided in Article 6, we hereby advise that we waive this requirement.

"In accordance with your request, we will remove our tools and equipment from the site of the work as promptly as possible. It will be necessary, of course, for us to employ certain persons to accomplish this and we understand that you will reimburse us for this cost.

"We sincerely regret that the threats and other action of representatives of the United Construction Work-  
page 360 } ers, a branch of District 50 of the United Mines  
Workers of America, have prevented us from continuing work under the contract. As you know, this has been most embarrassing to us.

"We greatly appreciate the many courtesies which you and your representatives have shown to us in connection with our work for you in Breathitt County.

"Sincerely yours, Laburnum Construction Corporation, by  
A. Hamilton Bryan, President."

page 361 } By Mr. Robertson:

Q. Mr. Bryan, on August 4, 1949, did you receive a letter from the Spring Fork Development Company through its president, W. A. Ogg, substantially in the form of the letter you have already read from Pond Creek Pocahontas Company, the letter from Spring Fork Development Company also terminating its contract?

A. Yes. This is a letter from Spring Fork Development Company to us, dated August 4, 1949, terminating our contract for the 25 dwellings.

Mr. Robertson: I offer the letter in evidence, and ask that it be marked Plaintiff's Exhibit No. 29.

(The letter referred to was marked Plaintiff's Exhibit No. 29 and received in evidence.)

Mr. Robertson: I don't think it is necessary to read that letter, because it is the same as the other one.

By Mr. Robertson:

Q. On August 4, did you reply to that letter substantially

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as you replied to the letter you received from Pond Creek Pocahontas Company?

A. Yes, sir.

Q. I hand you what appears to be your reply to the Spring Fork Development Company, and ask you if that is a copy of your reply?

A. Yes, this is a copy of our reply to Spring page 362 } Fork Development Company, dated August 4, 1949.

Mr. Robertson: I offer the reply in evidence, and ask that it be marked Plaintiff's Exhibit No. 30.

(The letter referred to was marked Plaintiff's Exhibit No. 30 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, when the Pond Creek Pocahontas Company and the Spring Fork Development Company told you on August 3 that they were going to cancel your contract, and you required them to give you a letter to that effect, did you stay there in Huntington until you got the letter, or did you come on back to Richmond and get the letter later?

A. No, I stayed in Huntington.

Q. And got the letter while you were in Huntington?

A. On August 4.

Q. And replied to it while you were in Huntington on August 4?

A. That is right. I wanted to be sure they were going to pay us for moving our tools out.

Colonel Harris: We move to exclude that answer as not responsive to any question, if the Court please.

The Court: Gentlemen, disregard the answer. It was not responsive to the question.

Mr. Robertson: If Your Honor please, of course, I know he has a right to say that, but that is utterly trivial.

page 363 } By Mr. Robertson:

Q. Why did you stay in Huntington?

A. I wanted to be sure to get the letter, and I wanted to be sure to have it understood that they would reimburse us for the cost of moving our tools and equipment away.

Q. What instructions, if any, did you give your new super-

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intendent, Veltry, about getting your tools and equipment off the job?

A. I told him to get together some men and make arrangements to have railroad cars come in to get the guide derrick, and the cots and blankets and stoves, and saws, and all the rest of the stuff we had out there, together, and send it back to Richmond.

Q. Did Veltry move out, pursuant to your instructions?

A. Yes. He hired some carpenters. He had two iron workers, four or five carpenters. He had a half a dozen or so laborers who had worked for us before.

Q. Did he report to you whether the United Construction Workers, or any of the defendants, made any objection to those men working?

A. Yes. A couple of days after he started to move the equipment out, he said that a representative of the United Construction Workers had told him he couldn't do that. Mr. Veltry protested, and said that surely no objection would be made to Laburnum moving its tools and equipment away. He said he never heard any more.

Q. On August 5, did you go to Pikeville, Kentucky, and have a conference with David Hunter?

A. I was in Huntington on August 5, and telephoned Mr. David Hunter at about 1:00 o'clock. Mr. Hunter was in Pikesville. I asked Mr. Hunter if he could see me that afternoon or the next morning. Mr. Hunter said that the next day, August 6, he had to go to Winchester, Kentucky, to see Jimmy Codell, but that he would see that afternoon. He said that if I left Huntington at about 1:30, I ought to be able to get to Pikesville around 4:30, and he would wait for me and I could see him in his office?

Q. Did you go to Pikesville and see him?

A. Yes. I went to Pikesville and got there at approximately 4:30.

Q. I am going to ask you what building his office was in?

A. His office was in the Soward Building in Pikesville. It is spelled S-o-w-a-r-d, I think.

Q. Do you know whether the United Mine Workers of America maintain an office in that same building?

A. At that time, the office of District 50 and United Construction Workers was on the third floor of the Soward Building, and the office of United Mine Workers was on the second floor. At the present time the offices are in the same building and are all on the second floor.

The United Mine Workers' offices are in the

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front of the building, and immediately next to those offices is the office of Mr. Hunter, District 50, and United Construction Workers.

Q. State what occurred when you had your meeting there on August 5 with Mr. Hunter? How long did the meeting last, approximately?

A. The meeting lasted from about 4:30 to almost 8:00 o'clock.

Q. Now, just tell what you said to him and what he said to you and what happened during the meeting.

A. I will have to refer to this memo a little bit on that. It was a right long conference.

I told Mr. Hunter that we always had dealt with A. F. of L. unions, and had never had any agreements with the United Construction Workers. It seemed to me that the United Construction Workers was organized somewhat differently from the A. F. of L. unions. I asked him if he would explain to me about the United Construction Workers, and how it operated. I asked Mr. Hunter if it was correct that the United Construction Workers was a part of the United Mine Workers of America. Mr. Hunter said that it was.

I then asked Mr. Hunter to explain to me how the United Construction Workers was connected with the  
page 366 } United Mine Workers of America and District 50,  
what the set-up was.

Mr. Hunter proceeded to do that. I was asking him questions from time to time about it.

Q. Just go ahead and give what his explanation was of the set-up.

A. Mr. Hunter said that the United Mine Workers of America was an organization that consisted of 31 groups or divisions known as districts, in connection with coal; and also of another group or division, known as District 50, in connection with everything except coal. He said that United Construction Workers was a part of District 50 which handled the construction business. Mr. Hunter said that John L. Lewis was the International President of the United Mine Workers of America, and of all its districts, including District 50, and that under John L. Lewis there was an Executive Board or Policy Committee. Some of the information, I might add, that Mr. Hunter gave, I don't think is exactly accurate, but I am telling you what he said.

Mr. Hunter said that on the International Executive Board were the Chairman of various districts. He said that Mr. A. D. Lewis was the brother of John L. Lewis, and that he

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was the Chairman of the Organizing Committee of District 50; that Mr. A. D. Lewis was on the International Executive Board.

Mr. Hunter said there was a man in Pikesville page 367 } named Tom Raney connected with the coal handling districts, who also was on the International Executive Board. He said that there was a Comptroller, a man named Mr. O. B. Allen, who was the Comptroller of District 50.

I don't remember whether he said Mr. Allen was on the Executive Board or not.

Mr. Hunter said that under Mr. A. D. Lewis, as Chairman of the Organizing Committee of District 50, were four Assistant Chairmen. He gave me their names.

Q. Do you have the names there?

A. Yes.

Q. Give them, please.

A. Thomas Davis, Frank Barnhart, a Mr. Moffet—I didn't get his first name—and a Mr. Brett.

During my talk with Mr. Hunter, I was making notes continually.

He said that Mr. Davis was the Assistant Chairman serving as coordinator of the various regions in the Southeast. He said that he, that is, Mr. Hunter, as the Regional Director of District 50, and United Construction Workers of Region 58, worked under Mr. Davis. He said that Region 58 comprised two counties in West Virginia, Logan and Mingo Counties; two counties in Virginia, Wise and Buchanan; and ten counties in Kentucky, Breathitt County and nine others.

Mr. Hunter said that as the Regional Director page 368 } of Region 58, he had charge of all activities of District 50 and the United Construction Workers in Region 58.

Mr. Hunter said that in a United Construction Workers local union, the construction people were usually by themselves, but that this was not always true; that sometimes they would have barbers and taxicab drivers, laundry employees, and other people, in a union with construction men.

Q. Let me interrupt you there a minute. Did Mr. Hunter say whether or not William O. Hart and this man Robinson were field representatives working under his orders?

A. Yes, I think he did a little later on.

Q. All right, sir. Go ahead.

A. I asked Mr. Hunter about the wage rates for construction people, and whether or not the barbers and taxicab

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drivers would have anything to say about the wage rates for carpenters; and he said that no, on that phase of it, it was separate.

Mr. Robertson: If Your Honor please, if I may break in now, I have found the original letter.

The Court: You may do that afterwards, when we recess for lunch.

By Mr. Robertson:

Q. When you entered into these discussions of wage rates and contracts, did Mr. Hunter turn over any data to you?

A. Yes, sir. I asked Mr. Hunter if he would  
page 369 } let me see a copy of the form of agreement which  
was used by the United Construction Workers  
with contractors. Mr. Hunter gave me a copy of the form, and  
I read it aloud, paragraph by paragraph, with him. We  
discussed the various paragraphs.

Q. Did he also give you, with that, a list showing various  
classifications of employees and the form of a membership  
application card, and a recognition agreement, and tabulation  
of wage rates (exhibiting document to Mr. Mullen)?

Mr. Mullen: No objection.

By Mr. Robertson:

Q. Did he turn over to you various data while you were  
there in his office?

A. Yes. He gave me a conformed copy of the agreement  
which he used with contractors. He gave me a copy of a mem-  
bership application form and check-off authorization used in  
connection with United Construction Workers. He gave me  
a form of agreement which he asked contractors to sign, and  
other people to sign, recognizing the United Construction  
Workers as the bargaining agent for employees pending the  
execution of a more formal agreement.

He also gave me a copy of the construction wage rates  
used by United Construction Workers in Region 58.

Q. Is the data which I have handed to you collectively, the  
data which he gave you there that afternoon and evening?

A. It is, with this exception: Mr. Hunter also  
page 370 } gave me a copy of the Rules of District 50, re-  
vised March 15, 1949, but with that exception this  
is what it was.

Q. Were the Rules that he gave you of District 50, a copy

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of the same rules that have been introduced in evidence here as an exhibit?

A. I haven't compared them word for word, but I assume that they are. Both of them were dated "Revised March 15, 1949."

Mr. Robertson: I offer all of the data which Mr. Bryan has mentioned, with the exception of those Rules, in evidence, and ask that it collectively be marked Plaintiff's Exhibit No. 31.

(The documents referred to were marked Plaintiff's Exhibit No. 31 and received in evidence.)

Mr. Robertson: Judge, I am sorry, but I am going to have to go through this data in great detail.

The Court: I think we had better have something to eat. We will recess, gentlemen, for lunch, and be back at 2:15.

(Whereupon, at 12:50 o'clock p. m., a recess was taken until 2:15 o'clock p. m., of the same day.)

page 371 } AFTERNOON SESSION.

2:15 p. m.

Whereupon,

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the witness on the stand at the time of recess, resumed the stand and testified further as follows:

DIRECT EXAMINATION—continued.

By Mr. Robertson:

Q. Mr. Bryan, there is a question I failed to ask you before lunch. You stated when you and Hart were at the job site on Monday, August first, you were discussing the proposed meeting for the next day at Salyersville and you asked him would he come to the meeting. Did he make any condition about coming as to whether you would work or not work if he came?

A. Mr. Hart said that he would come to the meeting but that he wanted it understood that we would not attempt to perform any more work until after the meeting.

*A. Hamilton Bryan.*

Q. Did you accept that condition?

A. I said we would not try to perform any more work. I knew we couldn't, actually.

Q. I will give you back this data which has been introduced here as Plaintiff's Exhibit No. 31. When we adjourned for lunch you were discussing Mr. Hunter's explanation to you of the organization of the three defendant unions.  
page 372 } Will you take up where you were discussing that and continue your discussion of what he told you there and what happened in that conference?

A. When we adjourned for lunch I think that I had just said that Mr. Hunter gave me a mimeographed copy of a form of agreement which was used by United Construction Workers in making agreements with contractors in Region 58. The agreement or form of agreement that Mr. Hunter gave to me has been offered in evidence. I discussed the form of agreement with Mr. Hunter extensively. In fact, the agreement was read aloud paragraph by paragraph and we discussed different portions of it. Mr. Hunter showed to me an executed copy of the agreement which United Construction Workers had made with the Beckett Construction Company of Huntington, West Virginia, dated in June, I believe, June 20, 1949. The agreement was executed by Beckett Construction Company, had been signed by Mr. Hunter as regional director on behalf of the United Construction Workers and had also been signed by Mr. Denny Lewis to indicate the approval of the National organization. The agreement signed with the Beckett Construction Company was very similar to the form of agreement which Mr. Hunter gave to me except that the agreement with the Beckett Construction Company contained a "no-strike" clause and also contained a no-suit clause. In other words, the contractor agreed not to bring any sort of suit against United Construction  
page 373 } Workers.

Mr. Hunter and I then discussed the matter of the wage rate of \$1.36 an hour for laborers in Breathitt County. I told Mr. Hunter that in my judgment the wage rate of \$1.36 an hour was preposterous, that my investigation had shown that the most that those laborers had received in the past was about 60 or 75 cents an hour and that our wage rate of 90 cents an hour was the most which they had ever received before we came there.

I told Mr. Hunter that I thought it was a mistake to start out with such a high wage rate, that it would be much better to have a wage rate lower than \$1.36 an hour and then have

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something to build on, to have some increases from time to time.

Mr. Hunter agreed with me. He said he thought I was right, but that the Beckett Construction Company had already agreed to a rate of \$1.36 an hour and that there wasn't anything that United Construction Workers could do about it.

After that we discussed the matter. Mr. Hunter said the State Highway Department in Kentucky had approved a wage rate of \$1.35 an hour. He showed me some papers that indicated that to be correct. Later I questioned him and he said that it turned out that that was the wage rate around Lexington and Louisville, which was a very different proposition from that in Breathitt County. It also developed page 374 } that Mr. Hunter was confused about rates between wage rates for skilled classifications for labor and for unskilled classifications of labor. In other words, \$1.35 an hour wage rate apparently was not the same thing as what we were talking about in Breathitt County.

After that, we discussed what seemed to be some advantages of the United Construction Workers arrangement. I asked Mr. Hunter if, for example, a carpenter could be used to tie reinforcing steel, which work is normally done by a reinforcing iron worker under A. F. of L. agreements. Mr. Hunter said yes, that that could be done under the United Construction Worker arrangement, that there would be no question of any jurisdictional disputes, but that while the man was performing the work of tying reinforcing steel, that is, the carpenter, he would have to be paid the wage rate for reinforcing iron workers. I told Mr. Hunter that I thought that was a good arrangement and one that had a lot of advantage to it.

The next item that we discussed was the United Construction Workers requirement about seniority lay-offs. I told Mr. Hunter that I thought that their requirement on the matter of lay-offs would just lead to constant turmoil. I don't recall that Mr. Hunter made any comment about it.

The next question that came up was on the matter of the clause which prevented the contractor from bringing a suit against United Construction Workers. page 375 }

I told Mr. Hunter that I didn't see any good reason why the contractor should be required to agree in advance that he wouldn't bring suit against the United Construction Workers, that if the contractor was done a wrong, the contractor should be able to bring a suit. Whereupon Mr. Hunter said that the United Mine Workers didn't like to be

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sued, didn't like to get into court, that the last time they were in court the United Mine Workers had been fined a million dollars and John L. Lewis had been fined \$20,000.

After that, I told Mr. Hunter that for many years we had worked with A. F. of L. unions and we had agreements with A. F. of L. unions in the Building Trades Council, and that I just didn't see how we could make an agreement with his organization without breaking our agreements with the A. F. of L. unions. Mr. Hunter made no comment that I recall at the moment. He said he thought we should be able to make an agreement for the laborers and that the United Construction Workers people would work peacefully alongside of A. F. of L. men, that that had been done in connection with work at Wheelwright.

I said I just didn't think that that would work out.

Q. Did you discuss with him what Hart had done and what your contacts had been with Hart?

A. Yes, we discussed that, too. I told Mr. Hunter page 376 } ter that I was sorry that Mr. Hart had led this big crowd of men, 75 to 100 people to our job and had threatened and intimidated our employees, that Mr. Hart had called our office in the middle of July, on July 14, and had said that we would have to make an agreeemnt recognizing the United Construction Workers, or he would do it, and that we had not gotten in touch with him, that I didn't know how we could make an agreement with his organization, but that I had understood from Mr. Hart that he would get in touch with me again before he did anything, and the next thing I knew Mr. Hart planned to lead this big crowd to our job. I had gotten in a truck and driven all night on July 25 to try to get to the job site, and just missed it because of car trouble, and when I did get there all the damage had been done.

Mr. Hunter's comment on that was that he was sorry, too.

Q. Did you remind him of your telephone conversation with him when you called him at Pikesville from the service station in Huntington?

A. Yes, I did. I reminded Mr. Hunter of the fact that I had placed a telephone call for him, rather for Mr. Hart, and had been unable to reach Mr. Hart on the morning of July 26, and I finally talked to Mr. Hunter and had asked him to relay a message to Mr. Hart to the effect that I was trying to get to the job as soon as I could and please to ask Mr.

Hart not to interfere with our men until he talked page 377 } to me.

Mr. Hunter said that he remembered the con-

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versation and that he had told Mr. Hart, that he had given my message to Mr. Hart.

Q. Did he say whose order Hart was working under on that occasion?

A. Yes. I told Mr. Hunter that I discussed the matter with Mr. Hart, and Mr. Hart said that he was working under orders and that I assumed that Mr. Hart was working under Mr. Hunter's orders. Mr. Hunter said that was correct.

Q. Did you say anything to Mr. Hunter about what you proposed to do to protect yourself in the circumstances?

A. Yes, I did. I told Mr. Hunter that we had been badly damaged. I told him that I was very mortified, that the coal company had taken our contract away from us. I told him that I didn't like one bit the fact that he had arranged to have about 100 mountaineers go out to the job site and threaten and intimidate our people and cause our work to be stopped, and that I expected to hold him and the United Mine Workers responsible for what had happened.

Q. Did he state whether or not he had heard that you might sue him?

A. Yes, he said he had already heard that we might bring a suit against him.

Q. What did he say along that line?

page 378 } A. I don't think anything much was said along that line except that he commented that he had already heard that we might bring a suit against them.

Q. Did he have anything to say about the Taft-Hartley Act?

A. Yes, in the course of the conversation we discussed the Taft-Hartley Act and we discussed the Virginia Right to Work law. I asked Mr. Hunter whether he liked the Taft-Hartley Act and he referred to the Taft-Hartley Act as a slave law that didn't give the United Mine Workers any protection. I said, "Why doesn't it give you protection? It protects everybody else?"

Mr. Hunter said it didn't protect the United Mine Workers because he and the other officials were good American citizens and were not communists and there was no reason why they should have to make an affidavit to that effect. With reference to the Virginia Right to Work law, he said that was the most vicious labor law of all and that with a law like the Virginia Right to Work law they didn't need any Taft-Hartley Act.

Q. Did Mr. Hunter in the course of the conversation deny that Hart had run you off the job or did he agree to it?

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A. He admitted, I think, that it was done. There was no question about the fact that Mr. Hart had led the people to the job and had made them stop work.

page 379 } Q. Did you tell Hunter—

A. Mr. Hunter seemed to think he was entirely justified in what he had done. There wasn't any question about what had happened, it was the justification.

Q. Did you tell Hunter about Hart having told you at Sal-yersville that he could bring a thousand men there to hold the line, if necessary?

A. Well, in the conversation with Mr. Hunter he said that all they wanted us to do was to recognize them for the labor-ers, that they hadn't tried to organize the carpenters. I took issue with him on that and told him that they had threatened our carpenters and they had demanded that the carpenters become members of the UCW, and Mr. Hart had done so repeatedly, that he did it in his telephone conversation with me on July 14, he did it at the job site on July 26, and he had done it at the job site when he stopped the men from working. I said Mr. Hunter told me that Mr. Hart told me that he could bring a thousand men to the job to hold his picket line.

Mr. Hunter then replied that there wasn't any question about it. He said Mr. Hart could arrange to have 6,000 men brought there to stop us from working.

Q. Did you express yourself about Hart's men coming there armed to run your men off the job?

A. I certainly did. I asked Mr. Hunter why it was that Mr. Hart had brought the group of men there with guns. Mr. Hunter's response to that was that it was almost the second nature of a man in the mountains of Eastern Kentucky to carry a gun, and he couldn't help it, that he had often seen meetings up at Tiptop and at all those meetings people came there with guns, that the butt of a gun was used as a gavel to call them to order. I explained to Mr. Hunter that if he and Mr. Hart were going to undertake to organize groups of men that would go out and terrorize people with guns and then they got out of control, that they couldn't disclaim responsibility for it. Mr. Hunter seemed to have the idea that if these people came there with guns and shot and killed somebody, he didn't authorize it, and it wasn't his responsibility.

Q. During the course of the conversation did it become necessary for you and Mr. Hunter to reconcile any discrepancy in your recollection as to what Hart had done on a given day?

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A. Yes, we got into a discussion about whether or not Mr. Hart had gone to the job site on a certain date. I am not certain about the date at this time, but I think it was August first. I said that Mr. Hart had gone to the job and Mr. Hunter seemed to think that he had not gone to the job. Mr. Hunter said he could clear up the question very easily by looking at his files. He opened up a file drawer page 381 } and there was a whole series of files in a very neat arrangement. He pulled out a file folder that was clipped on a board, a cardboard back. It was a weekly report file that gave a daily account day by day of the activities of the different people who worked under Mr. Hunter. This was the report on Mr. Hart. Mr. Hunter said that this was a report that he sent in every week to Washington making a report on the activities in his region. He found the item that covered the question that we were discussing, and that cleared it up. I don't remember now exactly how it was cleared up, but I was able to glance briefly at the files.

Q. Since this suit was started, have you through interrogatories to the defendants attempted to get copies of those reports to which Mr. Hunter referred during that conference?

A. Yes.

Mr. Fred G. Pollard: Objection, Your Honor. The interrogatories are on file and they should be entered, and if the plaintiff is going to testify about them, they should be introduced.

Mr. Robertson: I never heard such a suggestion as that, Your Honor. The interrogatories and answers to them are entirely independent of this. They may or may not be introduced in evidence. They have not been introduced yet.

The Court: You merely asked him a question page 382 } about whether he received them.

Mr. Robertson: Whether he tried to get them by asking for them and whether he did get them or not and what was the reason he was told that he couldn't get them.

Mr. Fred G. Pollard: Your Honor, the best evidence is the interrogatories themselves, and he can't sit here and testify what is in the interrogatories when the interrogatories are sitting right up there on the desk.

Mr. Robertson: I never heard of such a proposition.

The Court: We will recess, gentlemen, and the Court will hear counsel in the Chambers.

(The following proceedings were held in Chambers:)

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The Court: Will you read the question and the objections?

(The question and objections were read by the reporter.)

Mr. Robertson: I might be able to shorten this discussion a little bit in this way: The reason I made the reference to the interrogatories was to show that we had asked for those answers in the way provided by law. If I were to ask him for those reports as a matter of courtesy, they would have a right to decline to let me have them. When I ask for them in the form of interrogatories, it is their duty to let us have them. Therefore, the purpose of my question is to show that

I asked in the way that the law allows me to ask  
page 383 } to get them as a matter of right. We didn't get them because they said they had been destroyed.

Mr. Allen: Section 8-320, the provision for the filing of the interrogatories and then Section 8-322, the provision for the answers being introduced in evidence: "Answers to such interrogatories may be used as evidence at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery." The cases construing this section hold that, for instance, a plaintiff can introduce the answers to interrogatories filed by the plaintiff against the defendant, and on the other side the defendant can introduce interrogatories filed against the plaintiff and his answers.

We asked in the interrogatories for these reports and they answered that they had been destroyed.

Mr. Robertson: Excuse me one minute. Just to shorten it. I am perfectly willing to change the form of the question and ask Mr. Bryan if since this trial started, since this suit was instituted, he has called on the defendant for copies of those reports. His answer would be yes. "Have you got them?" "No." "Why did they tell you you couldn't get them?" "Because they said they had been destroyed."

Mr. Allen: Let me finish what I started.

Mr. Fred G. Pollard: While you have that book will you please read the next two sections to the Court on  
page 384 } those interrogatories. I think you referred to 320.

Mr. Allen: You mean that is on production of books and other writings. "In any case at law a party may file in the clerk's office, and in any case or matter before commissioner of a court any person interested may file with such commissioner, an affidavit, setting forth that there is, he verily believes, a book of accounts or other writing in possession of

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an adverse party or claimant containing material evidence for him, specifying with reasonable certainty such writing or the part of such book. The clerk or commissioner shall issue a summons, directed as under 8-320, requiring him to summon the proper party to produce such writing, or an exact copy of any such part of such book, and make return thereof as under that section. With the summons there shall be a copy of the affidavit, which shall be delivered to the person served with the summons at the time of such service. If the summons be against a plaintiff who is not a resident of this State, or a defendant who is not a resident of this State but who has appeared in the case or been served with process in this State, the service may be on his attorney at law."

Mr. Fred G. Pollard: The next section, too, please, sir.

Mr. Allen: "When the court in which the case is, or whose commissioner issued the summons, is satisfied  
page 385 } that the person filing such affidavit has no means  
of proving the contents of such writing, or of  
such part of the book, but by the person summoned producing what is required by the summons, and that the same is relevant and material, and sees also that the call therefor has not been unreasonably delayed, it may, unless the person summoned shall, in a reasonable time, either produce what it so required, or answer in writing, upon oath, that he has not under his control such book or writing, or any of the like import, attach him and compel him to do the one or the other. It may also, if it see fit, set aside a plea of such person, and give judgment against him by default, or if he be plaintiff, order his suit to be dismissed with costs, or if he be claiming a debt before a commissioner, disallow such claim."

I don't see where those sections have anything to do with it. Do you want to say anything about that?

Mr. Fred G. Pollard: Your Honor, in no case in the entire interrogatories did plaintiffs file the affidavits required by those two sections, describing the documents they wanted. We think that Your Honor is in error when you required us to answer them. That is off the point of this subject.

Whatever our answer was is in those interrogatories and that is the best evidence, and Mr. Bryan can't testify to that.

page 386 } Mr. Mullen: If Your Honor please, the witness has no information whatever on this subject except what he gets from the interrogatories. He called for those, the interrogatories have been answered, that they have been destroyed. He has no knowledge other than that. He is

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endeavoring to testify on the answers given in the interrogatories. The law of Virginia is perfectly clear that all or none of the interrogatories must be introduced.

Mr. Allen: If Your Honor please—

Mr. Mullen: I will give you the cases if you want it. It is perfectly clear.

Mr. Allen: All we want to do is to avoid the breaking of the continuity of our story as it is being unfolded. We don't want Mr. Bryan to testify to what is in the interrogatories. We want the simple question if they have been called for and if they have been received. If these gentlemen insist on our stopping right here, right now, and digging out those interrogatories, which we are going to introduce later, we can go and produce this particular question and the answer to it and there they have filed the reports covering other periods but the reports covering the period here in which this trouble arose they have filed them and they say themselves that they have been destroyed.

Mr. Robertson: If Your Honor please, to solve page 387 } the thing I will withdraw the question, and I propose now in order that we won't have to come running out again—I propose to ask Mr. Bryan, "Since this suit was instituted have you attempted to get copies of those reports that you saw there?" His answer would be "Yes." "Have you been able to get them?" No. "Were you given any reason why you couldn't get them?" He was told they have been destroyed.

Mr. Allen: That is all we want now.

Mr. Fred G. Pollard: That is all we are objecting to. That is exactly what we are objecting to. He has no independent knowledge.

The Court: In other words, he is getting his information from the interrogatories.

Mr. Mullen: Giving an answer in the interrogatories when all or none of the interrogatories must be introduced.

The Court: I think the objection is good. I sustain the objection.

Mr. Robertson: The plaintiff excepts for the reasons stated.

page 388 } (The following proceedings were had in open court:)

Mr. Robertson: If Your Honor please, since the Court has ruled that in order to get that information we must refer to

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the interrogatories, we think that this is just as good a time as any to do it, and we are going to ask to take a recess until we can dig through it and find it. We had hoped to save this time, but if that is what we must do, we can find it.

Mr. Fred G. Pollard: May it please the Court, it is the position of the defendants that if plaintiff introduces any interrogatories, they must introduce them all. I suggest—

Mr. Robertson: I think the Court is in control of that situation.

The Court: The Court is in control but the Court will hear both parties on all controversial matters, and if you want to recess to go into the question of interrogatories the Court will do so. If you want to delay the matter and take the question up later, the Court will give you an opportunity to put Mr. Bryan back on the stand. It occurs to the Court that we might save some time if we go on with other questions and later on the Court will hear argument on the question of interrogatories.

Mr. Robertson: That is all right.

By Mr. Robertson:

page 389 } Q. During the course of that interview did this man Robinson who had been out on the job site put in my appearance?

A. He came in to the conference during the very last part of it.

Q. Mr. Bryan, I believe I pretty generally covered what I think occurred in that conference between you and Mr. Hunter there on August 5. Have you any recollection of anything else that occurred there in your conversation with him that I haven't asked you about?

A. Yes.

Mr. Fred G. Pollard: That is a leading question if I ever heard one. I object to it.

Mr. Robertson: Have I indicated what the answer is or what information he is going to give out?

The Court: I will overrule the objection.

Mr. Robertson: You ought to go to night school, Freddie.

Mr. Mullen: We object to a remark like that. We are trying to facilitate the case.

The Court: The jury will disregard sidebar remarks.

The Witness: During the course of the conference with Mr. Hunter I asked him what effect making an agreement with the United Construction Workers on one job would have in

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page 390 } connection with other jobs that we might have. I asked him if for example, we should make an agreement with the United Construction Workers on the job in Kentucky and should then be awarded a job in Kansas City, whether he would close down the job in Kentucky unless we made an agreement with him on a job in Kansas City.

Mr. Hunter said that his organization didn't work that way, that he wouldn't do that. I told Mr. Hunter that after my experience with them I didn't have any confidence in any agreement that United Mine Workers might make that I was satisfied that his organization had only one rule, and that was the rule of might is right.

Mr. Hunter said that I just didn't understand.

There is one other thing that occurred. I asked Mr. Hunter what would happen if we should make an agreement with the United Construction Workers for the common laborers, and then our A. F. of L. employees should get mad about it and have a picket line. I asked Mr. Hunter if United Construction Workers would honor the A. F. of L. picket line. Mr. Hunter said that I need not worry about that, that United Construction Workers would always see to it that its contractors would properly be taken care of and protected. Mr. Hunter said that each case of that kind would have to be decided on its own merits and he indicated strongly that United Construction Workers would not pay any attention to A. F. of L. picket lines.

By Mr. Robertson:

page 391 } Q. Mr. Bryan, on August 7, 1949, did your field clerk, Maynard Ragan, send you a number of applications by your laborers who had previously applied for membership in the Salversville A. F. of L. local?

A. On August 7, 1949, Maynard Ragan and Robert Poe, who was the business agent of the Salversville Carpenters Local 697, met me in the law offices of Mead & Johnson in Paintsville. I had been told that all of our laborers and labor foremen had made application to become members of the Salversville Local as carpenter helpers, and that Bob Poe had the applications. I asked Robert Poe if he would send them to me, that I would like to see them. So Robert Poe said he would give them to Maynard Ragan, who would send them over to me.

Q. Is that package the package that you received?

A. After that, Maynard Ragan mailed the application

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blanks to me and we received them in Richmond on August 10, 1949. Here they are.

Mr. Mullen: Do you propose to introduce those?

Mr. Robertson: Yes.

Mr. Mullen: If Your Honor please, the proper party to introduce those is the man named Poe. They are third-hand in Mr. Bryan's hands. The man who took those is the man who should identify them and who can tell under what circumstances they were taken.

Mr. Robertson: If Your Honor please, I am page 392 { going to prove through Mr. Bryan here that he has compared these signatures with the signatures on his payroll and that he has thereby established the authenticity of them. At the proper time I am going to have Maynard Ragan here to testify to the circumstances under which he actually received them. I offer them in evidence for what they are worth. I think it is material and relevant in view of the fact of the statement that was made by Mr. Mullen in his opening statement that these laborers of ours had joined up with the United Construction Workers when here are their applications at the very time—I think most of them are dated about July—I haven't looked at them—I have forgotten, the 16th or the 26th, the very time we are talking about, and they had filed applications with the Salyersville Local to join up there.

The Court: Do I understand you are going to have the man who took those applications present?

Mr. Robertson: Robert Poe? No, sir. I would like to tell this Court in the absence of the jury why I am not having him. I don't think I have a right to say it here in the hearing of the jury. If the Court tells me to go ahead—I ask, Mr. Mullen, may I tell?

Mr. Mullen: If you think it is proper before the jury. I know what would happen if you said it before the jury.

Mr. Robertson: I would like the jury to know page 393 { it.

The Court: There are a lot of things you gentlemen would like the jury to know that I haven't permitted you to tell.

Mr. Robertson: I think I will question Mr. Bryan along that line right now, Your Honor. I think I might as well.

Mr. Mullen: May I see one of them?

Mr. Robertson: Not yet, because you have objected to them.

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By Mr. Robertson:

Q. Mr. Bryan, in the latter part of August, 1950, did you go with me to Adrian, Michigan, in an effort to take the deposition of Robert Poe?

A. Yes, sir.

Q. Were we successful or unsuccessful in taking his deposition?

Colonel Harris: We object to that as wholly immaterial, if the Court please.

Mr. Robertson: If Your Honor please, I am just going to tell it right now.

The Court: I suspect we had better recess. There are two or three matters that you want to argue. We will just have to recess and hear it in Chambers.

page 394 } (The following proceedings were had in chambers.)

Mr. Robertson: If Your Honor please—

Mr. Fred G. Pollard: Before you start, sir. I think Mr. Bryan is still on the stand, and he will have to leave.

The Court: Mr. Bryan, you will have to excuse yourself. I do not know what will come up.

Mr. Robertson: If Your Honor please, the papers in this case will show this situation, and I won't stop and get the precise date; the papers will show it.

Mr. Bryan and I thought we had made arrangements to take the deposition of a man named Bradshaw, and Robert Poe, in Adrian, Michigan, in the latter part of August, 1950. We went out there and got in touch with him and interviewed him. He promised to give a deposition along the lines that we had anticipated and along the lines indicated in what has transpired thus far in this case.

On the morning that the depositions were to be taken, he arrived at the hotel and demanded that he be paid \$1,000 cash before he would testify. We explained the impropriety of it to him, and told him that we couldn't do it, and we wouldn't want to put ourselves in that position, and he wouldn't want to put himself in that position. He said, "Of course, nobody would know about it but you and me."

Finally, after we had talked a while, he said  
page 395 } that he was busy and couldn't stay but a few minutes, and if we would pay him \$500 before the deposition and give him a note for \$500 before we left town that day, that was his final proposition.

We told him, "Well, we couldn't do that." So he left.

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By then, I was already late to go to the office where the deposition was to have been taken. I read into the record that the witness we had expected to testify had declined to testify. Bradshaw never showed up at all. He never showed up at all. I said I would make my explanation to the Court at the proper time.

This, I take it, is the proper time, and I think I have a right to tell the jury why we haven't got Poe here; and in those circumstances, I think these applications are properly admissible in evidence for what they are worth. They may think they are not worth anything, but the jury may put such weight on them as they want.

The Court: Mr. Allen, do you want to say anything?

Mr. Allen: No.

Mr. Moore: No.

The Court: Mr. Mullen?

Mr. Mullen: If Your Honor please, the only one who can prove the identity of those is Poe. He is the man who took them.

page 396 } Mr. Robertson: I would like to add, a man named Hackett took a few of them, and we expect to have Hackett here.

Mr. Mullen: It has already been testified that they phoned their man out there to have them taken before he went and took them, after they had been in conference with Hart over the phone.

If they were taken, the circumstances under which they were taken show whether they are of any value or not, and to identify when and how he took them is for Poe to do. He should say, "These are the applications given to me as the representative of the A. F. of L. Union, applications to join the union." We have a right to ask the man what he did with them, whether or not he advised them later that he was sorry he could do nothing, that there was no place to take them in. Mr. Poe said he never delivered them to you for use on trial.

Mr. Robertson: I think Poe is lying.

Mr. Mullen: He may be. I think if that is the kind of people we are dealing with, he might be lying.

Mr. Robertson: We might all of us be lying.

Hamilton Bryan is prepared to testify that he has compared the signatures on those cards with his payrolls, and that they are the identical signatures. If there is any dispute about that, we can get the best handwriting expert that I know

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around here, Cassidy, and let him say whether  
page 397 } they are the same signatures or not.

The Court: I doubt if Mr. Bryan is a handwriting expert.

Mr. Fred G. Pollard: He is an expert on many things.

The Court: But Mr. Cassidy, the Court considers an expert.

As presently advised, the Court is of the opinion that you can get Mr. Cassidy here to compare signatures on the payroll as against the signatures on these cards.

Colonel Harris: May I offer a suggestion there?

The Court: Yes.

Colonel Harris: It seem to me, developing what Mr. Mullen said, that we are entitled to know the circumstances under which those men executed those signatures, and the man who got them may have held out inducements or promises or may have got them on condition, and if they can just bring somebody in and say, "This is the signature of that man," it deprives us of our right to get all the legitimate evidence on the question of what happened when they signed those papers, those cards.

Mr. Robertson: If Your Honor please, the Defendants claim that these men right here, our laborers, are members of the United Construction Workers. If they are in their own membership, they can bring them here and have  
page 398 } them tell anything they want to tell. They may be bringing some of them here, I don't know.

Colonel Harris: The fact that we may want to do something that he wants to do, equality of desire, doesn't mean abrogation of the rules of law on evidence, Judge. Every time any question comes up, counsel on the other side bring up that we are going to want to do something, but the rules of law don't change merely on account of the desires of the parties.

Mr. Robertson: I address myself to the rule of law, Your Honor. According to their own statement, these men are members of their union; and if so, it is within their power to bring them here. They can offer any explanation they want.

The Court: Let me see one of those.

Mr. Allen: If Your Honor please, I don't want to prolong this discussion, but let's get back to the simplicity of the thing. They say those men signed up with the United Construction Workers. We present applications for membership in the A. F. of L. with these men's names signed to them.

*Prima facie*, as soon as a man says he knows their signa-

*A. Hamilton Bryan.*

tures and that these are their signatures—he doesn't have to be any expert. All he has to say is that "these are the signatures of these people. They worked for me. I have their payroll checks. I have documents signed by them. I know that these signatures are the signatures of those page 399 } men." That is as far as we have to go. We have made a *prima facie* case for the introduction of those applications in evidence.

If they claim they are forgeries, that they were gotten by false pretenses or improper inducements, it is up to them to bring evidence here to prove it.

Mr. Roebt N. Pollard, Jr.: They are putting on us, Your Honor, laying the foundation for those documents. They admit they haven't laid the proper foundation when they endeavor to show by *ex parte* testimony whose signatures appear on the cards.

Mr. Robertson: I have offered to bring Cassidy here, if the signatures are challenged. It never occurred to me that they would be challenged.

I suggest the Court defer its ruling on it until I get Mr. Cassidy to come here. If Mr. Cassidy says they are all forgeries, I suppose you will want to offer them; but we won't, if they are forgeries.

Mr. Mullen: Will there be a proper foundation when you get him here?

Mr. Robertson: In view of all that has been said before the jury, I think I have a right to explain to the jury, through Mr. Bryan's testimony, why we haven't got him here and don't expect to have him here.

The Court: Let us settle this question first.

Would you care to address yourselves any further page 400 } ther to this subject?

What was the man's name who turned these cards over to Mr. Bryan?

Mr. Robertson: Maynard Ragan, his Chief Clerk on the job. Poe gave them to Ragan for forwarding to Bryan.

The Court: Is Ragan going to be here?

Mr. Robertson: Yes.

Mr. Allen: Your Honor understands who Poe is?

The Court: Yes.

Mr. Allen: You have the applications coming from a man who is supposed to get them and has charge of them. You have them given by him to the Clerk of the Plaintiff company, and he turns them over to the Plaintiff.

*A. Hamilton Bryan.*

The Court: Then Ragan is going to testify that Poe turned them over to him?

Mr. Robertson: Yes.

The Court: I think under those circumstances, a handwriting expert should compare the signatures, and the Court will admit them for what it is worth.

Mr. Robertson: I will have that done overnight.

Mr. Fred G. Pollard: We except to Your Honor's ruling.

The Court: Yes.

Mr. Robertson: On the other question, Your Honor, I say in view of the point that has been made here, I page 401 } have a right to have Bryan testify why we haven't got Poe here.

Mr. Fred G. Pollard: Your Honor, if Mr. Bryan can testify to that, I would like to testify why several of our witnesses aren't here.

Mr. Robertson: That will suit me all right.

The Court: Is there any objection to that, if both parties can testify to that?

Mr. Robertson: If you do, you must retire from the case. Bryan is not a lawyer.

The Court: I think it is in the discretion of the Court whether an attorney retires from the case.

Mr. Robertson: He knows what my thing is. If he will indicate what the line of his testimony is, then I will tell him whether or not I agree to it.

Mr. Fred G. Pollard: I have no idea of telling you at this time.

Mr. Robertson: I won't agree to it, then.

The Court: That is in the nature of a deposition that you have, is it not?

Mr. Robertson: No, sir.

Get the paper there and show it to the Court.

The Court: I thought you made the statement in the deposition.

Mr. Robertson: I didn't tell what it was. I said—it will be here in a minute.

page 402 } The Court: That is all right. I will take your word for it.

Mr. Fred G. Pollard: Mr. Robertson's statement is absolutely correct.

Mr. Robertson: If Your Honor please, this fellow Bradshaw out there kept on hinting that he wanted a hand-out, and we made out like we didn't get the point. He would do like

*A. Hamilton Bryan.*

this, and say, "You can't live on thanks, you know. It takes money to live. It takes money to live these days."

What was I going to do; get him a Virginia ham?

"Well, I don't know. Of course, I plant seed, and I expect them to come up."

We just couldn't see the point.

Then when the morning came for the shakedown, Bradshaw didn't show up at all, so we had nothing on him, you see. Bradshaw could walk right in here today and say I entirely misunderstood him and was doing him a great injustice. Poe came on in, and Poe didn't make any bones about it.

I said, "You don't want to look like you are selling out, and we don't want to look like we are buying you. What would happen? Suppose they spring that on you at the trial; how would you feel?"

He said, "Wouldn't nobody know anything about it but you and me."

page 403 } The Court: What is your objection to Mr. Bryan's stating those facts?

Mr. Fred G. Pollard: It is not material to the case.

Mr. Robertson: It is, Your Honor. They are going to argue: why didn't we have Poe here?

The Court: Do you want him to say why he isn't here?

Mr. Robertson: Yes, a reasonable explanation. We could have had him here if we bought him.

Mr. Fred G. Pollard: He can explain if he is asked why Poe isn't here.

Mr. Allen: The Business Agent for the A. F. of L. under whose jurisdiction these applications would come, was receiving them and handling them. He is the man to come here and testify about all this. We would certainly be criticized and there would be a presumption against us for not having him here, if we don't explain his absence.

Mr. Mullen: What was Ragan's part in it?

Mr. Allen: He didn't do a thing but just receive them from Poe, that is all.

Mr. Robertson: Hamilton Bryan was coming back to Richmond, and it was agreed there that—Poe didn't have them with him, and he would go back and get them and give them to Ragan, and Ragan would send them on in to Richmond to Bryan.

page 404 } Mr. Mullen: Did Ragan help to get them originally?

*A. Hamilton Bryan.*

Mr. Robertson: No, he didn't help to get them.

The Court: How far do you want him to go in his statement?

Mr. Robertson: Just to say that Poe tried to make us pay him a thousand dollars, and we wouldn't do it, and therefore he is not here.

Mr. Allen: And wouldn't give his deposition, either.

Mr. Robertson: Yes, he refused to give his deposition.

Colonel Harris: Judge, unless we accuse them of something,—if we were to make any accusation against them that implied that they had failed in their duty to produce evidence, they might be entitled to an explanation, but no accusation has been made against them.

You could prolong any trial indefinitely by just offering reason after reason as to why X, Y, Z, and A, B, C, and everybody else, hasn't been subpoenaed.

Mr. Robertson: We are not talking about that, Judge. We are talking about this one particular thing, this instance.

To show you how material it is, with all this talk that has happened about Poe and all that has been said now before the jury about Poe, they will say—Mr. Mullen just page 405 { went to town on that. "If he took them, why don't you have him here and prove them through the proper man?" That challenge has been laid down to us in the presence of the jury. Now we have a right to meet it.

Mr. Mullen: My language was, "I object to its being proved this way. The proper person to prove them is the man who took them."

Mr. Robertson: That is right.

Mr. Lowden: You also said you knew why he wasn't here.

Mr. Mullen: That was his side remark, and I answered it, and had a right to answer it. If he is going to make side remarks to the jury—

Mr. Robertson: And I have a right to show why he is not here and why we don't have his deposition.

Mr. Fred G. Pollard: In that connection, Your Honor, we would like to move the Court to ask the jury to disregard Mr. Robertson's remarks just before we retired back here to chambers.

The Court: What were the exact remarks?

Mr. Robertson: I don't remember what they were, but it is all right with me to tell the jury to disregard it.

The Court: Do you remember what the exact remarks were?

*A. Hamilton Bryan.*

Mr. Fred G. Pollard: He implied to the jury page 406 } that something happened to Mr. Poe which we had done to keep him from being here.

Mr. Robertson: Oh, no. You are wrong on that.

Mr. Allen: He doesn't intimate that.

Mr. Robertson: In view of that, that is just another reason why I should be permitted to tell the jury what happened.

Judge, it just seems to be that is ordinary fair play and common sense. There is nothing to it.

The Court: I will let him answer the question.

Mr. Fred G. Pollard: Reserve an exception.

Mr. Mullen: Do you want to take up the question of the interrogatories? We can dispose of that in a very few seconds.

The Court: Are you going into that right now?

Mr. Robertson: No.

The Court: One of the members of the jury wants to go to a doctor this afternoon at about a quarter to five, and I promised him I would adjourn at 4:30. He is having some sinus trouble. I thought maybe when we adjourned, we might come in here a few minutes and take that question up.

Can you think of any other question now that may come up before 4:30 that will require a conference?

Mr. Lowden: Can we think of anything that won't?

Mr. Robertson: Just to save time, as I understand page 407 } stand, I am going to try to get Cassidy tonight to make this comparison and be back here on that.

The Court: Yes, and they may be offered for what they are worth.

Mr. Robertson: Yes.

(The following proceedings were had in open court.)

Mr. Robertson: If Your Honor please, I think the sequence of this matter will be clarified if I at this time introduce in evidence the transcript of what occurred at Adrian, Michigan, on August 22, 1950, and then after that, have Mr. Bryan go ahead with his testimony.

(Document exhibited to Mr. Mullen.)

Mr. Mullen: If Your Honor please, this is not a deposition. There was no evidence taken here.

Mr. Robertson: I will ask the Court to look at it and rule.

*A. Hamilton Bryan.*

(Document handed to the Court.)

The Court: Why not let Mr. Bryan go ahead and testify, and we will take this up later.

Mr. Robertson: All right, sir.

Mr. Bryan, come around to the stand.

By Mr. Robertson:

Q. Mr. Bryan, there has been repeated reference here to a man named Robert Poe, one of the representatives of the Salyersville Local, A. F. of L. Do you recall his page 408 } connection with that union?

A. Robert Poe was Business Agent of the Salyersville Local.

Q. After the occurrences at the job site, about which you have testified, happened, did you take an affidavit or statement from Mr. Poe about the occurrences?

A. Yes.

Q. In consequence of that, did you go to Adrian, Michigan, with me for the taking of Mr. Poe's deposition there, scheduled for August 22, 1950?

A. Yes, sir.

Q. Where is Adrian, Michigan?

A. It is about 50 or 60 miles south of Detroit, closer to Toledo than it is to Detroit.

Q. Did you contact Mr. Poe there and arrange to take his deposition on August 22?

A. Yes.

Q. Did he come to see you on August 22?

A. Yes, he came there.

Q. Did he give his deposition?

A. No; he refused to do it.

Q. Why?

A. Well, Robert Poe said that he lived at Ivyton, Kentucky—

Mr. Fred G. Pollard: Your Honor, this testimony page 409 } many looks like it is not going to be what Mr. Robertson told us it was going to be.

By Mr. Robertson:

Q. Tell us why he refused to give his deposition.

The Court: The objection is sustained. Just give your reasons.

*A. Hamilton Bryan.*

The Witness: The two reasons—

Mr. Pollard: Mr. Robertson gave but one reason.

By Mr. Robertson:

Q. Mr. Bryan, you just give the one main reason that happened when you and I were in the room.

A. Robert Poe wanted to be paid a thousand dollars cash in advance to testify. He offered other reasons.

Q. Did he ever reduce that offer?

A. We said it wouldn't be proper and it wasn't right and we couldn't do it. He finally said, "I have one last proposition. Pay me \$500 now and give me a note for \$500."

Q. Did you accept that proposition or decline it?

A. No, we said we couldn't do that, that it was unlawful and wasn't right.

Q. Did he say anything about anybody knowing anything about it then?

A. I didn't understand your question.

Q. Did he say anything then about who would know about it?

A. He said wouldn't anybody know anything  
page 410 } about it but him and me.

Q. Is he the same Poe who took these applications?

A. Bob Poe was carpenter who had worked for us for some time and became business agent of the Salyersville local. Pursuant to Mr. Delinger's request, he arranged to have those applications signed, and later gave them to me through Mr. Ragan, and there was no question about the genuineness of them whatsoever.

Mr. Robertson: If Your Honor please, before I offer them I am going to have Mr. Cassidy, the handwriting expert, determine whether they are valid or invalid.

The Court: All right.

By Mr. Robertson:

Q. So far as you know, will Mr. Poe be here to testify for the Plaintiff during this trial?

A. No, he said he wouldn't testify for us unless we paid him, and threatened to testify for the Defendants if we didn't. I haven't heard any more from him.

Q. Mr. Bryan, did you have another interview with Mr. David Hunter at Pikeville on May 15, 1950?

A. Yes, sir.

*A. Hamilton Bryan.*

Q. How did you happen to have that interview with him?

A. We had been invited by the Island Creek Coal Company to submit a proposal to construct a church and a  
page 411 } recreation building in Mingo County near Ragland, West Virginia, or Delbarton. I think it is closer to Ragland. We had our estimate practically prepared and were going to submit it in the first part of May. At about that time I got information that another contractor, the R. H. Hamill Company, of Huntington, West Virginia, was constructing a small office building for Island Creek Coal Company at Ragland and that United Construction Workers had closed down the job of the R. H. Hamill Company. I decided that before we submitted our proposal we had better investigate the situation a little further. So I took a trip to West Virginia and Kentucky.

On the 15th of May, last year, I drove over from Williamson, West Virginia, to Pikesville, and went to the office of Mr. David Hunter. I got there about 8:30 in the morning and waited for Mr. Hunter to come in. His secretary came in at about 9:30 or 9:15 and said that Mr. Hunter was down the hall talking to Tom Raney an International Board member. I learned that Mr. Hunter had just been off to Washington for about a week to attend some conference of regional directors. Mr. Hunter came in about 9:15, came in to his office. His secretary must have come in a little bit before that.

He saw me. He didn't recognize me at first. I told him who I was. He wanted to know what I cared to see him about.

I said I wanted to talk to him. He took me into  
page 412 } his private office, shut the door, and we talked for a while. I told Mr. Hunter that we had been invited to submit a bid for some work over near Ragland and that, as I recalled it, he had told me in my last conference with him that Mingo County was in his region. Mr. Hunter said that was right. So I asked Mr. Hunter what the wage rate was. He said \$1.36 an hour.

I said, "Mr. Hunter, if we get that job, will you expect us to use United Construction Worker men and to make an agreement with United Construction Workers?" Mr. Hunter said that he did.

I told Mr. Hunter that we couldn't do that, that we had our agreements with the A. F. of L. unions and if we got the job we would do it with A. F. of L. men. Mr. Hunter said, "No such thing," that we would have to use his men.

I told him that the purpose of my visit was to see if I couldn't make some understanding that if we got the job in

*A. Hamilton Bryan.*

Mingo County he would leave us alone and wouldn't bother us, like happened over in Breathitt County. Mr. Hunter wouldn't agree to it. He said that they would attempt to organize our job just like had been done in Breathitt County and expected all our workers to be members of their organization.

I told Mr. Hunter that I understood that the R. H. Hamill Company had been stopped by Clifton Brown, a  
page 413 } field representative for the UCW over in West Virginia. Mr. Hunter said that the reason was that Mr. Hamill's superintendent had gotten sick.

I told Mr. Hunter that Mr. Hughes, the manager of the Hamill Company, had told me differently, that Mr. Hughes said—

Mr. Mullen: We are going clean out into another company and what the manager of some other company said. We are going far afield, I think.

Mr. Robertson: I don't want to go into it in too much detail, Your Honor. We have shown in our trial brief other instances of running other people off the job before and after this occurrence where they ran us off the job, and this is admissible to show a scheme, a course of conduct, and a planned proceeding.

By Mr. Robertson:

Q. Just tell what he said about your company now, Mr. Bryan.

Mr. Mullen: That question remains for the Court to pass on.

Mr. Fred G. Pollard: Do I understand that the objection and exception we made this morning still run to this line of questions?

The Court: I so understand.

Mr. Robertson: It is all right with me, Your  
page 414 } Honor, but it seems to me that they are making one objection to cover every phase of the law. I think we have gone into a lot of different legal points since then, but it is all right with me.

The Court: Do I understand you are objecting to all the testimony and evidence that has been given or just to that portion which you originally objected to for the reasons stated?

Mr. Fred G. Pollard: All that has been given, for the reasons stated.

*A. Hamilton Bryan.*

Mr. Robertson: That is all right with me.

The Court: All right.

The Witness: I told Mr. Hunter that Mr. Hughes had said differently and that the Hamill Company had given up all further ideas of doing work in the coal fields because of the way the United Construction Workers had been acting. After that, Mr. Hunter changed his tune and said, yes, that the job of the Hamill Company on the office building at Ragland had been taken over by the Frederick Engineering Company, which had an agreement with the United Construction Workers.

By Mr. Robertson:

Q. Did you make any suggestion to Mr. Hunter that he talk it over with Tom Raney, the International Executive Board member, and see if he couldn't let you by?

A. Yes. In the course of the conversation Mr. Hunter said that if we undertook to perform the work at Rag-  
page 415 } land with A. F. of L. men he didn't think the coal miners would work for the coal companies. He said he was going to talk to Tom Raney and to Mr. Blizzard, the President of District 17, Charleston, West Virginia, about it. I told Mr. Hunter that we had performed a lot of work in Mingo County and Logan County for the Island Creek Coal Company, and that we had never had any trouble before Mr. Hunter's region had been organized at Pikeville, and that I was sure that if Mr. Hunter and Tom Raney would give instructions that we were not to be bothered, we would never have any more trouble.

Mr. Hunter's response to that was that he couldn't do that, that it would be against their orders.

After that I asked Mr. Hunter what would happen if we got other work in his territory, say at Paintsville or some other place. He said that if we got any work in his area, whether it was in Mingo County or Paintsville or Williamson or wherever it might be, he would attempt to organize our job just like he had done in Breathitt County, and that that was all there was to it, that the A. F. of L. didn't have any business coming into his territory.

Q. Did he say anything about this suit?

A. Yes, he did.

Q. What was that?

A. To start off with, Mr. Hunter said that he thought that we had made a big mistake in pulling out of Ken-  
page 416 } tucky, and I told him that we didn't have any choice, that our contracts had been terminated.

*A. Hamilton Bryan.*

Then Mr. Hunter said that remained to be proven in court. He said there had been a lot of additional work in Kentucky and that we probably could have gotten it, but he didn't see how we had been damaged \$500,000. I told him that that remained to be proven in court.

Q. Is that the substance in general of your entire conversation with him, as you recall it?

A. I think about the only other thing of importance was that we discussed the additional work in Kentucky, and he said that it had been done with laborers and carpenter helpers who were members of the United Construction Workers, and that the other craft labor, carpenters, and so forth, had been A. F. of L. people. He said that in the future, that is, after May, 1950, all the employees on this work in Kentucky, carpenters and everybody else, would have to be members of the United Construction Workers.

He made a talk to me about the advantages of the United Construction Worker arrangement and tried to sell me on the idea that it was a much more advantageous plan than the A. F. of L. setup.

I told him that we just couldn't do that, that I was sorry, and that is about all there was to it.

(Document exhibited to Mr. Mullen.)

By Mr. Robertson:

Q. At any time during any of your interviews page 417 } with David Hunter did he deny responsibility for what had been done by Hart?

A. Oh, no. He said that Mr. Hart had done it pursuant to his orders and that that was their policy, and he would do it again if he had to.

Mr. Mullen: No objection.

By Mr. Robertson:

Q. Mr. Bryan, at my request have you made up a tabulated statement of the damages that you claim Laburnam sustained by being run off the work under construction, without reference to future work?

A. Yes.

Q. Is that the statement that you made up?

A. This doesn't undertake to set out any damages resulting from the loss of the business connections.

*A. Hamilton Bryan.*

Q. No. I am just talking about the jobs that were under way at the time you were run out.

A. That is right.

Mr. Robertson: I might explain, as I have to Mr. Mullen, I tore off the bottom part because it had some stuff there that was perfectly obviously inadmissible.

I offer the statement in evidence and ask that it be marked Plaintiff's Exhibit No. 32.

(The document referred to was marked Plaintiff's Exhibit No. 32 and received in evidence.)

page 418 } Mr. Robertson: Maybe I can read it to the jury, and it will save time.

The Court: I believe it would.

Mr. Robertson: Statement of Damages:

Damage from loss of fee on contract for construction of 25 dwellings: \$534.19.

Damage from loss of fee on work in connection with construction of schoolhouse: \$319.67.

Damage from loss of fee in connection with work for installation of asbestos shingles on said 25 dwellings: \$250.00.

Damage from loss of fee in connection with work for installation of concrete foundations for coal preparation plant for No. 2 Mine (now called No. 3 Mine): \$1,250.00.

Damage from loss of fee on other additional work in Breathitt County, Kentucky, amounting to approximately \$542,500.00 which Pond Creek Pechontas Company had agreed to have Laburnum Construction Corporation handle on a basis of cost-plus a fee of five per cent: \$27,125.00.

Total: \$29,478.86.

page 419 } (Document shown to Defendant's counsel.)

Mr. Mullen: If Your Honor please, we object to this because it is speculative, it is not under any existing contract which has been shown here, and it is improper to be put in for that purpose.

Mr. Robertson: If Your Honor please, I understand that that same question has been raised before, and the Court has ruled that it is admissible. I might state in addition to this that all of these items here are supported either by the testimony of Salvati, which is here in deposition form and I ex-

*A. Hamilton Bryan.*

pect to read when Mr. Bryan's testimony is concluded, and in the form of actual—I don't know whether that applies to this or not. It is supported by what Mr. Bryan has testified and will now testify and also by the deposition of Mr. Salvati, in which he says that he had agreed to award them this work. Here is the statement (handing to the Court). Mr. Mullen has written in there "Plaintiff claims." Of course they deny that that is what it comes to.

Mr. Mullen: I think it is one of the principal questions in the case, Your Honor, the question of speculative damages, whether they are to be permitted to put in evidence of speculative damages where there is no contract shown and work has not been done and might never have been done.

Mr. Robertson: That is the same question that has been argued in Chambers.

page 420 } The Court: The Court will admit this exhibit for what it is worth, and it is still a question for the jury.

Mr. Mullen: We reserve an exception.

Your Honor means it will be a question for the jury under the instructions of Your Honor when the time comes for Your Honor to give the instructions on what the law is.

The Court: The Court will instruct the jury what the law is at the proper time.

By Mr. Robertson:

Q. Mr. Bryan, at my request did you prepare an itemized statement of the work which Mr. Salvati testified and stated that he would have given the Laburnum Construction Corporation but for the fact that it was run out of the field?

A. This is a statement of the additional work which Mr. Salvati agreed Laburnum Construction Corporation would handle, which I testified amounted to approximately \$600,000. It actually totals \$617,500. This is a breakdown of it.

Mr. Robertson: If Your Honor please, I offer in evidence the statement which is now entitled "Statement of Additional Work in Breathitt County, Kentucky which Plaintiff claims Mr. Salvati agreed Laburnum Construction Corporation would handle on the basis of cost plus 5 per cent," and ask that this statement be marked Plaintiff's Exhibit No. 33.

page 421 } (The document referred to was marked Plaintiff's Exhibit 33 and received in evidence.)

*A. Hamilton Bryan.*

The Court: Gentlemen, the Court will recess for five minutes.

(Brief recess.)

Mr. Robertson: If the Court please, I will read to the jury Plaintiff's Exhibit No. 33, which is the statement of additional work which Plaintiff contends was promised by Mr. Salvati.

Machine Shop, \$60,000; Lamp House, Supt. Office and Oil House, \$12,000; Warehouse Building, \$25,000; 200 houses, \$300,000; 10 supervisors' Houses, \$60,000; one Large Store, \$75,000; one Service Store, \$15,000; Heating Plant for Tipple at Mine No. 1, \$23,000; Tipple Shop, \$3,000; Foundations for Tipple at Mine No. 2 (now called Mine No. 3), \$25,000; Sand House, \$7,000; Water System, \$12,500. For a total of \$617,500.

(Document shown to Defendants' counsel.)

Mr. Mullen: If Your Honor please, we object to the introduction of evidence as to other contracts other than those which are the subject of this suit, as set up in this suit, before and after.

Mr. Robertson: If Your Honor please, I think that is the question the Court ruled on a few moments ago and has been ruling on repeatedly through the trial here. It is page 422 } covered in the trial brief, that these contracts that were—I think all of these are either the contracts from which we were run off or contracts executed before then, and the purpose is to show the value of the business connection and the stability of our relationship with these companies.

The Court: May I see that.

(Document handed to the Court.)

Mr. Robertson: It is already in evidence. I want to support it now introducing the contracts that have not already been introduced.

Mr. Fred G. Pollard: If Your Honor please, the plaintiff introduced this morning—and the admissibility has not been determined yet—the Laburnum Construction Corporation, Richmond, Virginia, construction record, and the majority of the work contained on that list isn't contained in this con-

*A. Hamilton Bryan.*

struction record. I think they should be bound by what they introduced first.

Mr. Robertson: I think the gentleman is mistaken on that, Your Honor.

The Court: What is your understanding of it?

Mr. Robertson: My understanding is that it is included in there. We can ask Mr. Bryan right now.

The Court: Is this work included in that statement, Mr. Bryan?

Mr. Fred G. Pollard: Only a part of it, Your Honor.

The Witness: Yes, it is, Your Honor.

page 423 } Mr. Robertson: There may be some little items there, as Mr. Bryan said, some small items were left out of that book.

The Witness: It is included.

The Court: I will allow the admission of this exhibit for what it is worth.

Mr. Mullen: We understood your ruling this morning, but this is coming up anew. I think it is proper to note an exception.

The Court: Your exception is noted.

By Mr. Robertson:

Q. Mr. Bryan, at my request have you prepared an itemized statement of the various contracts that Laburnum had with Island Creek and its associated and affiliated companies including the contracts that it was run off of, according to your contention?

A. This is a statement showing contracts which Laburnum had with Pond Creek Pocahontas Company, Island Creek Coal Company and various associated companies and further showing the job profit or loss of Laburnum on each contract. The statement is dated January 9, 1951. It sets out all contracts and work which we have ever had with those companies, including the ones that we were run off of.

Q. Have you got a copy of that before you?

page 424 } A. Yes, sir.

Mr. Robertson: I offer the statement in evidence and ask that it be marked Plaintiff's Exhibit No. 34.

(The document referred to was marked Plaintiff's Exhibit 34 and received in evidence.)

*A. Hamilton Bryan.*

Mr. Mullen: Have you a copy of that that we could have, Mr. Robertson?

Mr. Robertson: Do you have some more copies of that, Mr. Bryan?

The Witness: I can give you one, Mr. Mullen.

By Mr. Robertson:

Q. The first item there is a contract dated September 6, 1947, for 50 prefabricated dwellings, Delbarton, West Virginia, amount \$95,631, showing a profit of \$10,696.05.

(Document shown to Defendants' counsel.)

Mr. Mullen: The Court has already ruled on this.

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of the contract I have mentioned and ask you if that is an executed copy of that contract.

A. Yes, this is an executed copy of the contract. The contract amount which you just read out was the contract amount including extra work added to the amount named in the contract.

Q. What profit did you make on that contract?  
page 425 } A. \$10,969.05.

Mr. Robertson: I offer the copy of the contract in evidence and ask that it be marked Plaintiff's Exhibit 35.

(The document referred to was marked Plaintiff's Exhibit 35 and received in evidence.)

By Mr. Robertson:

Q. The next item on there is marked June 6, 1948, Brookside and Valley View Stores, Delbarton and Holden, West Virginia, \$66,486.05, showing a loss of \$2,617.90.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what purports to be an executed copy of that contract and ask you if it is an executed copy of that contract.

A. Yes. The contract date, however, is June 29, 1948, instead of June 6.

*A. Hamilton Bryan.*

Q. I may have read it wrong.

A. I think you did.

Mr. Robertson: I offer that contract in evidence and ask that it be marked Plaintiff's Exhibit No. 36.

(The document referred to was marked Plaintiff's Exhibit 36 and received in evidence.)

By Mr. Robertson:

Q. Did that contract show a profit or a loss?

A. According to the books, the contract showed a loss.

Q. How much?

page 426 } A. \$2,617.90.

(Document shown to Defendants' counsel.)

Mr. Mullen: If Your Honor please, we don't think that this letter which it is proposed to introduce is material or relevant, and we object to it for that reason.

Mr. Robertson: If Your Honor please, we are introducing this letter at this time because it comes in here in chronological sequence. Mr. Bryan has testified that he was asked to take over the various building activities there in Kentucky for these companies and this is a letter which we think supports his testimony along that line.

(Letter shown to the Court.)

The Court: The Court will admit it for what it is worth.

Mr. Mullen: Note an exception, please.

By Mr. Robertson:

Q. Mr. Bryan, I hand you what purports to be a letter under the letterhead of Island Creek Coal Company dated September 3, 1948, from C. V. White, real estate agent, to Laburnum Construction Corporation, and ask you if you received that letter.

A. Yes, sir; I received it. White Real Estate Agency.

Mr. Robertson: I offer the letter in evidence and ask that it be marked Plaintiff's Exhibit No. 37.

page 427 } (The document referred to was marked Plaintiff's Exhibit 37 and received in evidence.)

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Mr. Robertson: I think I had better read this one, Your Honor.

"Island Creek Coal Company, Huntington, West Virginia, September 3, 1948.

"Laburnum Construction Corporation, 918 East Main Street, Richmond, Virginia.

"Attention: Mr. A. Hamilton Bryan.

"Gentlemen:

*Re: Building Program*

"Mr. Christie, Mr. Beattie, Mr. Saxe, Mr. Flint, and the writer discussed proposed Bartley Store, to replace one that burned recently. Mr. Beattie made a rough estimate of the cost, which I understand he will check and we will be advised within a few days. I am unable to give you the floor plan of this building at this time; but Mr. Flint expects to have it ready within a few days and we will forward it to you.

"In connection with our building program, about which we have had considerable correspondence, I would like to have you keep in mind the priority for the completion of these buildings, which is as follows:

"1. Bartley Store (mentioned above).

"2. No. 15 Store. Floor plan for this building page 428 } was furnished Mr. Beattie and we request that you prepare plans and specifications and forward to Mr. Saxe, with copy to me, as soon as possible.

"3. Club Lunch Room.

"4. Beauty Shop.

"No. 5. Appliance Warehouse.

"I will advise you later on the matter of Churches and Theaters. We are also drawing a floor plan for a Community House which will be approximately 64' wide and 100' in length, with a basket-ball court, bowling alley, and other recreational facilities. All of the above buildings will be at Holden or Pigeon Creek with the exception of Bartley Store.

"As pointed out above, Bartley Store and No. 15 Store have first priority, and we would like to have them completed before the first of the year. As soon as agreement can be

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reached on the above, we would like for you to be ready to put additional crews on these projects.

"I am suggesting that you send the plans, pending final approval, to Mr. Saxe in order that time may be saved.

"Very truly yours, C. V. White, Real Estate Agent."

The Court: Mr. Robertson, if you have something you can finish in five minutes, all right, but I have promised to adjourn at 4:30 because one of the jurors wish to go to see a doctor.

Mr. Robertson: I can get rid of a great deal right now. The question has been raised about these interrogatories and answers to them, that you couldn't say anything about any of them unless—

The Court: We won't go into that. I mean in the courtroom.

Mr. Robertson: Yes, sir. We offer all the answers by all three defendants to all interrogatories that have been filed against them.

Mr. Fred G. Pollard: Your Honor, I understand that if the plaintiff is trying to introduce them as an exhibit, that is improper. He now must read all of them to the jury.

Mr. Robertson: I don't understand any such thing on earth.

Mr. Mullen: That is the Virginia law.

The Court: I want to hear you gentlemen on that. We will adjourn, gentlemen, until ten o'clock in the morning.

(Whereupon, at 4:25 p. m. the jury was excused.)

page 430 } (The following proceedings were had in Chambers:)

The Court: As I understand, you are offering all the Plaintiff's interrogatories addressed to the Defendants.

Mr. Robertson: Yes, sir, and all the answers.

The Court: And the answers.

Mr. Mullen: Of course we can't object to their offering the interrogatories, but if they do, they have to read them, and read all of them. Section 8-322, "Use of such answers," reads:

"Answers to such interrogatories may be used as evidence

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at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery."

In *Faut v. Miller*, 17 Gratt. 187, the Court said at page 210:

"It may be proper to notice here the difference between the effect of an answer to a technical bill of discovery and an answer to other bills in equity, as a matter of evidence for the defendant. We have seen what is its effect in the latter case, and what amount of countervailing evidence is required to overthrow it. In the former case—"

Referring to the technical bill of discovery, which is what our Code says they may be used as,

"\* \* \* where the discovery is sought to be used in an action at law \* \* \*"

Mr. Robertson: I don't want to interrupt you, but I can save you some time here. We withdraw that offer, page 431 } Your Honor, pending our ability to read that case and decide overnight whether we want to do that or not.

Mr. Fred G. Pollard: Your Honor, has he got a right to withdraw?

Mr. Robertson: I have a right to withdraw it before it is ruled on. They are trying to put me in a hole there. I have a right to withdraw it before it is ruled on. I do now withdraw the offer.

The Court: The Court is of the opinion that counsel has a right to withdraw before the Court has ruled on it. That is how I am presently advised. Have you gentlemen any different views on that? I will be glad to hear from you if you do have.

Mr. Mullen: I hadn't considered that, Your Honor.

Mr. Allen: I am sure my good friend Mr. Mullen is wrong on that principle of law, and we want to be sure before we take a position. I thought the brief we had covered it, but it doesn't cover it. Before we take a definite position on that we want to be sure, and we can be sure by in the morning.

Mr. Mullen: There is no question under the Virginia law. These two cases settle it, and there is no exception to it.

Mr. Robertson: You contend there is no merit to any point I have made. We must be right somewhere.

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page 432 } Mr. Mullen: I don't say you are not right  
somewhere. That is one clear case.

Mr. Robertson: If you thought you had put me in the hole and I could jump out before you caught me, I am going to do it.

Mr. Mullen: All right, you can jump out if the Judge says you may jump out, but still you can't use the part of the interrogatories you think is good and leave out the part you think is bad.

Mr. Robertson: I have withdrawn the offer.

Mr. Mullen: The Code is specific that they must all be introduced and read to the jury.

The Court: This is off the record, if you gentlemen don't mind.

(Off the record.)

Mr. Robertson: The offer is withdrawn.

The Court: It is withdrawn.

Mr. Mullen: We are not going to object to his withdrawing it.

The Court: All right, what is the next matter?

Mr. Allen: If Your Honor please, I made the statement here this morning, and didn't refer to the written rule in Wigmore's Code of Evidence, that we didn't have to have any handwriting expert to prove the handwriting of these people to these applications; that if we could produce a  
page 433 } man who knows the handwriting of the persons  
and can say that that is their handwriting, it is just as good as any expert. Mr. Wigmore lays it down. He says in Article 3 of Rule—

The Court: I thought you had agreed to furnish the handwriting expert.

Mr. Robertson: Here is the thing, Your Honor. It could save a little expense. We are standing right to what we said we were willing to do, of course. The rule that Mr. Allen has there says that if anybody has compared the signatures and is satisfied they are correct, he can testify in support of it, and that is satisfactory. Mr. Bryan says he has done that. As I understand it, they are not satisfied with that and want the handwriting expert.

Mr. Allen: We might not be able to get him. We will get him if we can. That man is busy.

Mr. Robertson: We can get him before the trial is over. If you want him we will get him.

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Mr. Pollard: I understood, Mr. Allen, that the rule was that the person had to know the signature.

Mr. Robertson: I asked if you wanted the expert, and I am entitled to an answer.

Colonel Harris: We want him there, and I thought that was disposed of.

The Court: All right, what is next?

Mr. Robertson: Nothing.

page 434 { The Court: What about these depositions?

Mr. Robertson: I think I am entitled to read it.

The Court: We had passed that by for the time being. The Court made no decision as to the admissibility of these depositions.

Mr. Mullen: It isn't a deposition. It is an account of why they didn't take a deposition.

Mr. Robertson: It has all been explained, and I withdraw that.

The Court: All right, it is withdrawn.

What is this order here on my desk?

Mr. Fred G. Pollard: That is the subpoena. It is an affidavit.

The Court: A new affidavit? Have you gentlemen seen this?

Mr. Allen: Yes, but, Judge, my recollection is that the statute expressly provides if they are called for within a reasonable time. I don't think this is a reasonable time after the trial has gotten under way and we are busy day and night.

Mr. Pollard: It is called for under a different section, Mr. Allen. This is asked for under Section 290.

Mr. Robertson: How much trouble is it?

Mr. Allen: We don't mind getting it if we can.

page 435 { The Court: I will give you a reasonable time to furnish them, if that is what you are asking for.

Mr. Robertson: I don't think I have read it, Judge.

Mr. Fred G. Pollard: I saw you reading it just before lunch.

Mr. Robertson: You put one in every few minutes, and I am not sure I have read the last one.

Mr. Allen: He just put it in his pocket.

The Court: I will read it aloud. Do you want this on the record or not?

Mr. Mullen: I don't think so, no.

Mr. Allen: No.

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(Off the record.)

Mr. Robertson: We would like to have overnight on that. I don't know whether he is entitled to it or not.

The Court: All right, I will give you overnight on this. This will be the only matter we have to take up in the morning, will it not?

Mr. Robertson: Yes.

The Court: Will you gentlemen meet me here at a quarter to 10, and we will discuss this matter further.

Mr. Mullen: You mean the affidavit.

The Court: The affidavit and the order for *subpoena duces tecum*. All right, gentlemen, thank you very much.

(Whereupon, at 4:45 o'clock p. m. the Court recessed until 9:45 o'clock a. m. Thursday, January 25, 1951.)

\* \* \* \* \*

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\* \* \* \* \*

Hearing in the above-entitled matter was resumed, pursuant to recess, at 9:45 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 25, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

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## PROCEEDINGS.

(The following proceedings were had in Chambers:)

The Court: I believe, gentlemen, that we were to meet this morning to discuss further this order requiring Mr. Bryan to furnish certain documents.

Mr. Robertson: Judge, we have looked up the law last

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night, and we are going to discuss it here in a moment. Coming right down to the practical phase of this matter, these gentlemen are entitled to any data we have got showing the profits or losses on the work in Breathitt County, Kentucky involved in these cases, these particular jobs, or any jobs involved in this case. I ought to broaden that, I think, to anything we have put in this case about jobs we have performed. That would be it, jobs that we have performed so far as they are involved in this case. They have no right to go out side of that. What we did at Hopewell or Chicago or Cleveland or anywhere outside of the work involved in this case has nothing to do with it. I assume that these tax returns are correct and honest returns. I can't think that they would be stupid enough not have them correct and honest, but the proper way to get it, if they want it, we will do any reasonable amount of work through the company accountant to make that stuff available to them.

The audits and final returns were made by the page 438 } company auditors in collaboration with Leach,

Calkins & Scott. If they want to bring those accountants in we have nothing to cover up and hide, but if they bring them in we want them to pay their charges and not us. With that general statement, I am going to ask these gentlemen, and I suggest Mr. Moore lead off on the law there.

Mr. Moore: Taking up the law, the general idea seems to be that these tax returns are confidential matters between the party submitting the tax returns and the government. The general rule they lay down is that these returns can be used in litigation only when the government is a party. I would like to quote one part from a recent Treasury decision No. 4945 where it is stated: "Neither the original nor a copy of the return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

In the case of *John O'Connell v. Ugelstadt*, the facts are somewhat similar to what we are presented with here, and the court stated: "This is a personal injury action in which the plaintiff alleges that the injuries received have permanently and partially incapacitated him. The defendant moves for the production and inspection of the plaintiff's income tax returns for the years 1945, '46, '47, and '48."

page 439 } The ruling went on to say: "The Internal Revenue Code and the regulations issued thereunder provide that tax returns shall be confidential and disclosed only upon application of the plaintiff and his attorneys in

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fact. No such provision is made for the production of such returns upon order of a federal court."

Then it goes on to say that such a ruling is in accord with the previous holdings on documents which have been declared confidential of the federal departments are not open to discovery under rule 34 of the Federal Rules."

Then the interesting part is the final sentence, in which they state: "Such a ruling will have no serious consequences as it is information desired to be obtained by intelligent use of other discovery procedure," which we believe in the present case is a long the lines argued by Mr. Robertson.

The general theory behind all that seems to be that when you call for a man's entire tax return you get a lot of items that are irrelevant to the actual subject matter of the trial, and we don't believe that we should have to furnish that in the present case. They can check the audits and the work performed in the present case and avoid the necessity of having the income tax returns.

Mr. Bryan: May I say something about that?  
page 440 } The Court: No, let your attorneys talk.

Mr. Allen: Judge, let me say, if my memory serves me correctly, there is a state statute which declares the policy of the state with reference to state income returns. They are asking for the federal income tax returns, but the policy is the same and the principle back of it is the same. The state statute expressly prohibits these income tax returns made to the state from being exhibited even in a lawsuit. They are required to be locked up in a vault and kept there and can't be brought out or the information divulged except by authority of the state.

I know that is the statute because we had the question arise over in the Federal Court where a man tried to get the state income tax return for certain evidence, and it was shown there that it couldn't be done.

Mr. Mullen: You cannot get the original either from the State or the Federal Government, but you can call for the copies in a man's possession. About two years ago I was forced to do it up here in Law and Equity Court in the case of a client. I made the same objection that you are making right now, and they said, "Of course you can't call on the state to produce them and you can't call on the Federal Government to produce them, but if a man has copies, you can call for them," and we had to do it.

Mr. Allen: But the same policy that prohibits  
page 441 } the state and Federal Governments from being required to produce them is back of requiring the

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individual to produce the copies, because it is the same information. The policy of the law is to encourage people to make full, complete, and detailed returns, and if you can make a man produce a copy that is in his possession, you might just as well make the state produce the original. There is not a particle of difference.

In addition to that, as Mr. Moore here so well said, and as Your Honor knows, an income tax return covers a whole lot of things that are not material to the issue in any lawsuit. They are entitled to the information that they asked for, but they are not entitled to a lot of other information that is there on the income tax return. It is wholly irrelevant.

Mr. Mullen: The purpose of prohibiting the Government from making the thing public is to prevent a lot of snoopers and a lot of publicity. The Federal Government can go to the Governor here at any time and get them and use them in tax cases. They have done it in cases I have been in.

Mr. Robertson: I don't think you have to go to that at all. Here is what you come down to here. They are entitled to information about the work that has been injected into this case. The original data, the best evidence of that—suppose

we filed a fraudulent income tax return, the best evidence of the profits or losses in those cases is

the original records of the company, the accountants, who I imagine have their work sheets, certainly the records of their office are there. I think they are going to find that these things are strictly accurate. I think it is a fishing expedition in the hope of getting something, but that is all right, we are willing go fishing with them. If they want to do that and if they want to call in our accountants and pay for them or call in any other responsible accountant, we will work with any responsible people to divulge anything that is properly the subject of inquiry in this proceeding, but they have no more to do with what happened in Chicago or Cleveland or Alabama or Hopewell or Richmond, excepting those we have brought in.

The Court: As I understand, they are asking for returns on Kentucky and West Virginia. Virginia would include all this.

Mr. Fred G. Pollard: Judge, they have put into evidence all the work that has been done by Laburnum for a 9-year period. They have put in his gross income. He has testified as to his average gross income.

Mr. Robertson: He testified that those jobs netted those profits on those jobs.

Mr. Mullen: He went beyond that and put in his total in-

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come from all sources, \$20 million, you say, in ten page 443 } years, and then you itemize year by year. You put that in.

Mr. Robertson: We put in that booklet to show that we had done a gross construction business over that period of time exceeding \$20 million, and we might do that and be hopelessly busted.

Mr. Fred G. Pollard: If those income tax returns don't show the amount of income that Mr. Bryan has stated or the amount of gross business that he has stated, we are entitled to that information to show that he is puffing this case up, which he has been doing all the way through.

Mr. Allen: If Your Honor please, the books are the best evidence here. They are entitled to see the books and to have their auditors see them. Furthermore, I would like to say here that there are some factual reasons in connection with this matter that I would like for Mr. Bryan to state as a fact as a witness in connection with the matter.

The Court: Any objection?

Mr. Robertson: I object.

Judge, I suggest this: Mr. Bryan is under oath, and let him make a sworn statement to the Court right now. He asked to be heard. Let him make his statement under oath right now.

Colonel Harris: We object to that on the ground that it is just an argument extended to Mr. Bryan under the guise of testifying.

page 444 } The Witness: I would like to say—

Mr. Robertson: Wait. I think the Court wants all the light we can get. If we put Mr. Bryan under oath and hear from him I think that is one of the best ways to get it.

The Court: He is under oath. You ask him questions. Don't let him make a statement.

The Witness: I would like to make a statement for the record that hasn't anything to do with this right now, if I might.

The Court: I suspect that you should be asked questions, that you should confer with counsel and let him ask questions. Don't volunteer any statement.

The Witness: After this is over I would like to make a statement as to what my position is about these hearings in here.

Colonel Harris: We object to any statements by the witness.

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The Court: Counsel can make a statement, but I don't think it is proper for the witness to make a statement.

Colonel Harris: May we have an objection to all these questions?

The Court: Yes, objections and exceptions.

By Mr. Robertson:

Q. What is your attitude, Mr. Bryan, regarding your willingness or unwillingness to furnish copies of the page 445 } income tax returns that have been asked for in this proceeding?

A. The income tax returns will furnish information about our complete operations everywhere. As I understand it, that information is not material and relevant in this case. The only question to be determined here is whether our job profit from the work in West Virginia and Kentucky for the Pond Creek Pocahontas Company and Island Creek Coal Company and its subsidiaries and affiliates resulted in a total figure of approximately \$58,000 as shown on the statement offered in evidence. That statement was compiled by our own auditors and accountants based on data shown in our annual audits prepared by the firm of Leach, Calkins & Scott, for the years 1947, 1948 and 1949. I can have those accountants come here to show in detail exactly how they arrived at that information or I can have one of Mr. Leach's men to come here to support it. If a mistake has been made in compiling the information we will be glad to admit it and correct it. We believe it to be true, and it can be demonstrated to be correct, we think, to the satisfaction of anybody. What happened to us on our net operations is beside the point.

The Court: These gentlemen think it is material because you said you had done \$20 million worth of business, and you have not only taken in the work done for Pond Creek and others in Kentucky, but you have included work done elsewhere over a period of ten years.

The Witness: The point of that was to show page 446 } that we had an established business. The profits or losses on that other work are not involved in this case.

The Court: That may be true, but they are entitled to show that you didn't do \$20 million worth of business.

Mr. Robertson: I haven't talked to Mr. Bryan about it. I don't see any objection to showing that, but that is still far away from the income tax returns. Suppose you did a gross business of \$20 million and then had losses that made you a

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net deficit over the whole period of years, you would still have done the gross business.

The Court: It is still in evidence that you did \$20 million worth of business.

The Witness: If they want evidence that we did \$20 million worth of business over a ten-year period we will furnish a statement of our gross sales yearly for the last ten years. I have no objection to that.

Mr. Fred G. Pollard: Your Honor, the witness is arguing with you.

The Witness: We don't object to doing that but when it comes to the profit part, we do.

Mr. Fred G. Pollard: If they say they have had a \$58,000 profit on these jobs, we are entitled to know if they reported that much income.

The Court: Do you have any authority on that, page 447? Mr. Pollard, whether or not the Court can require a party to furnish a copy of his income tax? Frankly, I haven't had to pass on that.

Mr. Fred G. Pollard: I only know that it was required in a case that Mr. Mullen had before Judge Miller, wasn't it, in Law and Equity Court?

Mr. Mullen: Yes.

Mr. Allen: If Your Honor please, suppose the income tax returns shows that he lost \$50,000 down here in Colonel Harris' town of Birmingham, and therefore his over all net profit was only \$8,000. What would that have to do with the case here? We are talking about the business here concerned. The profits that we made and would have made--

Mr. Fred G. Pollard: This isn't putting this information in evidence. It is giving us the right to inspect it. After we inspect it, then they can raise the question of whether it is admissible. We certainly have a right to look at it.

Mr. Mullen: From the figures you have furnished us, frankly--

Mr. Robertson: Mr. Mullen hasn't answered the question the Court asked him. What is the authority upon which you base your demand?

The Court: Mr. Pollard answered it.

Mr. Mullen: Mr. Pollard answered it.

page 448? The Court: Mr. Pollard stated that the Law and Equity Court required your client to furnish copies.

Mr. Mullen: My client. I was on the losing end of it.

Mr. Fred G. Pollard: And that case went to the Supreme Court of Appeals.

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Mr. Mullen: Nothing was said about that in the Supreme Court of Appeals when it was taken up. It went up on another question.

Judge, they have furnished us certain figures. We have analyzed them. We think the conclusions they have drawn from those figures and testified to are not correct, and we want means to check them by. They have undertaken to state \$20 million gross business and \$2 million a year, and then they go on to argue that that is a measure of what these damages should be, and so forth. We have analyzed the figures and don't think it works that way. During the war years there may be a big pile up of business and in the other years, it may drop down. It isn't the average. We are talking about the normal business.

The Court: In other words, you would like to have a breakdown of their contracts showing what amount of work was done in '43, what amount was done in '44, instead of the average over a ten-year period.

Mr. Fred G. Pollard: We have that, Your Honor.

Mr. Mullen: We say these figures are misleading—  
page 449 } ing in here, and also it is misleading merely to  
state the gross amount of work they had. They  
are basing it on benefit to them, the profit to them that they  
would lose by reason of these transactions out there, income.  
We are entitled to know. They leave that question on the  
jury. They talk about \$20 million and \$2 million. The in-  
come may be very, very small.

page 450 } The Court: You want to know what the profit  
is from each job?

Mr. Mullen: I want to know what the net is after they  
have met their overhead and their taxes.

Mr. Allen: Outside of Kentucky?

Mr. Mullen: I mean everywhere, because you all have put  
in the gross figures.

Mr. Allen: We only claim profits on the business in Ken-  
tucky.

Mr. Fred G. Pollard: Will you be bound by that?

Mr. Allen: What?

The Witness: Kentucky, West Virginia—

The Court: Let Mr. Mullen finish.

Go ahead, Mr. Mullen.

Mr. Mullen: He testified he would get 5 per cent on these  
jobs. That isn't 5 per cent net. That is 5 per cent gross.  
And that 5 per cent may or may not provide a profit. They

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have to pay taxes, they have to pay the home office overhead, and so forth. It is a very different thing.

These figures put in about \$20 million gross and \$2 million a year are thoroughly misleading.

Mr. Robertson: If Your Honor please, here is the proposition: We are entitled to show what our gross business was, and we have shown it, just as Mr. Bryan said here a moment ago. We are entitled to show that we had a job page 451  $\frac{1}{2}$  profit or a job loss of so much on these different items of work.

What we did with it, and whether it was eaten up by a loss somewhere else has nothing to do with this case.

The Court: Gentlemen, I think they are entitled to information concerning the \$20 million worth of jobs that they allege they have performed during the last ten years, to show whether or not it was profitable to the company, because \$20 million is before the jury, and that is big money. I believe that they are entitled to information and a breakdown on those contracts for their own information for cross examination.

In regard to the tax returns, as presently advised the Court will not require the Plaintiff to furnish his tax returns, but will require any other information they desire.

Mr. Mullen: On the audits?

The Court: On the audits.

Mr. Mullen: They have had a certified public accountant make up an audit each year. We want those audits.

Mr. Robertson: You don't mean we have to furnish a copy of that?

The Court: You have them, do you not?

Mr. Robertson: That is worse than the other, Your Honor. They are not even entitled to our annual audits of the entire corporation.

The Court: If you can get this information, page 452  $\frac{1}{2}$  from the audit. I do not mean the full audit of the corporation, but I am talking about dealing with this \$20 million that you have alleged that you have done. That is before the jury, \$20 million.

Mr. Allen: Give them a breakdown of it?

The Court: Give them a breakdown on those contracts.

Mr. Fred G. Pollard: They put in yesterday a statement, and you have it on your desk here—

The Court: I haven't had a chance to look at that, and it hasn't been admitted into evidence. It was passed by.

Mr. Fred G. Pollard: That is right. That brings it up

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through the year December 31, 1949. We want that same information for 1950.

Mr. Robertson: We are perfectly willing to do that.

Mr. Allen: We will furnish the breakdown.

Mr. Fred G. Pollard: That isn't a breakdown of the gross business.

They have also testified that they made \$58,000 on these jobs in Kentucky and West Virginia. That is the only work the corporation did in those States.

Mr. Robertson: We have no objection to giving them that.

Mr. Fred G. Pollard: We certainly ought to have the returns as to that information, because we want to page 453  $\frac{1}{2}$  see if they actually reported as much income as they claim to make.

Mr. Robertson: The Court has already ruled on that. We will get the audit.

Mr. Mullen: I think we are entitled to the audits.

Colonel Harris: Aren't we also entitled to the books? We can hire public accountants. We don't have to let them go off and make summaries.

The Court: I think you are entitled to inspect the books in regard to these contracts.

Mr. Allen: That is all right.

Colonel Harris: And have CPA's go over them.

The Court: All right.

Mr. Fred G. Pollard: We are also entitled to this information: Part of the alleged profits from the work at Pond Creek and Island Creek has got to be allocated to overhead. We don't know—

Mr. Robertson: They don't know anything about that. He is making wild statements. The auditor has determined that.

The Court: Go ahead, Mr. Pollard.

Mr. Fred G. Pollard: It is not all net profit if part of that has to go to pay overhead.

The Court: That is something you can determine from the figures and the books which you will see.

page 454  $\frac{1}{2}$  Mr. Mullen: We will examine the books for those purposes, and see the whole thing.

The Court: That is true.

Mr. Mullen: And from that, we will get their net income from everything.

Mr. Fred G. Pollard: To allocate, to make the proper allocation.

The Court: The books will show how they arrived at this profit; and if your auditors, after inspecting the books, have

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a different idea of the situation, then, of course, they would interpret it as they saw fit. It would be a question then for the jury.

Mr. Allen: If Your Honor please, I think I might say this for the information of all of us: As I understand the law concerning voluminous books and that sort of thing, their auditor or our auditor can make summaries of the books and come in court and testify to them. They can get an auditor and he can go there and make up a summary and give us a copy, and testify to it. That is my understanding of the law.

Mr. Mullen: Now you are talking about a very different thing from what you were talking about the other day, about summarizing papers. The rule is that prolonged accounts, and things like that, can be summarized by a CPA.

Mr. Allen: I admit that, but I say it is not page 455 } confined to books, but that is neither here nor there.

Mr. Robertson: Let's talk about this one.

Mr. Allen: We are talking about this one now.

The Court: When can you gentlemen make those books available?

The Witness: Your Honor, I would like to have it understood that any inspection of the books will be done in the presence of our representatives, and they will not be turned over to them. We will prepare for them a detailed statement showing our gross sales on each job in the last ten years. We will show where the information came from so it can be checked. We will also show not only the gross sales on the work for these companies in West Virginia and Kentucky, each job, but what the costs were and what the net job operating profit was, in order to support the statement we put in. That is what they are after.

When it comes to overhead expenses and net profit from operations, and so forth, we think that goes beyond the scope of their examination. We did put in this statement to support the fact that we had an established business, showing that there was \$20 million of business. That is not a complete statement. Actually, it amounts to more than \$20 million. They want to verify that, and that will be verified and shown.

We also said that we had a job profit from this page 456 } work in West Virginia and Kentucky. Regardless of what happened on our operations as a whole, if we hadn't had this job profit on the work in West Virginia and Kentucky, we would have been \$58,000 worse off than we

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are today. That is the material point. That is what they want us to establish, to prove.

That, we are prepared to prove. If we have made a mistake in compilation of figures, it will be corrected. I don't think that we have.

Mr. Allen: When can you make the books available to them; say, Saturday and Sunday?

The Court: When would you gentlemen like to have the books?

Colonel Harris: Judge, we will get in touch with our auditors when we get through court this afternoon, if possible, and find out from them how much time, and when; but we don't think that our auditors should be handicapped by having their auditor or anybody else their interfering or overhearing any conversation.

Mr. Robertson: Not interfering; just watching.

The Witness: The books will be made available at our office. We are not going to turn the books over to them.

Colonel Harris: The books will be made available wherever Your Honor says.

The Court: That is true. The Court wants to page 457  $\frac{1}{2}$  be reasonable.

The Witness: It is a big job.

The Court: We have to be reasonable about all things.

Mr. Fred G. Pollard: Judge, this is a handicap. We asked for this information last summer, and they objected to it; and Your Honor ruled that they didn't have to give it. It is going to take some time to make an analysis, and we think we asked for it in time.

Mr. Robertson: So what?

The Court: If the analysis isn't complete, the Court would give you an opportunity to put Mr. Bryan back on the stand at a later date to pursue this line of cross examination.

The Witness: I will call our people down there right now and ask them to start compiling it.

The Court: I think it would be reasonable to ask your auditors to review the books in his office. I think that is a reasonable request.

Mr. Fred G. Pollard: All right, sir.

Is it our understanding that they can see any books they want?

The Court: They can see any books they want, but not the tax returns.

Mr. Robertson: Any books they want relating—

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The Court: Relating to the \$20 million.  
 page 458 { Mr. Mullen: The books of account.

The Witness: Not all portions of the books, but the parts that show how the \$20 million came about.

The Court: They are entitled, in my judgment, to determine whether or not on this \$20 million worth of business there was a profit or loss, because before this jury there is the figure of \$20 million, big money, and I don't think they should be permitted to speculate how much profit is in that \$20 million. Some might say, "He made \$250,000 over there." Some might say, "He made \$100,000." I think they are entitled to know all the facts concerning that figure.

Mr. Fred G. Pollard: I understand Your Honor's ruling is that we cannot have the tax returns?

The Court: As presently advised, that is my ruling.

Mr. Fred G. Pollard: We except to that ruling, because we think that if the tax returns show a different figure from what Mr. Bryan has testified to, the jury is entitled to know that he reported something different from what he testified to.

The Court: All right.

Mr. Robertson: The Plaintiff excepts to the ruling of the Court requiring the Plaintiff to show its overall net profit or loss upon the complete operation, upon the ground that it is irrelevant in this case. The Plaintiff readily  
 page 459 { admits that the defendants are entitled to a breakdown of the \$20 million gross business, and are entitled to a breakdown showing the job profit or loss on all work done by the Plaintiff for Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated and affiliated companies. The Plaintiff denies that they have any legal right to extend the scope of the inquiry beyond those matters.

Mr. Allen: Plaintiff excepts upon another ground, namely, that the information is not timely demanded. We are now during the fourth day of the trial. Mr. Bryan's presence is necessary at every moment of the trial. We are trying the case from 10:00 to 5:00 every day, and we haven't the time to get the necessary information or the time to have available men present when the information is being gotten by Defendants' auditors from the books.

Mr. Mullen: In answer to Mr. Allen's statement, counsel for the Defendants states that the necessity for these figures was brought about by evidence given by the Plaintiff on the stand, in addition to the fact that they were asked for last

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summer; but the immediate necessity was brought about by the testimony of the Plaintiff. We did not choose the time.

Mr. Allen: With further reference to the timely motion, we think this information involves something like 200 jobs which have nothing to do with the jobs now under page 460 } investigation.

Mr. Fred G. Pollard: Your Honor, do I understand that you have ordered Plaintiff to furnish a similar statement for the year 1950?

The Court: Yes. You have agreed to do that, as I understand, as contained in Plaintiff's Exhibit 22. This is the exhibit you are referring to?

Mr. Fred G. Pollard: Yes.

The Court: You want it brought up to date through 1950?

Mr. Fred G. Pollard: Yes, sir.

The Court: As I understand, you gentlemen have agreed to furnish that information.

Mr. Fred G. Pollard: We still object to the introduction of Exhibit 22.

The Court: Do you all wish to be heard further on this? We passed it by, to save time, yesterday.

Mr. Robertson: They can't except to it and call for it at the same time. They have to make up their minds.

Mr. Fred G. Pollard: If it is introduced, we are entitled to the full information.

Mr. Mullen: It was introduced enough by questions to the Plaintiff to cover what we are asking for.

Mr. Allen: This hasn't been filed in evidence.

The Court: It has not been admitted in evidence. page 461 } dence. It has been marked.

Mr. Allen: We withdraw our motion to file it in evidence, then.

The Court: He withdraws the motion to file it in evidence.

Mr. Mullen: I have it right here in the questions. I looked it up just now.

The Court: There is a statement in evidence showing that you did \$20 million worth of business.

Mr. Allen: Are you objecting to the admission in evidence of this construction record, May, 1942, to December, 1949?

Mr. Mullen: Have we a copy of it?

Mr. Fred G. Pollard: Yes.

The Court: Yes, I think Mr. Robertson gave you a copy of it.

Mr. Mullen: I don't know that I have seen it.

The Court: He gave it to Mr. Pollard.

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Mr. Allen: I just want to know if you are objecting to it. If you are objecting to it, we certainly have a right to withdraw it. If you are not objecting to it, well and good, let it stay.

Mr. Fred G. Pollard: The damage was done, Your Honor, as far as we are concerned, when the Plaintiff was allowed to testify that he had done \$20 million worth of  
page 462 } business over a period of ten years.

Mr. Allen: My simple question is: Are you still objecting to the introduction of this in evidence?

(Defendants' counsel conferring.)

Mr. Mullen: Let us confer a few minutes.

The Court: Very well, we will recess for a few minutes while all counsel confer.

(Short recess.)

Mr. Mullen: If Your Honor please, we withdraw any objection to the introduction of it.

The Court: All right. The Court will admit it.

Mr. Allen: Describe it, so there isn't any question.

Mr. Moore: It is already described as Exhibit 22.

The Court: The Court will admit in evidence Plaintiff's Exhibit No. 22.

(The document previously marked Plaintiff's Exhibit No. 22 was received in evidence.)

Mr. Allen: We understand there is no objection to the admission of this exhibit in evidence.

page 463 } (The following proceedings were had in open court:)

Mr. Robertson: If Your Honor please, and gentlemen of the jury, we were diverted from discussion of Plaintiff's Exhibit No. 34 yesterday before we finished going through with it.

The Court: Gentlemen, we will poll the jury to see if they are all present. Let the clerk call the roll.

(Roll call of the jury.)

The Court: Now, Mr. Robertson, you may proceed.

Whereupon,

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the witness on the stand at time of recess, resumed the stand and testified as follows:

Mr. Robertson: I refer now to Plaintiff's Exhibit No. 34, to the Contract dated June 29, 1948, for the construction of Brookside and Valley View stores, Delbarton, West Virginia, at \$66,486.05, which showed a loss of \$2,617.90.

Still referring to Exhibit No. 34, the next item is dated September 19, 1948, for the construction of an appliance warehouse at Holden, West Virginia, at \$40,895.89, which showed a job profit of \$6,814.24.

(Document shown to Defendants' counsel.)

Mr. Mullen: Of course, Your Honor, we are simply seeing them, not admitted.

page 464 } By Mr. Robertson:

Q. I hand you what purports to be a signed copy of the contract I have last mentioned and ask you if that is an executed copy of that contract.

A. Yes. The contract amount is \$36,000. The actual amount of work after extras and so forth was \$40,845.85.

Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 38.

(The document referred to was marked Plaintiff's Exhibit 38 and received in evidence.)

Mr. Robertson: The next Item on Exhibit 34 is dated October 21, 1948, for store No. 15, Holden, West Virginia. The amount of the job is \$34,313.31, showing a job profit of \$7,450.32.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of the contract I have first mentioned and ask you if that is an executed copy of that contract?

A. Yes, that is an executed copy of the contract.

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Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 39.

(The document referred to was marked Plaintiff's Exhibit 39 and received in evidence.)

Mr. Robertson: The next item on Exhibit 34, page 465 } dated December 9, 1948 is for a colored lunch room at Holden, West Virginia. The amount of the job being \$9,550.39, showing a job profit of \$795.56.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of the contract I have last mentioned and ask you if that is an executed copy of that contract.

A. Yes, sir.

Mr. Robertson: I offer the contract in evidence and ask that it be marked Plaintiff's Exhibit No. 40.

(The document referred to was marked Plaintiff's Exhibit 40 and received in evidence.)

Mr. Robertson: The next item on Exhibit 34 is a contract dated December 13, 1948, for a hearing plant at Tipple No. 25, Dellarton, West Virginia, at \$21,236.05, which showed a net profit of \$406.36.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of an order for that job and ask you if that is an executed copy upon which the job I have last mentioned was done.

A. That is right.

Mr. Robertson: I offer the order in evidence and ask that it be marked Plaintiff's Exhibit No. 41.

page 466 } (The document referred to was marked Plaintiff's Exhibit 41 and received in evidence.)

Mr. Robertson: The next contract is dated June 4, 1949,

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for an addition to the rear of store No. 28 at Holden, West Virginia, at \$4,021.06, showing a job profit of \$909.78, and on the exhibit by the date is marked "oral".

By Mr. Robertson:

Q. Was that work done under oral agreement or written agreement?

A. That was done under an oral agreement. After the work was performed we submitted a bill and it was paid.

Mr. Robertson: The next item on Exhibit 34 is dated October 28, 1948, for the coal preparation plant in Breathitt County, Kentucky, at \$265,370.09, showing a job profit of \$10,232.48.

By Mr. Robertson:

Q. Is that the contract of October 28 which already has been introduced in evidence?

A. That is right.

Q. Is that the contract upon which the ceiling fee of \$12,000 was stipulated?

A. That is correct.

Q. How does Exhibit 34 show a job profit of only \$10,232.48?

A. We had some direct job expenses that were page 467 } not reimbursable. They were mostly travelling expenses in connection with that work. Then there were some other items, I think, in connection with the commissary and the barracks.

Mr. Robertson: The next item on Exhibit 34 is a contract dated December 15, 1948, for 25 dwellings, Breathitt County, Kentucky, \$41,282.05, showing a job profit of \$1,946.99.

By Mr. Robertson:

Q. Is that the contract of December 15, 1948, for the 25 dwellings that already has been put in evidence?

A. That is correct.

Mr. Robertson: The next item on there is a contract dated December 8, 1948, for telephone line, Breathitt County, Kentucky, at \$4,591. 59, which shows a job profit of \$218.68.

By Mr. Robertson:

Q. Is that the telephone line that you have testified about for which the contract is already put in?

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A. Yes, sir.

Mr. Robertson: The next job date is marked July, 1949, for a school house, Breathitt County, Kentucky. The amount of work on it is \$637.16, showing a job profit of \$30.33, and by the side of it is marked "oral".

By Mr. Robertson:

Q. Is that the agreement or contract for the construction of the school house about which you have already testified?

A. That is the part of the work that Mr. Salvati page 468 } agreed, additional work, that we would do on a cost plus 5 per cent basis.

Mr. Robertson: The next job number on Exhibit 34 is dated June 28, 1949, for a job at Bartley Boiler Plant, Bartley, West Virginia, at \$67,158.20, showing a job profit of \$21,787.37.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what appears to be an executed copy of the agreement I have last mentioned and ask you if that is an executed copy of that agreement?

A. Yes, this is an executed copy of the agreement, but there was a supplemental agreement which followed it.

Mr. Robertson: I offer the agreement in evidence and ask that it be marked Plaintiff's Exhibit No. 42.

(The document referred to was marked Plaintiff's Exhibit 42 and received in evidence.)

Mr. Robertson: All the items about which you have testified on Exhibit 34, as appears from the exhibit, show an aggregate construction value of \$651,192.84, and a total job profit of \$58,714.26.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. A moment ago you stated that there was an agreement

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which supplemented the agreement of June 28, page 469 } 1949, for the Bartley Boiler Plant at Bartley, West Virginia, and I hand you what appears to be an executed copy of an agreement and ask you if that is the supplementary agreement to which you referred.

A. This supplementary agreement is dated July 5, 1949, and it supplements the first agreement dated June 28, 1949, which you have already offered in evidence.

Mr. Robertson: I offer this supplemental agreement in evidence and ask that it be marked Plaintiff's Exhibit No. 43.

(The document referred to was marked Plaintiff's Exhibit 43 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, I call your attention to the fact that the agreement of June 28, 1949, and also the supplemental agreement referred to work at the Bartley Boiler Plant, Bartley, West Virginia. Was that work which you were completing in that agreement and this supplemental agreement after you were run off the job in Breathitt County, Kentucky?

A. There is a typographical error in this statement. It is really the Bartley Boiler Plant, not Bartlet. The work was awarded to us under the agreement dated June 28, the agreement dated in June, 1949, and then the supplemental agreement in July, 1949. We did not actually complete that work until December 31, approximately the end of the year 1949.

Q. But you were not run off that work as you page 470 } were from the work in Breathitt County?

A. No.

Q. Mr. Bryan, at my request is Mr. Cassidy, the Richmond handwriting expert, now making an examination to ascertain whether or not the application blanks mentioned here yesterday are true or untrue so far as the signatures are concerned?

A. At the present time he is comparing the signatures on the application blanks with signatures which we have and which we know to be genuine.

Q. Will he make himself available as a witness at a later stage of the trial?

A. He said he would be ready by tomorrow.

Q. At my request have you prepared a list of the laborers who were employed at the job site in Breathitt County, Kentucky, on July 26, 1949?

A. Yes, sir; as shown on the payroll.

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Q. Does that show them by name?

A. Yes, sir.

Q. Will you read the names into the record from the payroll?

A. Labor foremen?

Q. Everybody.

A. Lee Bach.

page 471 } These are the laborers: Dan Combs, Hargus H. Howard, Jerry Barnett, Green Trusty, Donald B. Trimble, Avis Salyers, Matt Miller, Green Stacy, Green Conley, Luther Litteral, Ossie Lovely, Earnest Howard, John Jordon, Burl King, George P. Miller.

Q. Does it also show the other laborers who were working there that day and other people who were working there that day?

A. Yes, I can give the names of everybody.

Q. Will you just give the names of everybody and what their job was?

A. Superintendent Cecil M. Delinger.

Chief Clerk Maynard C. Ragan.

Iron Workers: John W. McClellan, Carl B. Rice.

Hoist Operator: D. T. Miller.

Millwright Foreman: Harold Goad.

Millwrights: Charles L. Bassam, E. H. May, Lowell H. May.

Carpenter Foremen: Henry Starr, Howard Williams, Charles Patrick.

Carpenter Layout Man: Thomas Greene.

Carpenters: Jack Patrick, M. F. Sublett, N. Hackworth, Verner Conley—

Mr. Mullen: What did you say Hackworth?

The Witness: Yes.

page 472 } Mr. Mullen: What is his first name?

The Witness: His first name is Norman.

Harrison Daniels, Lonnie Dixon, Alfred Dorson, M. M. Price, Robert Poe, Robert Hackworth, J. E. Hackworth, W. P. Wright, Otto Preston, Clarence Endicott, Grant Davis, B. F. Pelphrey, H. H. Hounshell, Roger H. Ray, Charles Collett, Thomas Arms, John T. Arnett, Tomie Wireman, Wishard Lemasters, Homer Salyer, Charles Marshall, Harry J. Watson, LeGrand Mayo, Chester Trimble, Bert E. Preston, Jr. Take Bert Preston out. He wasn't working at that time.

Estle Robinson, Paris Trimble, Lindon Higgins, Edmond Dobbins, Leslie I. Myers.

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Painter: Walter S. Moore, Jr.

Electrician Foreman: Carl Patrick.

Electricians: Hulbert Bailey, Clarence H. Patrick and William E. Patrick.

That was all for July 26.

By Mr. Robertson:

Q. How many is the sum total of that if it is shown there, where you can get it by glancing at it?

A. I have it in another place, I think. 64 people.

Q. Were any of those working up at the top of the mountain at the head house and up around there?

A. Yes, sir.

Q. As I understand, none of those up on top page 473  $\frac{1}{2}$  of the mountain were bothered.

A. No, they continued working.

Q. They were all delivering coal. How many were working, including the tippie, the residences and the school house, everything except up on top of the mountain?

A. Thirteen people were working on top of the mountain: 8 carpenters, 1 carpenter foreman, a hoist operator, and 3 laborers.

Q. That would be how many down below?

A. On the tippie there were 41 people working: 2 iron workers, one millwright foreman, one millwright, one carpenter foreman, one carpenter layout man, 18 carpenters, one labor foreman, 12 laborers, and 4 electricians.

Q. How many were working at the school house?

A. Seven people: 1 carpenter foreman and 6 carpenters.

Q. How many were working at the 25 residences?

A. A painter and apprentice.

(Documents exhibited to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you now what appears to be the Laburnum Construction Corporation payroll for the week ending July 31, 1949, in four sheets, and I will ask you if that is a copy of a part of the payroll from which you testified a moment ago.

A. This is a copy of our payroll for the week ended July 31, 1949, for our jobs 322, 323, 326, and 340, all page 474  $\frac{1}{2}$  in Breathitt County, Kentucky.

Q. Is this a copy of what you testified from, of the original payroll?

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A. The original was prepared on a stencil which we still have, and this was run off the same stencil.

Mr. Robertson: I offer these four sheets in evidence collectively and ask that they be marked Plaintiff's Exhibit No. 44.

(The documents referred to were marked Plaintiff's Exhibit 44 and received in evidence.)

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you now what appears to be the payroll for the week ended July 31, 1949, in two sheets for the Virginia Mechanical Corporation and ask you if that is a copy of one of the payrolls from which you testified.

A. Yes. The Virginia Mechanical Corporation is a wholly owned subsidiary of Laburnum, and electricians appeared on the payroll of the Virginia Mechanical Corporation. This is the payroll for the week ended July 31, 1949, on the work in Breathitt County, Kentucky.

Mr. Robertson: I offer the two sheets in evidence collectively and ask that it be marked Plaintiff's Exhibit 45.

(The documents referred to were marked Plaintiff's Exhibit 45 and received in evidence.)

page 475 } By Mr. Robertson:

Q. Mr. Bryan, after you were run off the work in Breathitt County, Kentucky, and after your interview with Mr. David Hunter at Pikeville, about which you have testified, on August 5, 1945, did you continue for a time to submit bids for work to Island Creek Coal Company and Pond Creek Pocahontas Company and their associated and affiliated companies?

A. Yes, we were invited to submit proposals for a while.

(Document exhibited to Defendants' counsel.)

page 476 } By Mr. Robertson:

Q. Mr. Bryan, I hand you a carbon copy of a letter dated September 5, 1949, from A. Hamilton Bryan, President, to Pond Creek Pocahontas Company, Holden, West

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Virginia, and ask you if that is a proposal by Laburnum Construction Corporation to Pond Creek Pocahontas Company to furnish labor and materials for the installation of a heating plant in connection with the coal preparation plant at the No. 1 Kentucky Mine for the lump sum of \$25,595?

Colonel Harris: We object to it, if the Court pleases, on the ground it is immaterial and irrelevant and incompetent. He didn't get the contract. He didn't do the work. He didn't make any profit on something that he didn't do.

Mr. Robertson: If Your Honor please, that is the same point you have ruled on repeatedly. It is in the trial brief. We are going to show here that he submitted a series of bids, and finally I am going to introduce here a letter from the Pond Creek Pocahontas Coal Company telling him as long as the situation existed, he need not bid any more. In short, they broke up the connection.

The Court: The Court will overrule the objection and admit the paper for what it is worth.

Mr. Mullen: Will you note an exception, Your Honor, and that it continues as to this line of testimony?  
page 477 } The Court: All right.

The Witness: This is a part of the work that Mr. Salvati had agreed we would have on the basis of cost plus 5 per cent. After our contract was terminated and we moved away, we were asked to submit a lump sum proposal, and we did it in this letter.

Mr. Robertson: I offer the letter in evidence, and as that it be marked Plaintiff's Exhibit No. 46.

(The letter referred to was marked Plaintiff's Exhibit No. 46 and received in evidence.)

By Mr. Robertson:

Q. What was the lump sum estimate in that letter?

A. We were to prepare drawings and specifications for the heating plant and submit them to Pond Creek for approval. Based on our idea of what would be required as shown on the plans and specifications, we said we would do it for \$25,595.

Q. At cost-plus, or what?

A. No, that would be a fixed price.

(Document exhibited to Defendants' counsel.)

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By Mr. Robertson:

Q. Mr. Bryan, I hand you a carbon copy of a letter dated September 7, 1949, unsigned but typed: "Sincerely yours, President," addressed to Pond Creek Pocahontas Company at Holden, West Virginia, and ask you what that is?

A. This was a letter submitting a proposal for page 478  $\frac{1}{2}$  the construction of one cement block store building and two 6-room frame dwellings, and 12 five-room frame dwellings, at Evanston, Kentucky. They were a part of the buildings that Mr. Salvati agreed we would do on the basis of cost plus 5 per cent.

After we moved away and our other contract had been terminated, they asked us to submit a lump sum proposal.

Q. What was the lump sum of that proposal?

A. The lump sum proposal was \$205,047. However, it was conditioned in various ways.

Q. Did you get the work?

A. No.

Q. Did you get the work that you mentioned there in Exhibit No. 46 for the heating plant at No. 1 Kentucky Mine in Breathitt County, Kentucky?

A. No.

Mr. Robertson: I offer the letter of September 7, 1949, in evidence, and ask that it be marked Plaintiff's Exhibit No. 47.

(The letter referred to was marked Plaintiff's Exhibit No. 47 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you a carbon copy of a letter dated September 29, 1949, typed "Sincerely yours, President," addressed to Pond Creek Pocahontas Company, Holden, West Virginia, having attached to it a sheet dated September 29, 1949, entitled "Proposed Addition to Store Building, Pond Creek Pocahontas Company, Bartley, West Virginia," and ask you what that is?

A. We were asked by Pond Creek Pocahontas Company to submit a proposal to construct an addition to a store at Bartley. There were no drawings and specifications. We had more or less to imagine what we thought they wanted.

We wrote this letter dated September 29, 1949, and made a proposal to perform the work on a cost-plus basis. We also said that we estimated that the work would cost \$28,877, and we would perform it for that lump sum amount, provided we

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had time to fix drawings and specifications so that there couldn't be any misunderstanding as to what the work included.

Q. Was that work awarded to the company?

A. No. We never heard from it.

Mr. Robertson: I offer the two sheets in evidence, and ask that they collectively be marked Plaintiff's Exhibit No. 48.

(The documents referred to were marked Plaintiff's Exhibit No. 48 and received in evidence.)

By Mr. Robertson:

Q. Did the Laburnum Construction Company on November 4, 1949, submit a proposal to Island Creek Coal Company for the construction of a community building near Ragland or Delbarton, West Virginia, for the lump sum of \$94,359?

A. Yes. We prepared an estimate for the cost page 480  $\frac{1}{2}$  of that work and gave an oral proposal of \$94,359 on or about November 4, 1949. We were soon advised, after that, that the Island Creek Coal Company decided to change the scope of the work entirely, and that no action would be taken, and that they were going to fix up some plans and send them to us and then we could submit another bid.

This work didn't go ahead on that basis.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you a carbon copy of a letter typed, "Sincerely yours, President," dated November 23, 1949, to Pond Creek Pocahontas Company, Holden, West Virginia, and ask you what that is?

A. This is another proposal for the addition to the store at Bartley, West Virginia, \$37,308.

Q. Was that a lump sum proposal or cost-plus?

A. Yes, this was a lump sum proposal for the work generally for which we had submitted a prior proposal, but they decided to change it somewhat. This was a large job.

Q. Did you get the work?

A. No.

Mr. Robertson: I offer the letter in evidence, and ask that it be marked Plaintiff's Exhibit No. 49.

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page 481 } (The letter referred to was marked Plaintiff's Exhibit No. 49 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, I am speaking from memory, but my recollection is that during the early part of May, 1950, Island Creek Coal Company or Pond Creek Pocahontas Company invited Laburnum to take over its building program in West Virginia and Kentucky, and that we have introduced that letter in evidence. Is my memory correct?

A. You are correct. The letter was dated September 3, 1948.

Q. I am wrong in my date.

A. The letter related to Island Creek Coal Company's building program in West Virginia for the construction of churches, community houses, stores, beauty shops.

(Document shown to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you now a carbon copy of a letter typed, "Sincerely yours, President," dated December 29, 1949, to Pond Creek Pocahontas Company, Holden, West Virginia, and ask you what that is.

A. We were asked by Pond Creek Pocahontas Company to submit a proposal for the construction of a gas station, a service station, at Bartley. We wrote a letter dated December 29, 1949, offering to do the work for \$5,596.

page 482 } Q. Was that a lump sum price?

A. It was lump sum proposal, and then we submitted an alternate proposal to perform the work on a cost-plus basis.

Q. Did you get the work?

A. No, sir.

Mr. Robertson: I offer the letter in evidence, and ask that it be marked Plaintiff's Exhibit No. 50.

(The letter referred to was marked Plaintiff's Exhibit No.

(Document exhibited to Defendants' counsel.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you what appears to be a photostat of a letter under the Island Creek Coal Company letterhead, dated May 18, 1950, from R. E. Salvati to you as President of the Laburnum Construction Company, and ask you if you received the original of that letter?

*Alexander Hamilton Bryan.*

Mr. Mullen: Your Honor, we object. That letter was purely a self-serving declaration solicited by the Plaintiff long after this suit was brought. It shows plaintiff what it was for. It was in May, 1950. This suit was brought in December, 1949. This letter is purely a self-serving declaration.

Mr. Robertson: Are you through?

Mr. Mullen: I am through for the time being.  
page 483 } Mr. Robertson: It is the same old objection which Your Honor has ruled on time and again. It is a letter from Salvati to Bryan, telling him there is no use to bid any more and not to do it. I offer it to show that these people destroyed this business connection.

Mr. Mullen: I still say, Your Honor, it was after this suit was brought, something that happened subsequent to the suit. It was solicited by the Plaintiff, of Salvati. It plainly shows it was solicited for the purpose of this suit.

Mr. Robertson: This all goes to the weight of it.

The Court: I will overrule the objection and admit it for what it is worth.

Colonel Harris: We reserve an exception, at this time.

The Witness: Yes, this is the letter.

Mr. Robertson: I offer the letter in evidence, and ask that it be marked Plaintiff's Exhibit No. 51.

(The letter referred to was marked Plaintiff's Exhibit No. 51 and received in evidence.)

Mr. Robertson: I ask to read this letter to the Jury:

**"ISLAND CREEK COAL COMPANY**

R. E. Salvati  
President

Huntington  
West Virginia

May 18, 1950

page 484 } Mr. A. Hamilton Bryan, President  
Laburnum Construction Company  
Richmond, Virginia

Dear Mr. Bryan:

I have seriously considered your bidding on the recreation building and church at Rockhouse. Since I talked to you, I

*Alexander Hamilton Bryan.*

find that we have about four or five other reputable and well qualified concerns, which have contracts with the United Mine Workers, that are going to bid. In view of this situation, it seems to me that it would be better that you refrain from bidding because of the facts outlined to me in our conversation Monday evening.

I regret that these circumstances prevail, but I believe it is better to go along with the suggestion which I have outlined.

I was glad to have an opportunity to talk and be with you. With kindest regards.

Sincerely,

R. E. SALVATI."

(Document exhibited to Defendants' counsel.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you a carbon copy of a letter dated May 23, 1950, signed "A. Hamilton Bryan, President," to Mr. Salvati, and ask you if that is your reply to the letter I have just read?

page 485 } Mr. Mullen: If Your Honor please, we object to that. That is not a letter from Salvati, as they argued the other. This is a letter written by the Plaintiff after this suit was brought, written to Mr. Salvati. It contains an argument about why he can't bid, and so forth. It certainly is not proper in this suit.

Mr. Robertson: I think it might be well for the Court to read it.

The Court: Let me see the letter, please.

(The Court examining document.)

Mr. Robertson: I withdraw the letter, Your Honor, if they object to it.

The Witness: Your Honor—

The Court: It is withdrawn.

The Witness: Your Honor, may we adjourn court a minute?

The Court: Yes. Court will recess, gentlemen, for five minutes.

(Brief recess.)

*Alexander Hamilton Bryan.*

page 486 } (The following proceedings were had in chambers.)

Mr. Fred G. Pollard: Judge, Plaintiff's Exhibit No. 49 is a letter dated November 23, 1949, addressed to Pond Creek Pocahontas Company, Holden, West Virginia. Mr. Bryan testified he signed it as President of Laburnum Construction Corporation. The last sentence reads: "We thank you for having given us an opportunity to submit this proposal."

That was done on November 23, 1949. This suit was instituted on November 16, 1949. By the Plaintiff's own exhibit, it shows that the business relation was not destroyed at the time the suit was instituted. Therefore, we move that the jury be instructed to disregard any evidence after the date the suit was instituted, because it is shown here that the business relation still existed at the time the suit was brought.

We would like also to move the Court to exclude any evidence in the future that might be offered as to what transpired.

Mr. Robertson: I can't hear you.

Mr. Fred G. Pollard: Since the date the suit was instituted.

Mr. Robertson: I didn't hear your last statement. Will you speak a little louder?

Mr. Fred G. Pollard: Would you read that to Mr. Robertson?

page 487 } (The statement referred to was read by the reporter.)

Mr. Robertson: If Your Honor please, since he is taking that tack, I think I will just go ahead and offer the exhibit, because I think it is all admissible. He is trying to get rid of the letter where Salvati told us not to bid any more. We claim that is the culmination of being run off the job; that it destroyed this relationship. Everything he says goes to the exhibit and stand my ground on it.

Mr. Mullen: If the suit was brought in November, that suit has to be based on an existing injury. It can't relate to something that happens after that. Your injury, then, as claimed, was lost on work on this job, not future work, not business connections. You hadn't lost it.

Mr. Robertson: Judge, I am not sure what I want to do on that. Will you give me a few minutes to confer?

*Alexander Hamilton Bryan.*

Mr. Fred G. Pollard: May I turn this exhibit over to the reporter?

The Court: Yes.

(Counsel withdraw for separate conference.)

Mr. Robertson: We think the evidence is admissible as confirming and showing the destruction of the business relationship.

Mr. Allen: If Your Honor, please, the situation is this, as I see it: Without respect to the particular page 488 } form of the testimony, it must be true that we should be able to show anything that happened afterwards that confirms the fact that the business connection is destroyed permanently. On the other hand, if Mr. Bryan and these companies out there had gotten back together and the business had been revived and they were now giving them contracts freely, they certainly would be permitted to show that.

Mr. Fred G. Pollard: There wouldn't be any litigation.

Mr. Allen: They would be permitted to show that the business connection had not been destroyed.

The object of evidence like this is to show that Mr. Bryan has been continually trying and doing his best to get that business, and has been unable to do it, even up to this date; that it has destroyed permanently that connection. Anything that shows that, that is in the proper form, is admissible.

Mr. Mullen: You have to go to the date of the suit, the date the suit was instituted. That is the only thing you can bring the suit for; not for something future. At the date the suit was instituted, the connection had not been broken. He has already testified, as shown by his recent testimony, that he has bid and bid and bid. Nobody knows why—we know why some of them weren't accepted. It was because he was the high bidder. But it is something in the future, page 489 } You certainly can't bring a suit today and claim something that happens in the future is the pain for which you are suing.

Mr. Allen: If Your Honor please, we don't want to argue about things that we don't consider so material. This doesn't mean anything in this case, anyway. We think it is legitimate evidence. We think we are entitled to it. If they object to it seriously, we just withdraw it.

Mr. Fred G. Pollard: No, Your Honor. That evidence has been introduced and the Court has ruled on it, and we don't want it withdrawn.

*Alexander Hamilton Bryan.*

The Court: I thought that was your motion.

Mr. Fred G. Pollard: No, sir. Our motion was to tell the jury that any evidence that has come in on the business relationship of the Plaintiff with the Coal Companies after the date the suit was instituted is to be disregarded by them, and not to allow any more testimony on that point.

Mr. Robertson: You either have to strike it out or leave it in. You can't make your decision—

Mr. Fred G. Pollard: We want it all stricken, anything he has testified to after the date the suit was instituted.

Mr. Mullen: Strike it out. Striking it out and withdrawing it after you have read it are two very different things.

Mr. Allen: Your Honor, we must not confuse page 490 } the principle here with the one that when you bring a suit for damages, your damages are limited up to the time that the action started unless it is a continuing thing that results in more damages. You can show your damages all along. You can show whether they are permanent or whether they are temporary.

All of this goes to show the nature of the damages suffered, whether they were temporary or permanent.

I merely offered to withdraw it just to save time and get along. If they don't want it withdrawn, then we say let it stay in.

Mr. Mullen: We have stated what we want.

The Court: Do you contend that you are entitled to any damages after the suit was instituted?

Mr. Allen: We are not entitled to any damages that arose out of something that was done after this suit was started. There isn't any question about that. But we are entitled to damages for what was done before the suit was started, and we are entitled to show whether those damages were temporary or permanent.

The object of this testimony is to show the nature of the damages; that they were permanent.

Mr. Fred G. Pollard: Your Honor, the damage hadn't occurred when the cause of action was instituted, because a week after the action was instituted, Mr. Bryan writes page 491 } to the Coal Company and says, "We thank you for giving us an opportunity to submit this proposal," which shows that the business relation had not been destroyed.

Mr. Mullen: He was never interfered with in West Virginia where he was making bids.

*Alexander Hamilton Bryan.*

Mr. Fred G. Pollard: He was still working in West Virginia.

The Court: Isn't that a question to argue before the Jury?

Mr. Robertson: Yes.

Mr. Mullen: I think it is a question of law.

Mr. Fred G. Pollard: The Jury is not entitled to consider any evidence—

The Court: Couldn't that be taken care of by proper instruction of the Court? It seems to the Court that the situation could be taken care of by proper instruction of the Court and by argument before the Jury.

I will overrule the motion.

Mr. Fred G. Pollard: We except, Your Honor.  
page 492 } Mr. Mullen: Then we are going to object to  
any further evidence being introduced occurring  
subsequent to the suit.

Mr. Robertson: I didn't hear that.

Mr. Mullen: We are going to object to the introduction of any further evidence of occurrences subsequent to the bringing of the suit.

Mr. Robertson: Suppose you wait until we offer it. You might change your mind. You might find something helpful to you.

The Court: Do you gentlemen intend to offer any other evidence along this line?

Mr. Robertson: I don't think so, Your Honor, but I am not sure. I don't think so.

The Court: All right. Did you note your exception?

Mr. Fred G. Pollard: Yes, sir.

page 493 } (The following proceedings were had in open  
court:)

By Mr. Robertson:

Q. Mr. Bryan, you have previously testified that after your men were run off the job on July 26, and after your efforts to get them to go back to work failed, you instructed your new superintendent, Mr. Veltry, to clean up the job and ship your equipment elsewhere. I think you testified that he did that. At my request have you ascertained from the payrolls how many men he employed to do that and how many days and who they were?

A. Yes, sir.

Q. Will you state first who they were?

A. During the week ended August 7, 1949, there were two

*Alexander Hamilton Bryan.*

men, iron workers, John W. McClellan and Carl B. Rice, who worked on August 4 and 5. During the next week, that is, the week ended August 14, 1949, we had the following men employed:

Superintendent, Louis G. Veltry. Chief Clerk, Maynard C. Ragan. Iron Worker Foreman, John W. McClellan, Iron Worker, Carl B. Rice. Carpenters: Harrison Daniels, Clarence Endicott, H. H. Hounshell, and John T. Arnett. All of those men worked from August 8 through August 12.

In addition to that we had the following Laborers: Donald B. Trimble, Hargis H. Howard, Green Conley, George England, and Arnold Sloan. Those men worked every day from August 8 through August 12. We also had Green  
page 494 } Trusty, Dan Combs, and Burl King. They worked on August 8 and August 9.

Mr. Veltry and Mr. Ragan, of course, were also employed during the prior week. I don't think I named them.

(Document exhibited to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you what appears to be a carbon copy of the Laburnum Construction Corporation payroll, in two sheets, for the week ended August 7, 1949, and ask you if that is a copy of the original payroll about which you have testified.

A. Yes, sir, this is a Ditto copy of the original payroll.

Mr. Robertson: I offer the two sheets in evidence collectively and ask that they be marked Plaintiff's Exhibit No. 52.

(The document referred to was marked Plaintiff's Exhibit No. 52 and received in evidence.)

By Mr. Robertson:

Q. I hand you what appears to be a copy of payroll, in two sheets, of Laburnum Construction Corporation for the week ended August 14, 1949, and ask you if that is a copy of the payroll about which you testified.

A. Yes, sir, it is a Ditto copy of that payroll.

Mr. Robertson: I offer the two sheets in evidence collectively and ask that they be marked Plaintiff's Exhibit No. 53.

page 495 } (The document referred to was marked Plaintiff's Exhibit No. 53 and received in evidence.)

*Alexander Hamilton Bryan.*

Mr. Robertson: If Your Honor please, that completes my examination of Mr. Bryan at this time, with these qualifications: After Mr. Cassidy has completed his examination about the applications that have been referred to here and has testified regarding them, I think it will be necessary to put Mr. Bryan on regarding that phase of the case, and also later on it is going to be necessary to put him back regarding the interrogatories and regarding some photostat evidence which more appropriately comes in at the end of our case-in-chief. I would like to put him back for those purposes later on.

Colonel Harris: If the Court pleases, before the cross examination begins, the Defendants ask the Court to instruct the witness to deliver to us now all the different batches of prepared testimony to which he has been referring for two or three days since he has been on the stand, and we also ask that Defendants' counsel be given sufficient time to read all those batches of prepared testimony.

Mr. Robertson: We welcome that, Your Honor, and they are welcome to it.

The Court: How much time will you need?

Colonel Harris: I haven't seen them. One of them looked like it had about thirty pages. The yellow one looked like it had five or six. Then there are two more batches. page 496 } I don't know how long they are. I haven't seen them.

The Court: Suppose we recess for five or ten minutes, and counsel for Plaintiff will furnish counsel for the Defendants copies of the various papers. Then the Court can determine how much time will be allotted for that purpose.

Colonel Harris: If the Court pleases, we want the exact papers that he has been reading from and referring to as he testified.

The Court: That was understood.

Mr. Robertson: I want this understood, too, Your Honor, that it is our contention that he has a right to look at them, but he hasn't a shadow of legal right for what he is asking now. We welcome the opportunity to give it to them and they may take them and keep them as long as they want them.

The Court: It was understood that you would receive these papers at the end of the examination.

Mr. Mullen: He knows we have a legal right to have them. The statement that we don't have a legal right is improperly made.

*Alexander Hamilton Bryan.*

The Court: Gentlemen, if they didn't have a legal right to them, I wouldn't let them have them.

Mr. Robertson: He might have availed himself of our courtesy.

The Court: It is a courtesy and it was agreed to. Then there was contention on the part of the Defendants that they had a legal right to it, and I don't know that it became necessary for me to rule on it, since the Plaintiff agreed to furnish them. Anyhow, they will receive the papers. We will recess for five or ten minutes, and then I can tell you when to come back.

All right, gentlemen, you may confer.

(Brief recess.)

page 498 } (The following proceedings were had in Chambers:)

The Court: Mr. Mullen has a statement he would like to make.

Mr. Mullen: I question their right, Your Honor, to put on Mr. Bryan's testimony piecemeal as they propose. I think we are entitled to have his evidence-in-chief put on as a whole so we know how to cross-examine. If we were to cross-examine on what is put in now and they still continue his examination in chief, the second part of it may make unnecessary what we say or may put an entirely different phase on what he said on cross examination. I don't think that they have a right to do that.

Mr. Robertson: If Your Honor please, of course the whole matter is completely within the discretion of the Court. Counsel for the Defendants announced yesterday that if we put in any interrogatories and answers, they were going to insist that all of them be read. We have not yet finished our analysis, which we are making anew of those interrogatories and answers, and therefore we haven't determined yet how we are going to meet that situation. We will determine it in due course.

I have already stated about the applications of the laborers. That is a minor phase of it which Mr. Cassidy, I understand, will be ready on tomorrow. We are going to put him on whether he says they are forgeries or whether he says they are genuine. We are going to let everybody know what they are. I don't know what he is going to say. I think he will say they are genuine, but if he says they are false we will put him on anyway.

The other evidence from him, so far as I know, will be what he may have to testify about the interrogatories—I don't mean the contents of them. I mean the way they were made up or something like that, and about the photostats, the way he got the photostats. I have no idea of going back through the merits of the case again. I think the logical place for that to come is at the conclusion of our case in chief. I don't think that this is the proper time for the Court to make a moot ruling that if we offer Mr. Bryan hereafter, the Court is not going to let him testify. I am perfectly willing to abide by our judgment of the Court as to what is the proper ruling when the time comes.

We have finished our case in chief with the exception of the records and those applications so far as I am now advised. Of course there may be some tag ends that I have overlooked that we would want to cover later on. At the moment I don't think of any, but that is customary and the approved practice in a case that covers the scope that this case is covering.

Mr. Allen: Let me say something so you can answer that, too, Colonel, before you start.  
page 500 } If Your Honor please, I do not understand that a definite ruling has been made by the Court that if we introduce any of the interrogatories we have to read them all to the jury. I think that is open. While I don't want to argue that now, we are thoroughly prepared to show your Honor that that rule does not apply to interrogatories.

Mr. Robertson: Let me interrupt you just one moment. What we are really trying to do, Judge, we are trying to eliminate as much controversial matter as we can, to lessen the labor of everybody on those.

Mr. Allen: In other words, Your Honor, just to illustrate what Mr. Robertson says, in the interrogatories we asked questions relating to the official organ of the United Mine Workers. Then we asked a question asking them to produce them. They produced a batch of copies of the United Mine Workers Journal that thick (indicating).

Mr. Fred G. Pollard: At your request.

Mr. Allen: Do they mean to contend that we have got to sit here until next Christmas to read everything in the United Mine Workers Journal? We asked them to produce them and when they produce them there are certain things in there we want to read, only, and that is all we expect to read. That applies as it applies to exhibits filed with interrogatories, because interrogatories proper call just for questions and answers.

page 501 } Mr. Robertson: We don't have to argue that now.

Mr. Allen: I know, but I want the Judge to understand that that is the question, and we will be here forever if we have to read everything.

Leaving that for the moment, we have got to call Mr. Bryan back some time or other to testify on photostats of certain of the journals that they said they didn't have. They said they had only certain copies and they would furnish us what they had. What they didn't furnish we want to introduce, perhaps, just a very few photostats from the journal, photostats from the proceedings of the International Convention. It will be absolutely necessary for us to call Mr. Bryan back on those things which don't relate to anything that he has already been examined upon. In other words, we are not going to examine him on anything he has already been examined upon, and then if we put him back on for those limited purposes, they may cross-examine him with reference to the limited examination which we have conducted of him.

As Mr. Robertson has said, the order of testimony and the order of examination of witnesses is entirely within the discretion of the Court, and it is not reversible error. It doesn't make any difference what the Judge does about it. It just simply facilitates the trial, expedites it, and helps us get along, because we want to eliminate all the page 502 } photostats that we can. We want to eliminate everything that we can so as to get along. We have no desire to keep them from reading anything they want that is in the interrogatories or in the journals or in anything else, but we just want to keep the case to a minimum, if possible.

Mr. Fred G. Pollard: Your Honor, just to clear up an erroneous impression that I think Mr. Allen might have given, the reason that they have got all those newspapers and all these other documents in the interrogatories is because they didn't comply with the statute which requires them to file an affidavit describing the papers that they wanted. They have gotten all these papers, and the law is if they propound interrogatories to us, we cannot put them in evidence, but if they put them in evidence they have to read everything in them. They must take the good with the bad. I just wanted to clear up that situation.

Colonel Harris: They asked me a question which I want to answer when you get through.

Mr. Fred G. Pollard: I am through, sir.

The Court: All right, Colonel Harris.

Colonel Harris: In reply to the argument that this is a moot question that we are arguing, I submit that it is not correct. Counsel for the Plaintiff announced in open Court in

the presence and hearing of the jury that they were going to call Mr. Bryan back and stated the purpose for page 503 } which they would call him. If we had kept quiet and had made no objection, then when they did call him back they could come up and say, "You assented to it. The time for you to object was when we made our positive announcement, and on that announcement we didn't finish our examination." So we are compelled to put in these objections now. I don't think they are moot at all. They have announced what they are going to do.

In every lawsuit, if the Court pleases, there is by skilled trial lawyers a jockeying for position, and your Honor knows that in any kind of a contest position has just as much to do with final results as the skill of the players. It does two things: It enables them to use Mr. Bryan to open and Mr. Bryan to close, the witness also being a lawyer. Then it deprives Mr. Mullen and Mr. Pollard and myself of that information that he then gives when we cross-examine him, when we are making preparations as to what we will do with our witnesses. I submit if you were to concede that it is a matter of discretion of the court, it is a discretion that should be exercised in the customary way, and let them finish with the witness and then turn him over to the other side.

Mr. Robertson: Your Honor, I want to say just two things: I don't want to argue this today, but we are prepared to argue the matter right this minute. Mr. Moore has page 504 } the authorities and has the books with him if you want to argue it.

Mr. Mullen is wrong on his law on the interrogatories, what Mr. Mullen said last night. What the statute says is that all relevant and material parts must be read. That is the sense of it. I have not memorized the statute. I submit that that is the law and we are prepared to argue it, but I don't want to argue it now because I want to try to reduce it to a minimum. Frankly, what I think we are going to have to do is ask the Court to come here perhaps Saturday and go through those things one at a time and rule what is relevant and what is not relevant, and what is in and what is out. Then if they insist that all relevant parts be read, I think we have to read them. I don't think the law is that you have to read a lot of irrelevant trash.

Coming along now to our putting Mr. Bryan on later, that is within the sound discretion of the Court. If the Court defers its ruling now and we offer Mr. Bryan as a witness later on, and the Court thinks we do it under unfair circumstances or in a way that puts the Defendants at any unfair disadvantage, the Court at that time can exercise its discretion and

rule that he cannot go to the stand. I have never tried a case in Virginia yet where I have been denied the request for the exercise by the Court of the discretion that we are requesting now.

page 505 } Mr. Allen: I would like to make a brief reply to what Mr. Pollard said there about our proceeding in an improper way to get those interrogatories.

Mr. Fred G. Pollard: I didn't say it was improper.

Mr. Allen: You said we didn't comply with the statute. The Court held in the famous Robinson case, in 101 Va. 520, and I want to read it. It is very short. I will read one paragraph that may not have anything to do with it but it leads up to it:

"A litigant's attendance upon the trial may be compelled by the issuance and service upon him of a subpoena under code section 6-217 as amended by Act 1940, Chapter 159, as the case with any other witness; but a party to a civil suit as well as any other witness who is present in court may, of course, be called upon to testify although he may not have been served with a subpoena. The same principle applies to subpoenas issued under Code Section 6-219 and 6-237. While under these sections a witness or an adverse party may be compelled to appear and bring with him material documentary evidence, should the witness or party be present in Court and have in his custody the desired document, he may be lawfully compelled by the verbal direction of the court to produce it, although no subpoena has been issued therefor."

Then the court cites a number of authorities.

page 506 } We have the pre-trial conference rule by statute now, and at the pre-trial conference you can call for any document, and the court says whether they are presented. In these interrogatories, they were a combination of interrogatories, and then they said, "If you have these reports or if this man made these weekly reports, produce them. If this is the official journal of the United Mine Workers, produce it."

We came here and the transcript of the pre-trial conference will show that when we got to those things Mr. Mullen over there, I think it was Mr. Mullen, said "We haven't got all the copies of the journal that you want, but we will furnish the copies we have." They did furnish a batch of copies that thick (indicating). They are here, and all we have to do is ask that they be produced. The same way with the news, and the same way with those reports. In connection with interrogatories we called for all sorts of reports. They are here.

## Supreme Court of Appeals of Virginia.

All we have to do is ask to be allowed to produce them. The fact that we didn't—

The Court: Can't I pass on that at the time?

Mr. Robertson: Yes.

Mr. Allen: Certainly.

Mr. Robertson: I don't see why we are arguing it now.

Mr. Fred G. Pollard: I want to straighten one page 507 } thing out. Mr. Robertson said I quoted the law incorrectly and it is he who quoted it incorrectly.

The Court: We will have to go into that more thoroughly.

Mr. Mullen: On the question of interrogatories, if you are going to try to argue that, I want to be heard fully on that. There isn't any question in the law about that. I didn't know we were here for that. We are here to see for how long we are going to adjourn.

The Court: I understand you want to adjourn until tomorrow morning.

Mr. Mullen: Yes.

Mr. Allen: May I make a suggestion here, then. I am just saying this out loud. If you are going to adjourn until tomorrow morning, we may be able and may be ready to go on with Mr. Bryan. Maybe Mr. Cassidy will have made his report by that time. Maybe we will have these other documents ready by that time. Then before we turn him over for cross examination you will have all this testimony.

The Court: If you can do that, do it. I will let the jury go until tomorrow morning at ten o'clock. In the meantime, if you have an opportunity, gentlemen, you might prepare me a memorandum on these interrogatories, the question having been raised that you have to read them all.

Mr. Mullen: Don't the Virginia cases settle it page 508 } absolutely?

Mr. Allen: I will save that for another time.

The Court: It would be helpful if you could let me have a memorandum on that tomorrow morning. I have your memorandum, Mr. Mullen.

Mr. Mullen: Yes.

Mr. Robertson: Have you given the Court a memorandum and not given us a copy of it? If you have, we would like that courtesy.

Mr. Fred G. Pollard: You cite one of the cases in your trial brief.

Mr. Robertson: I am saying if you have given papers to the Court I think I have a right to have a copy of it.

Mr. Mullen: Certainly I will give it to you.

The Court: The Court would like to have an opportunity to review the memorandum before passing on the question.

Mr. Allen: What time would you like to have it in the morning, Your Honor?

Mr. Robertson: Unless you are going to write it, let's leave it where it is.

Mr. Allen: The Judge said he wanted a memorandum.

Mr. Robertson: I just wanted you not to put a deadline on our work unless you are going to write it.

Mr. Allen: We have the authority.

page 509 } The Court: What time do you think the question will come up?

Mr. Robertson: I can't tell.

Mr. Allen: I don't think we will reach that—

Mr. Robertson: I want to confer with you before you commit us, George.

The Court: Let the Court go in and adjourn the jury until tomorrow morning and then we will come back in here.

(Brief recess.)

(Whereupon, at 12:45 o'clock p. m. the jury was excused until the following morning at 10:00 o'clock a. m.)

(The following proceedings were had in Chambers:)

The Court: Is there anything else that you gentlemen want to take up before we adjourn?

Mr. Robertson: No.

The Court: I thought maybe you gentlemen were conferring on something.

Mr. Robertson: No, sir.

The Court: We will meet tomorrow morning at ten o'clock.

(Whereupon, at 1:00 o'clock p. m. the Court recessed until 10:00 o'clock a. m. Friday, January 26, 1951.)

page 510 }

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 26, 1951.

*Alexander Hamilton Bryan.*

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

page 511 } PROCEEDINGS.

(Roll call of the jury.)

Mr. Robertson: If Your Honor please, I would like to put Mr. Bryan back for just a very few questions.

Whereupon,

ALEXANDER HAMILTON BRYAN,  
the witness on the stand at time of recess, resumed the stand and testified further as follows:

DIRECT EXAMINATION—continued.

By Mr. Robertson:

Q. Mr. Bryan, yesterday you testified regarding various proposals for construction work which you submitted to Island Creek and its associated and affiliated subsidiary companies for construction work which was not awarded to Laburnum. At my request have you made a tabulated statement summarizing those estimates?

A. Yes, sir.

(Defendants' counsel examining document.)

Colonel Harris: That is just summarizing the ones talked about yesterday?

Mr. Robertson: Yes.

Mr. Bryan, I hand you a statement and ask you if that is such a summary?

The Witness: Yes, it is.

Mr. Robertson: I offer the paper in evidence  
page 512 } and ask that it be marked Plaintiff's Exhibit No.  
54.

*Alexander Hamilton Bryan.*

(The document referred to was marked Plaintiff's Exhibit 54 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, you testified previously that your field clerk at the job site in Breathitt County, Kentucky, was Mr. Maynard Ragan; is that correct?

A. That is correct, he was the chief clerk.

(Document exhibited to Defendants' counsel.)

By Mr. Robertson:

Q. I hand you an unexecuted printed form entitled "Membership Application and check-off authorization, District 50, United Mine Workers of America," and attached to it is an envelope addressed to Laburnum Construction Corporation, 918 East Main Street, Richmond, Virginia, P. O. Box 234, attention Mr. A. Hamilton Bryan, with a cancelled postage stamp and stamped Salversville, Kentucky, July 16—it looks like 7 a. m., 1949, and ask you what that is?

A. After Mr. Hart telephoned me on July 14 I talked to the job superintendent Mr. Delinger, and also talked to Mr. Ragan, and asked that they keep in touch with the situation, and if United Construction Workers or District 50 were trying to organize any of our workers, please to let me know. On July 16 Mr. Ragan mailed to me this form of a membership application and check-off authorization, District 50, which one of our laborers had turned over to him.

Mr. Robertson: I offer the form and the attached envelope together in evidence and ask that they collectively be marked Plaintiff's Exhibit No. 55.

(The document referred to was marked Plaintiff's Exhibit 55 and received in evidence.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you an unexecuted printed form for recognition of United Construction Workers, District 50, UMW, bargaining agent for employees in all matters pertaining to wages, hours of work, and other conditions of employment, and also agree to meet within blank days for the purpose of negotiating a contract, which you have turned over to me, and ask you where you got that, if you recall.

*Alexander Hamilton Bryan.*

A. This is one of the papers which Mr. David Hunter gave to me during my conference with him in Pikeville on August 5. Mr. Hunter was asking me to sign an agreement with the United Construction Workers. This is a printed form, rather, a mimeographed form under the letterhead of the United Construction Workers, Pikeville Regional Office, P. O. Box 50, Pikeville, Kentucky, which Mr. Hunter said contractors and other employers signed for the purpose of recognizing United Construction Workers and District 50 as the bargaining agent for employees pending the execution page 514 } of a more formal type of agreement after various terms and conditions had been agreed upon.

Mr. Robertson: I offer the sheet in evidence and ask that it be marked Plaintiff's Exhibit No. 56.

(The document referred to was marked Plaintiff's Exhibit 56 and received in evidence.)

Mr. Robertson: That is a short one and I would like to read it to the jury, if Your Honor please.

"A. D. Lewis, Director, O. B. Allen, Comptroller, United Construction Workers, affiliated with United Mine Workers of America, 900—15th Street, Northwest, Washington, 5 D. C. Address Reply to: Pikeville Regional Office, Post Office Box 50, Pikeville, Kentucky, Telephone 1031.

"We the undersigned do hereby agree to recognize the United Construction Workers, District 50, U. M. W. A., as bargaining agent for our employees in all matters pertaining to wages, hours of work, and other conditions of employment and also agree to meet within . . . . days for the purpose of negotiating a contract.

"U. C. W. Representative, Date, Company's Name, Address, signed By, Signature, Title, Approved by, David Hunter, Acting Director Region 58. This paper Union made by District 50, UMWA."

There is a union symbol on this which I can't read, it is so small.  
page 515 } If Your Honer please, that is all the questions that I have to ask Mr. Bryan at this time. As I said yesterday, I wish to reserve the right to put him back on the stand later in further proof of our case-in-chief, if necessary to do so. I state at this time I have, of course, no

*Harry Evans Cassidy.*

intention of covering the same ground that he already has been over, and I would expect the Court at that time to rule whether the Court thought it fair for me to be permitted to put Mr. Bryan back or not. I realize I take that chance in what I am doing now and ask the Court to defer ruling on it until the question is actually presented.

The Court: The Court will reserve its ruling.

Mr. Robertson: I might say that Mr. Mullen has agreed with me that Mr. Bryan may now leave the stand before he is cross-examined in order that I may put Mr. Cassidy on to give evidence about these applications for membership that have already been mentioned in Mr. Bryan's testimony.

The Court: Very well. Stand aside, Mr. Bryan.

(Witness excused.)

Mr. Robertson: I call Mr. Harry C. Cassidy, please. I think Mr. Cassidy has not been sworn.

page 516 } Whereupon,

**HARRY EVANS CASSIDY**

called as a witness for Plaintiff, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Robertson:

Q. Mr. Cassidy, your name is Harry C. Cassidy?

A. No, sir. Harry Evans Cassidy.

Q. Where do you live?

A. Lower Hanover County, about half way between Old Church and Cold Harbor.

Q. What is your present business or profession?

A. The examining of questioned documents.

Q. Will you state generally what experience you have had in that work in the last 25 years?

A. I began the study of them back in 1915 while I was Superintendent for the Identification Bureau in the Kentucky State Reformatory in Frankfort, Kentucky. I was an officer down there. I worked there in 1915 and I came to Richmond and went to work for the Chesapeake & Ohio Railway Company. I was with the C. & O. until 1948, and then I quit. I didn't retire. I quit and went into this business of document examination on my own hook. During that time I studied

*Harry Evans Cassidy.*

various questions that came up, read the books on the subject, did all the research work that I knew how to do and got in touch with people up in the cities that knew a page 517 } lot about it, and they tried to make something out of me. As they say, they did the best they could. Mr. Albert S. Osborn in New York, Mr. J. Fordyce Wood in Chicago, and Mr. Herbert Walter up at Winnipeg, Canada. I got in touch with quite a number of those important people and tried to do the best I could under the circumstances.

Q. How many years were you with the C. & O.?

A. Thirty-two years and 11 months and 15 days, I think.

Q. During that time did you have experience with the C. & O. in examining the authenticity of various questioned documents which came through the C. & O. offices in Richmond?

A. Most every type of an examination, except will cases, came up somewhere down through the C. & O. during that period, yes, sir.

Q. Are you the man who did that work for the C. & O.?

A. Yes, sir.

Q. Throughout the system?

A. Yes, sir.

Q. Have you had experience before today in testifying regarding questioned documents in lawsuits?

A. Yes, sir.

Q. Were you one of the handwriting experts in the Lindbergh kidnapping cases?

A. Yes, sir; one among nine.

Q. Could you mention some Virginia cases that page 518 } you have been in?

A. I have been in several will cases around over the State and in criminal prosecutions for extortion letters and different kinds of cases like that.

Q. At the request of Mr. Bryan, the President of Laborum Construction Corporation, have you made an examination of 16 application cards for A. F. of L. membership?

A. Yes, sir.

page 519 } (Defendants' counsel examining documents.)

By Mr. Robertson:

Q. Mr. Cassidy, I hand von 16 application forms, and I am going to call the names of them and get you to arrange them alphabetically as I do so, so that I may question you about them in that order.

*Harry Evans Cassidy.*

Mr. Fred G. Pollard: Your Honor, we object to the introduction of these in any form, on the ground that no proper foundation has been laid for their introduction. Some of them are filled in, some of them are not. We don't know under what conditions they were signed, whether the laborers were coerced into signing them, who filled them in, whether they were filled in before they were signed or after they were signed.

Mr. Robertson: We went over all that yesterday, Your Honor. That goes to the weight of it. I can only ask one question at a time. I am going to question him about the authenticity of the signatures.

The Court: The objection is overruled.

Mr. Fred G. Pollard: Exception.

By Mr. Robertson:

Q. Harry Barnett.

A. Jerry Barnett, you mean?

Q. Mr. Bryan says that they are numbered, so if you start with 2 and come right on down, you will have page 520  $\frac{1}{2}$  them in order.

(Discussion off the record.)

By Mr. Robertson:

Q. Mr. Cassidy, are those 16 application forms the forms which you examined, at the request of Mr. Bryan, to determine the genuineness of their signatures?

A. I spent the day yesterday.

Q. Will you describe precisely what examination you made to determine whether the signatures were genuine or false?

A. They supplied me what they said they could prove were known signatures, admitted signatures, genuine signatures, whatever you want to call them.

I went at it just like old Federal Judge Cochran did in *In re Barney*, Va. 2d. I laid the known writing on one side and the questioned writing on the other, in front of me, and then I examined it point by point, character by character, quality by quality, characteristic by characteristic. I did it in the best way that I knew how. The questioned signatures, of course, were compared with the known signatures.

Q. What was the character of the unquestioned signatures which you accepted as being correct?

A. They looked like they were on Government forms for deduction of their income tax and forms of the Labor-

*Alexander Hamilton Bryan.*

page 521 } num Construction Company. There were three of them, three forms that were filled out and signed.

(Documents exhibited to Defendants' counsel.)

Mr. Mullen: If Your Honor please, there has been no foundation made for comparison with these. There has been no foundation as to these.

Mr. Robertson: Are you objecting to them?

Mr. Mullen: I object to them at this time.

By Mr. Robertson:

Q. Mr. Cassidy, I will ask you to turn now to Application No. 1, which I believe purports to be signed by Lee Bach.

Based upon your examination and comparison, in your opinion is that signature the same as the signature upon the document with which you compare it?

The Witness: Your Honor, I can't answer that question until those documents are proved.

\* \* \* \* \*

page 522 }

\* \* \* \* \*

ALEXANDER HAMILTON BRYAN,

recalled as a witness on behalf of Plaintiff, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION (resumed).

Mr. Robertson: Do you want to look at them before I give them to him?

(Documents examined by Mr. Fred G. Pollard.)

By Mr. Robertson:

Q. Mr. Bryan, I hand you batch of documents with various signatures, and ask you if you turned those over to Mr. Cassidy yesterday for him to use as the basis of his examination and comparison to determine the genuineness of the signa-

*Alexander Hamilton Bryan.*

tures of the applications that have been mentioned page 523 } and received in evidence here?

A. It is the standard practice of our Company to have all employees, when they are hired, sign the Employees Withholding Exemption Certificate, which shows how many exemptions he is claiming in connection with withholding taxes. The employee also signs what is known as an Employee's History Record, which states his name, Social Security Number, age, residence, his father is, whether he is married, and so forth, what his address is.

Also, in connection with work in Kentucky, it was also necessary to have every employee sign a paper electing to accept the provisions of the Kentucky Workmen's Compensation Act. We understood that unless he signed such a paper, the Workmen's Compensation Act didn't apply to him; so we had every man sign those three papers on this job.

When the question came up about the authenticity of the signatures on these application blanks, we went to our files and got the Employee's History Records, the Employees Withholding Exemption Certificates, and their statements accepting the provisions of the Kentucky Workmen's Compensation Act, for each one of these 16 people. They are the papers which I have in my hand, and they are the ones which I furnished to Mr. Cassidy to use in making his comparison of signatures.

Q. Were they kept in the regular course of the page 524 } business of the Laburnum Company?

A. They were kept in the regular course of business, not only on the work in Kentucky, but everywhere, the only exception to that being that the paper electing to accept the provisions of the Kentucky Workmen's Compensation Act was done on all employees in Kentucky, but only in Kentucky.

Q. Were those signed statements accepted by those who signed them as the basis upon which those particular phases of their connection with Laburnum were acted upon?

A. Yes, sir. There are witnesses to the signatures on most of the statements.

Mr. Robertson: Unless there is a request for it, I will not offer them in evidence. I think it just clutters up the record.

Mr. Mullen: We do not insist, Your Honor, on their being put in the record. We simply wanted the proper course to be followed.

Mr. Robertson: Will you stand aside, please, Mr. Bryan?

*Harry Evans Cassidy.*

(Witness Bryan temporarily excused.)

Mr. Robertson: Mr. Cassidy, will you come back, please?

page 525 } Whereupon,

**HARRY EVANS CASSIDY**

recalled as a witness on behalf of Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

**DIRECT EXAMINATION (resumed).**

By Mr. Robertson:

Q. Mr. Cassidy, I hand you a group of papers bearing various signatures, and ask you to look at them and see if those are the signatures which you used as the basis of your comparison of the application cards you mentioned, to determine the genuineness of the signatures on the application cards?

A. These were the known signatures that were furnished me to use as the standard of comparison with the questioned signatures, yes, sir.

Q. You have already stated the kind of examination you made. I don't think it is necessary to repeat that.

I will ask you to turn to Application No. 1, Lee Bach. The questions I ask you now are based on your examination.

In your opinion, is the signature of Lee Bach on the application blank the same as the unquestioned signature with which you compared it?

A. Yes.

Q. If you will lay that aside and go to No. 2, page 526 } What is the date of No. 1, first?

A. 4/18/49. All three of the documents bear the same date.

Mr. Robertson: I am asking you to look at No. 1, the application blank. You haven't got them. You are looking at the wrong thing.

(Discussion off the record.)

By Mr. Robertson:

Q. I hand you No. 1, Lee Bach, and ask you what is the date of that one?

*Harry Evans Cassidy.*

A. It is dated at the bottom, in pencil, 7/21/49. That is July 21, 1949.

Q. I hand you now No. 2, Jerry Barnett, and ask you whether, based upon your examination, that signature is the same as the unquestioned signature with which you compared it?

A. Yes, it was, but this document is not dated.

Q. I hand you now No. 3, Dan Combs, and ask you whether that signature, in your opinion, is the same as the unquestioned signature with which you compared it?

A. Yes, sir, absolutely, sir.

Q. What is the date of that one?

A. That is dated 7/21/49.

Q. I hand you now No. 4, which bears the signature of Green Conley, and ask you whether or not, in your opinion, that signature is the same as the unquestioned signature 527 } ture with which you compared it?

A. There isn't any unquestioned signature here. On the Employees Withholding Exemption Certificate here, the known one, the Laburnum documents here, the two forms they filled out, this Green Conley signed by mark; and on this, there is very good handwriting here that doesn't even resemble this Green Conley over here.

Q. What is your explanation of that, if any?

A. I would judge that this is—thus, by inference, that they forgot to have the person who signed this make his mark, that somebody signed it for Green and just neglected to have him put his "X" mark on it. That is all I know.

Colonel Harris: We move to exclude that pure guesswork on the part of Mr. Cassidy.

The Witness: It is nothing else but a guess.

The Court: I will sustain the motion.

It is a guess. Gentlemen, disregard the evidence regarding the "X" mark.

By Mr. Robertson:

Q. Is the written part of those applications, the handwriting part of those applications above the various signatures, in your opinion, all in the same handwriting?

A. As far as I can tell, they were, yes, sir.

Q. Can you tell whether or not the signature on the Green Conley application is the same writing as the page 528 } handwriting in the body of the application?

A. It doesn't have any resemblance, and I don't

*Harry Erans Cassidy.*

think the person who filled this out could hardly write two signatures like that "Green Conley" in the way it has been here on this questioned document.

Q. You have no explanation, based on your examination?

A. I couldn't do nothing but guess, and there is no use in guessing about something.

Q. I ask you to turn to No. 5, which—first, what is the date of No. 4?

A. 7/21—No. 4? They are all dated July 21, 1949, when they are dated.

Q. Now, No. 5 bears the signature of Earnest Howard. In your opinion, is that signature the same as the unquestioned signature with which you compared it?

A. Yes, sir, even though some of them are spelled E-a-r-n-e-s-t and some E-r-n-e-s-t. On the questioned document, they are spelled E-a-r-n-e-s-t; and on the Laburnum Company records, it is spelled once as E-a-r-n-e-s-t Howard and twice as E-r-n-e-s-t. There has been, it looks like an addition of this "a" in the Employees Withholding Exemption Certificate of this standard which has been furnished me. It looks like the person might have started to write his name E-r-n-e-s-t and then changed it to E-a-r-n-e-s-t, which, of course, is the wrong spelling. E-r-n-e-s-t is the page 529 } way to spell the person's name, if I am right in my spelling.

Q. I hand you now No. 6, which bears the signature Hargus Howard, and ask you if that signature is the same as the unquestioned signature with which you compared it?

A. Yes, sir, in my best judgment they are the same, but the "Hargus" is spelled wrong. H-a-r-g-i-s is the way to spell Hargis. This is H-a-r-g-u-s.

Q. You are not an authority on the spelling of proper names?

A. I know those families down through there, and I know the way they spell their names.

Q. Did you come from out there?

A. Yes, I come from Kentucky. I came from Clementsville, Kentucky, and I know lots of people from Breathitt, Wolfe, Magoffin, Floyd and Pike, and they are all good friends of mine, too, most of them.

Q. Why don't you go back?

A. I am doing all right, outside of court days. (Laughter.)

Q. I hand you now No. 7, which bears the signature of John Jordan, and ask you if, in your opinion, that signature is the

*Harry Evans Cassidy.*

same as the signature of the unquestioned document with which you have compared it?

A. I don't have any doubt about it whatsoever, but what that is a genuine signature.

page 530 } Q. I hand you now No. 8, which bears the signature of Burl King, and ask you if, in your opinion, that signature is the same as the unquestioned signature with which you compared it?

A. The person who wrote these signatures, the questioned signatures, didn't get on the line, the horizontal line of writing, as well as they did over on these, but they still have the same form, shape, size, proportion, pen lifts, beginning strokes and ending strokes, all the way through. I have to pronounce them genuine when they are that good.

Q. I hand you next No. 9, which bears the signature Ossie Lovely, and ask you whether or not, in your opinion, that signature is the same as the unquestioned signature with which you compared it?

A. Every element, feature, quality, and characteristic of one shows in each. These all conform to each other, and these two conform with each other. All five conform together, so I think they are good.

Q. I hand you now No. 10, which bears the signature of Luther Litteral, and ask if, in your opinion, that signature is the same as the signature of the unquestioned document with which you compared it?

A. Yes, sir, I think unquestionably they are all written by the same person.

page 531 } Q. I hand you now No. 11, which bears the signature of George Miller, and ask you whether, in your opinion, that signature is the same as the signature of the unquestioned document with which you compared it?

A. I don't think two people could write two sets of signatures that bad and exactly alike and not be the same person. (Laughter).

Q. Is that George Miller application dated?

A. No, sir. It is one of the undated ones, and very slightly filled in. It hasn't anything but his name and the name Decoy, Kentucky, on it.

Q. I hand you now No. 12, which bears the signature Matt Miller, and ask you whether or not, in your opinion, that signature is the same as the signature on the unquestioned document with which you compared it?

A. There is only one questioned signature involved here.

*Harry Evans Cassidy.*

Matt didn't sign it where he was supposed to sign it here, but he did put it in at the top. I think that top signature and the bottom signature are the same as the three on these Laburnum Company records.

Q. Is that application of Mat Miller dated or undated?

A. No, sir, it is not dated.

page 532 } Q. I hand you now No. 13, which bears the signature Avis Salyers and ask in your opinion if that signature is the same as the unquestioned signature with which you compared it.

A. These two questioned signatures were so much alike and the same length and height and so forth that I am a little skeptical of them. They look like they might have been copied from the same model. So I made a tracing of this signature and this signature as a test and held it up between me and the light and they didn't coincide. So they are the signatures of the same person at the same time and it is a genuine writing. I think the writing of this signature agrees with the known signatures over there.

Q. What is the date of Avis Salyers' application?

A. That is 7-21, July 21, 1949.

Q. I hand you now the application signed Green Stacy and ask you whether in your opinion that signature is the same as the signature of the unquestioned document with which you compared it.

A. I do. Green Stacy writes a very rapid signature that would be very difficult to forge. Some of these poorly written signatures are susceptible to tracing and forgery, but one that is rapidly written by Green Stacy, like John Hancock's signature on the Declaration of Independence, is mighty hard to imitate. It is hard to imitate good writing page 533 } like that.

As a handwriting expert is the fact that John Hancock's signature is hard to forge the origin of the expression "Put your John Hancock on it"?

A. Yes, sir; I think that is where it originated.

Peter Fannhill is another writer up in Boston that was another hard one for anybody to imitate.

Q. Green Stacy's application is signed what?

A. Green Stacy, S-t-a-c-y.

Q. What is the date?

A. July 21, 1949.

Q. I hand you now application which bears the signature Donald B. Trimble and ask you whether or not that signa-

*Harry Evans Cassidy.*

ture in your opinion is the same as the signature on the unquestioned document with which you compared it.

A. I think it is the same and that is another very difficult signature for a person to counterfeit or simulate. Mr. Trimble writes a very good hand. If he didn't have a man's name I would think it might be a woman's writing.

Q. What is the date of that application?

A. 7-21-1949.

Q. I hand you now application which bears the signature Green Trusty, and ask you whether or not in your opinion that signature is the same as the signature of the unquestioned document with which you compared it.

page 534 } A. Unquestionably, not a doubt in the world in my mind about them.

Q. And is Green Trusty's application dated or undated?

A. It is undated. That is a family name I never heard of down there.

Mr. Robertson: You may cross-examine the witness.

The Witness: I forgot to mention that that form there was filled in by Trimble, too. That is the only one that is not in the same handwriting that apparently filled in the rest of those forms.

#### CROSS EXAMINATION.

By Mr. Mullen:

Q. You have no information whatever in regard to these except what you have testified to for the purpose of determining the authenticity of the signatures. That is correct, is it not?

A. I haven't any information—

Q. You have no information in regard to these, how or when they were taken or anything, except what you have testified?

A. Except what it shows on the face of it. I am accepting that.

Q. You do not know whether those papers have ever been questioned, the signatures on those, or not, do you?

A. No, I do not. I am acting on faith as far as page 535 } the known documents are concerned and using my best judgment on the questioned ones.

Q I hand you No. 1, Lee Bach. Is the body of that filled out?

*Harry Evans Cassidy.*

A. Yes, sir.

Q. Is the handwriting in the body filling it out the handwriting of the person who signed it?

A. Oh, I don't think so, sir.

Q. What date does that bear?

A. 7-21, July 21.

Q. Is that in the handwriting of the man who signed it?

A. No, sir; I don't think so. In my opinion—

Mr. Robertson: Wait a minute. Let him finish, please, before you interrupt him.

The Witness: In my opinion the filling in of the body of it, everything except the signature, was by somebody else than the signer.

By Mr. Mullen:

Q. That is an application for membership in what?

A. The United Brotherhood of Carpenters and Joiners of America, and then it says at the bottom the Louisville District Council of Woodworkers Affiliated with the American Federation of Labor.

Q. You don't see the word Paintsville or Salyersville on there anywhere, do you?

A. Not on this one, no, sir.

page 536 } Q. I hand you No. 2, Jerry Arnett. Is the body of that filled out?

A. Only with the name Jerry Arnett, Noctor, Kentucky.

Q. Is that the same handwriting as the signature?

A. No, not as the signature.

Q. What is the date of that?

A. No date.

Q. To whom is that addressed, that application?

A. To the United Brotherhood of Carpenters and Joiners of America.

Q. And down at the bottom the Louisville District Council.

A. The Louisville District Council of Workers affiliated with the American Federation of Labor.

Q. There is nothing about Salyersville or Paintsville on that, is there?

A. No, sir.

Q. I hand you No. 3, Dan Combs. Is that filled out in the body of it?

A. Yes, sir.

Q. Is the handwriting in which it is filled out the same as the handwriting of the person who signed it?

*Harry Evans Cassidy.*

A. No, sir.

Q. What date does it bear?

page 537 } A. 7-21-49.

Q. To whom is that addressed?

A. It is addressed to the United Brotherhood of Carpenters and Joiners of America, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. There is written in there at the top the word Salyersville, isn't there?

A. Yes, sir.

Q. And Local—?

A. 697.

Q. That is different from those that you have already passed on?

A. It is in addition to what the others were, yes, sir.

(Defendants' counsel conferring)

By Mr. Mullen:

Q. Is that dated?

A. Yes, sir; this is dated July 21, 1949.

Mr. Robertson: Let him complete his answer before you ask him another question. You are inadvertently cutting in on the witness before he finishes.

Mr. Mullen: I thought he had finished.

The Witness: I thought I had, too.

Mr. Robertson: I am wrong, then.

The Court: Mr. Robertson, you are in error (laughter).

page 538 } By Mr. Mullen:

Q. I hand you No. 4. Is that filled in?

A. Yes, sir.

Q. Is the writing filling it in the same as the writing of the person who signed it?

A. No, sir; not in my opinion it is not.

Q. What is the date of it?

A. July 21, 1949.

Q. Is that the handwriting of the signer?

A. No, sir; only the signatures.

Q. That is addressed to—

A. United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

*Harry Evans Cassidy.*

Q. Does that have the words Salyersville, Kentucky, up above that?

A. Yes, sir, up at the right-hand corner.

Q. And on the left-hand corner?

A. Local 697.

Q. I hand you No. 5. That is Earnest Howard. Is the body of that filled in?

A. Yes, sir.

Q. Is the handwriting in which it is filled in the same as that of the signer?

A. No, sir; not in my opinion, sir.

Q. Is it dated?

page 539 } A. Yes, sir; 7-21-49.

Q. Is the date in handwriting of the signer?

A. No, sir.

Q. To whom is that addressed?

A. United Brotherhood of Carpenters and Joiners, Louisville, District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Does that have anything else up in the right-hand corner?

A. It has the notation, Salyersville, Kentucky on the right-hand side and Local 697 on the left.

\* \* \* \* \*

Q. I hand you No. 6, Hargus Howard. Is that filled in?

A. Yes, sir.

Q. Is that handwriting the same as that of Hargus Howard?

A. No, sir.

page 540 } Q. Has it a date?

A. Yes, sir.

Q. Is the date in the same handwriting as Hargus Howard's?

A. No, sir.

Q. To whom is that addressed?

A. That is addressed to the United Brotherhood of Carpenters and Joiners of America, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Does that have any addition at the top above the application?

A. It has Salyersville, Kentucky up at the right-hand side and Local 697 over on the left-hand side.

*Harry Evans Cassidy.*

Q. I hand you No. 7, John Jordan. Is the body of that filled in?

A. Yes, sir.

Q. I notice there is an "x".

A. In front of the signature.

Q. In front of the signatures. Do you take that merely as a check?

A. No, sir. I think that was put there to show the man where to sign. It is frequently done.

Q. That is the question I asked you. You re-  
page 541 } gard it as a check and not as a signature?

A. Not as a mark.

Q. Is the body of that filled out?

A. Yes, sir.

Q. Is that in the same writing as Jordan's?

A. No, sir.

Q. And the date on it?

A. 7-21-49.

Q. That is addressed to whom?

A. United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Is there any addition at the top?

A. It has Salyersville, Kentucky on the right-hand side and Local 697 over on the left-hand side.

Q. I hand you No. 8, Burl King. Is that filled in?

A. Yes, sir.

Q. Is the handwriting in which it is filled in the same as that of the signature?

A. No, sir.

Q. Is it dated?

A. Yes, sir; 7-21-1949.

Q. To whom is it addressed?

A. United Brotherhood of Carpenters and Joiners, Louisville Council of Woodworkers affiliated with the  
page 542 } American Federation of Labor.

Q. That has an addition?

A. Salyersville, Kentucky up at the right-hand side, Local 697 over to the left.

Q. I hand you No. 9, Ossie Lovely. Is that filled in?

A. Yes, sir.

Q. Is the body of the form filled in in the handwriting of the signer?

A. No, sir; not in my opinion.

Q. Is it dated?

*Harry Evans Cassidy.*

A. Yes, sir, 7-21-1949.

Q. Is that in the same handwriting as the signature?

A. No, sir.

Q. To whom is that addressed?

A. To the United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Is there any pencil addition?

A. Salyersville, Kentucky over on the right-hand side, Local 697 over to the left.

Q. I hand you No. 10, Luther Literal. Is the body of that filled in?

A. Yes, sir.

Q. Is the handwriting the handwriting of the person who signed it?

page 543 } A. No, sir.

Q. Is it dated?

A. Yes, sir; 7-21-49.

Q. Is the writing the same as that in the body?

A. Not in my opinion. Salyersville is up on the right-hand corner and Local 697 over on the left.

Q. I hand you No. 11. Is it supposed to be George Miller?

A. Yes, sir.

Q. Is that the one that you questioned?

A. No, sir.

Q. That is the one that is so bad no two people could make it the same.

A. I don't think any two people could write that bad.

Q. Is the body of that filled in?

A. Only in part. It just has the name George Miller, Decoy, Kentucky.

Q. To whom is it addressed?

A. Addressed to United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Does that have Salyersville on it?

A. No, no notation of Salyersville.

Q. No local number on it?

page 544 } A. No, sir; nor date of birth and none of the other questions asked.

Q. Is it dated?

A. No, sir.

Q. I hand you what purports to be the application of Matt Miller. Is the application itself filled out at all?

A. It only has the name Matt Miller, Decoy, Kentucky.

*Harry Evans Cassidy.*

Q. And the application is not signed, is it?

A. It is signed below and filled in at the top with Mat Miller.

Q. But the actual application there--

A. Oh, no, the application doesn't have anything but Matt Miller, Decoy, Kentucky.

Q. Up at the top, and not signed?

A. Up at the top. That is not signed. It is just signed at the bottom.

Q. Signed in that headed "authorization for representation under the National Labor Relations Act"?

A. That is right.

Q. But the application to join the union is not signed at all?

A. No, sir; it is not.

Q. Is there any date on it?

A. No, sir.

Q. Is there anything about Salyersville or local?

A. Neither one; no, sir.

page 545 } Q. I hand you No. 13, Avis Salyers. Is that filled in?

A. Yes, sir; it is filled in.

Q. Is the handwriting in which it is filled in the same as the handwriting of the signer?

A. No, sir.

Q. Has it any date?

A. Yes, sir; it is dated July 21, 1949.

Q. Is that the same handwriting as the signer?

A. No, sir.

Q. To whom is that addressed?

A. To the United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. Is there anything about Salyersville?

A. It has in pencil Salyersville, Kentucky up on the right-hand side of the application, and Local 697 over on the left-hand side of the application.

Q. I hand you No. 14, Green Stacy. Is the body of the application filled in?

A. Yes, sir.

Q. Is that in the handwriting of the signer?

A. No, sir; not as good handwriting as the signer.

Q. Is it dated?

A. Yes, sir; 7-21-1949.

page 546 } Q. Is that in the handwriting of the signer?

*Harry Evans Cassidy.*

A. No, sir; I don't think so.

Q. Does that have anything about Salyersville?

A. No, sir; it doesn't, or No. 697 either, and it is addressed to the United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. I hand you No. 15, which is the application of Donald B. Trimble. Is the body of that filled in?

A. Yes, sir.

Q. Is that the same handwriting as the signature?

A. Yes, sir; in my opinion Donald B. Trimble filled in that, all except the Local 697 and Salyersville.

Q. That was not filled in in his handwriting?

A. That is not in his handwriting.

Q. That was addressed to—

A. The United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. But it has above in the right-hand corner the addition of Salyersville?

A. Yes, and in the left-hand corner 697, but not in his handwriting.

Q. Did I ask you if that was dated?

A. No, you didn't; but it is dated 7-21-1949.

page 547 } Q. Is that in—

A. I think Donald put the figures on there, too, he dated it.

Q. I hand you No. 16, Green Trusty. Is that filled in?

A. Only in part. It just has the name Green Trusty, Decoy, Kentucky. It is signed and it has an "x" mark in front of it.

Q. Is the name in the body of it and the location in the handwriting of the signer?

A. No. Green couldn't write that good.

Q. Is it dated?

A. No, sir.

Q. To whom is it addressed?

A. It is addressed to the United Brotherhood of Carpenters and Joiners, Louisville District Council of Woodworkers affiliated with the American Federation of Labor.

Q. These applications are in the form of a letter, with postage paid, so they could be mailed, are they not?

A. Yes, sir.

Q. To whom are they addressed?

A. To the Louisville District Council of Woodworkers,

*Harry Evans Cassidy.*

Room 204 Torbitt Building, 406 South Fifth Street, Louisville, Kentucky. It is what is known as a business reply envelope.

Q. I know that all of them show at the top that they have been sealed and torn open. Were they sealed page 548 } when they were given to you?

A. No, sir.

Q. So you know nothing about that.

A. No, sir; I do not.

Q. Did you compare the handwriting in the body of those instruments with each other, that is, handwriting with handwriting in the body?

A. Yes, sir.

Q. Are the larger number of them in the same handwriting?

A. I would say all of them were except Burt Trimble's.

Q. All except Burt Trimble's are in the same handwriting.

A. Yes, sir.

. . . . .

page 549 } (The following proceedings were had in chambers.)

Mr. Mullen: Judge, we have Mr. Holt, a member of the firm of Elkins, Durham & Kemp, accountants, and we would like now to put the books at his disposal and to know how it can be done.

Mr. Robertson: You want to do what?

Mr. Mullen: We want to make arrangements for carrying out the authorization given us yesterday to examine the books.

Mr. Robertson: I think he can go down there and have our representative there, have Mr. Bryan's representative there. What firm is Mr. Holt from?

Mr. Mullen: Elkins, Durham & Kemp.

Mr. Robertson: Where is that?

Mr. Mullen: 1201 State Planters Building.

Mr. Robertson: I don't see any reason why he shouldn't.

Mr. Mullen: Get Mr. Bryan to come in.

Mr. Robertson: I thought you wanted Mr. Bryan to come out whenever you mentioned his name.

Mr. Mullen: Not on that particular question.

Mr. Allen: I think it is all understood.

Mr. Mullen: We want to do it in time.

The Court: He wants to get to work on it.

Mr. Robertson: I also understand Mr. Bryan page 550 } wants his accountant there, and wants Mr. Leach there, since they can help.

*Harry Evans Cassidy.*

Mr. Fred G. Pollard: Provided that it won't delay things to have him there.

Mr. Robertson: It doesn't make any difference whether it delays it or not.

The Court: Would it be helpful to you, Mr. Holt, to have these gentlemen, who are familiar with it?

Mr. Holt: It probably would be.

The Court: I think it would be.

Mr. Fred G. Pollard: We understand he is entitled to see everything except the income tax returns.

Mr. Robertson: The Judge can't make any such—I didn't mean any reflection on Mr. Holt at all. The Court is not going to make any such blanket ruling as that. Mr. Pollard certainly doesn't know any more about accounting than I do. They have reputable accountants to go down there and see whatever is necessary for them to come up with what they think is the necessary information that the Court directs them to give. They are reputable certified public accountants, and our people are going to cooperate with them to that end.

Mr. Mullen: Mr. Bryan.

(Mr. Bryan entered the room.)

Mr. Mullen: Mr. Bryan, we just want to make page 551 } arrangements for Mr. Holt, who is a member of  
the accounting firm of Elkins, Durham & Kemp,  
to start work without delay. He is here. Can you give instructions for him to go to work now?

Mr. Robertson: I told them that you wanted your company accountant and also Mr. Leach to be there to cooperate and collaborate with Mr. Holt and help in any proper way they can.

Mr. Bryan: That is a right big order. It goes back to the beginning of 1941. I have already instructed our people to start assembling the records, and we had planned to have them available beginning tomorrow morning. We are having photostatic copies made of portions of the auditor's reports which give detailed information on every job that we have done from 1941 through the end of 1950, showing sales, the direct cost of sales, and the job profit or loss. That is going to be the simplest way to handle it.

If this gentleman over here, or any other accountant, in my opinion, undertakes to verify everything shown on these reports over a ten-year period, the trial won't finish for two or three months.

*Harry Evans Cassidy.*

We will also ask our accounting firm, Leach, Calkins & Scott, to collaborate with the firm of Elkins, Durham & Kerap, to assist them. Perhaps the data can be supported by notes that Leach, Calkins & Scott have made during page 552 <sup>1</sup> their periodic audits.

I understand from our auditors and accountants that it would be an exceedingly difficult job, if not almost impossible, within the period of time allotted, for Elkins and Durham, or any other accounting firm, to go back and segregate out of the various accounts the data that is already compiled on the audit reports of Leach, Calkins & Scott.

The Court: Mr. Holt has indicated to the Court that he thought their assistance would be helpful.

Mr. Bryan: I was not able to get in touch with Mr. Leach yesterday, and of course, I have been here all this morning. We started the ball rolling.

The Court: And you will be ready by tomorrow morning?

Mr. Bryan: We plan to be ready by tomorrow morning. That was our schedule.

Mr. Fred G. Pollard: Judge, I don't think that we want to go in and verify things that already have been done by Leach, Calkins & Scott, but we want their results. I understood yesterday we were entitled to the audit reports, and Mr. Bryan says he is having portions or parts of the audit reports photostated.

page 553 <sup>1</sup> Mr. Robertson: Let me say something here, Judge. It seems to me that we just talk, talk, talk, and are not getting anywhere. The Court has indicated what we want. We have thoroughly responsible accountants. In good faith we are going to cooperate with them. If Mr. Holt thinks he is not getting cooperation—

The Court: You will report to your attorneys and let the attorneys report to me if you are not getting what you want.

Mr. Pollard: There is one thing we know we want. You have said we are not entitled to the income tax returns. We would want this figure, and it is not giving us the return. We would like to know the figure that Laburnum Construction Corporation reported to the State of Kentucky and the State of West Virginia for 1948 and 1949 as its figure for net income taxes on which the tax was based.

Mr. Robertson: Your Honor, we think they have no right to it.

Mr. Fred G. Pollard: That is not seeing the returns. They claim so much profit out there. We just want to know what they reported to those states as taxable income.

*Harry Evans Cassidy.*

The Court: It wouldn't take long to furnish that information. Let the Court take that point under advisement, and when you are through with the audit by Mr. Holt, take that matter up with me again. It wouldn't take long page 554 } to get those figures, I imagine. It wouldn't take more than 10 or 15 minutes. The Court will take that request under advisement.

Mr. Robertson: That is all right.

The Court: As I say, it would take but a few minutes to get that.

Mr. Fred G. Pollard: I don't think the other information we want will take terribly long.

The Court: I do believe that all these gentlemen, the CP's and professional men are of good standing, and I think probably collaboration would be helpful and would save a lot of time.

Mr. Robertson: I think they know a lot better what to do than we can tell them.

The Court: Better than the Court and I guess counsel.

Mr. Allen: While we are in here, Your Honor, I think yesterday we promised Your Honor we would let you have a memorandum in connection with these interrogatories.

The Court: Yes.

Mr. Allen: I have about completed that memorandum but I had to come back in Court this morning before they were quite finished. If I get that completed and get it to Your Honor this evening after adjournment and a copy to counsel, will that be all right?

The Court: Yes.

Mr. Allen: It may be some seven or eight page 555 } o'clock before I get it to you but I think I will be able to get it to you before that time.

The Court: Very well.

Mr. Allen: I will have to send it to you by special messenger to your home.

The Court: It may be that I will be coming in town for a few minutes tomorrow. Call me at home tonight if you don't mind. It might save a trip. I may have to come in town for a few moments and I could pick it up then.

Mr. Mullen: You are going to give us a copy of that?

Mr. Robertson: Yes.

The Court: Of course you will furnish Mr. Mullen a copy.

Mr. Allen: Yes. I stated that.

Mr. Mullen: What you furnished was a very sketchy one.

of course, and we didn't think there was any question about it.

Mr. Allen: Where would you want me to deliver the copy and to whom?

Mr. Mullen: What time?

(Off the record.)

Mr. Mullen: Mr. Holt, I don't think we need to keep you any longer. You know where the Laburnum Corporation is. You can go there tomorrow morning and get in touch with them.

page 556 } Mr. Robertson: I think they open there at eight o'clock.

The Court: We are about to start the cross examination of Mr. Bryan, are we not?

(Mr. Holt left the room.)

The Court: Gentlemen, you will recall that on January 22 counsel for the defendants moved the Court to permit Mr. Fred Pollard to examine and cross-examine witnesses on behalf of District 50, and either Mr. James Mullen or Colonel Crampton Harris to examine and cross-examine witnesses on behalf of the United Construction Workers, and the United Mine Workers of America, which motion was objected to by counsel for the Plaintiff. Do you gentlemen still object to that motion?

Mr. Robertson: Yes.

Mr. Allen: I object to that, Your Honor. Where they are closely connected like this, it is not permitted.

The Court: Do I understand you still object?

Mr. Allen: Yes.

The Court: Gentlemen, I have given careful consideration to this motion, and the record discloses that all three of these gentlemen have appeared for and represent all three of the defendants in this case. It appears to the Court that the practice in the courts of this Commonwealth under similar circumstances is to permit only one attorney for the page 557 } defendants to examine a witness of the defendants and to permit only one attorney for the defendants to cross-examine a witness of the Plaintiff, and not have the privilege of cross-examining the witnesses of the defendants. Therefore, the motion is overruled.

Mr. Fred G. Pollard: We note an exception.

The Court: All right.

Mr. Mullen: Your Honor, there is one other matter we would like to take up.

Mr. Robertson asked Your Honor to postpone a ruling to the question of interrupting Mr. Bryan's testimony at this time and putting him back for some of their major testimony-in-chief. I know it is in the discretion of the Court, and I know it is permitted where some question has been overlooked or something of that kind, but having him break into what he admits is his main evidence, his evidence-in-chief, and a considerable amount of it, and then call on us to cross-examine on a part of the evidence-in-chief and later put on a whole lot more evidence I think is a disadvantage to the defendants under which we ought not to labor.

The Court: Mr. Mullen, the Court prefers to defer ruling on that question until Mr. Bryan is offered again as a witness in this case.

Mr. Mullen: The reason I was asking Your Honor—

The Court: But I will say this. If the Court page 558 } decides to let him take the stand again, counsel for the defendants will have every opportunity to cross-examine him.

Mr. Mullen: I knew we would have that, but the damage has been done then.

Mr. Fred G. Pollard: Your Honor, of course we don't know what their plan of presenting their case is, but we can speculate, and we think that what the plaintiff is doing is that if at the end of the trial they feel that they haven't proved agency in some other way, then they are going to put Mr. Bryan back on with the interrogatories.

The Court: As I understand, they want to put Mr. Bryan back on or may want to put him back on before they close their case.

Mr. Robertson: That is right.

Mr. Mullen: Before they close their case, yes.

The Court: Before you put on any evidence at all.

Mr. Fred G. Pollard: But they are going to wait to see whether they can get certain evidence in before, and if they are denied the right to put that evidence in, then they will come back with Mr. Bryan.

Mr. Robertson: Judge, this is the answer to the thing. Mr. Pollard admits that he is conjecturing. He doesn't know what we are going to do at all. If we are taking the risk in what we are doing, if we want to put Mr. Bryan back before we close our case-in-chief and the Court thinks page 559 } that the circumstances under which we are doing it are unfair and unjust to the defendant, of course the Court will rule we can't do it.

The Court: I think the Court will be in a better position

*Alexander Hamilton Bryan.*

to rule on that question at the time you offer Mr. Bryan.

Mr. Robertson: We might not offer him.

The Court: If you do offer him. That is the position the Court takes, gentlemen.

page 560 } (The following proceedings were had in open court:)

The Court: All right, Mr. Bryan, will you take the stand.

Whereupon,

ALEXANDER HAMILTON BRYAN

recalled as a witness on behalf of Plaintiff, having been previously duly sworn, was examined and testified as follows:

Mr. Mullen: If Your Honor please, the defendant without waiving any of the objections heretofore made will proceed to cross examination.

The Court: Very well.

CROSS EXAMINATION.

By Mr. Mullen:

Q. Mr. Bryan, you stated near the end of your testimony that a prominent businessman—was it of Paintsville or Salyersville—came to your superintendent and brought a message that if he wanted to go out of Kentucky under his own steam, he had better go? Who was that businessman?

A. Mr. Adams.

Q. What is his first name?

A. I don't know.

Q. Where did he live?

A. Salyersville, I was told.

Q. Salyersville. He came as a messenger from someone else?

A. That is what Mr. Delinger was told.

page 561 } Q. Did Mr. Delinger state whether he told him from whom he was bringing the message?

A. Yes.

Q. Who was that?

A. Mr. Delinger told me United Construction Workers, District 50.

Q. Who?

A. United Construction Workers and District 50.

*Alexander Hamilton Bryan.*

Q. I asked you from what individual he brought the message.

Q. No, He didn't tell me that. Mr. Delinger will be here to testify and you can find out from him.

Q. Mr. Bryan, you have put in evidence the contract of October 28, 1948, which provided for necessary construction work at installations, the preparation of a coal tippie, a coal preparation plant, for the Pond Creek Pocahontas Company in Breathitt County, Kentucky. The contract described the work to be done, the basis of the payment to you and other conditions. You testified you went over this proposed work and were advised that other work was to be done there, and you claim that you were assured that you would get the other work which you subsequently in your testimony have itemized. Were you given any contract for other work at the time you entered into the contract of October 28, 1948?

A. Mr. Salvati, who was then the Vice President in Charge of Operations of Pond Creek Pocahontas Company, and also of Island Creek Coal Company, agreed—I might say first he told me about the additional work and said what it was, said that it had been approved by the Board of Directors, that he wanted us to do it, and it was agreed that we would do it on the basis of cost plus 5 per cent. The work amounted to over \$600,000.

Q. Did you enter into any written agreement with him for extra work at that time?

A. No, there was no written agreement.

Q. Was any assurance given you that the additional work which you have outlined, which you claim was promised you, would be done regardless of conditions or developments?

A. Mr. Salvati said that the most important thing to do was to get the coal preparation plant in operation as promptly as possible, that the C&O was spending several million dollars bringing in railroad tracks and making the tunnel through the mountain for the tracks, and that it was estimated that they would be ready some time in May 1949, and that this work had to be done by that time so that the plant could be put in operation. First Pond Creek wanted to be able to ship coal, and the C&O wanted to get freight for hauling coal, and nobody wanted to hold up anybody else. He said that on the additional work we could also start almost right away the construction of 25 of 200 houses page 563 } which were going to be needed. That was to take care of the Pond Creek employees and other people who would be there at the little development which was

*Alexander Hamilton Bryan.*

afterwards known as Evanston. Other work was to follow. There was a big development planned which he outlined to me which had been approved by the Board of Directors, and he said that the work at the plant was going to be constructed during the winter under the most adverse conditions you could imagine, just like going up into the wilds of Alaska. There were no facilities at all. We would have to provide everything. He wanted us to do all the rest of the additional work. It was agreed then and there that we would do it.

Q. I will ask you the question in another form. Was not the Pond Creek Pocahontas Company entirely free to change their plans and to change their intention to do all of the work which you have outlined if conditions changed or if they saw fit so to do.

A. There were no dates set, Mr. Mullen, for starting the additional work. As I said, he told us that he wanted us to start on the 25 houses pretty quickly because he needed those facilities. He said that later on they were going to have a number two or number three mine, and when they were ready for that they wanted us to put in the concrete foundations.

A little later they said they had to have telephone page 564 } communications to and from the job site, and he wanted us to run a telephone line from Carver 11 miles over to the job site. That was some additional work that Mr. Salvati didn't mention at the time when we talked about the additional work. He said that as the coal preparation plant got into operation and more people were there and more things were needed, there would be machine shops and schools, a church, warehouses and stores; there would be all this additional work that would come along in the ordinary development of their plant. If Pond Creek Pocahontas Company decided to abandon the operation and never had put up the work, that would be one thing; but if they did it and we had assurance they were going to do it, we were going to do it on a cost plus 5 per cent basis.

Q. But they were entirely free, so far as any binding contract with you was concerned, to change their plan for that additional work.

A. If Pond Creek Pocahontas Company had decided to stop the whole thing, I don't think we would have had a law case against them, if that is what you want.

Q. You considered that the promise of that work, the understanding that you would have that work, was one of the considerations for the contract of October 28, 1948, to which you entered.

*Alexander Hamilton Bryan.*

A. Mr. Salvati said it was.

Q. As one consideration.

page 565 } A. I regarded that as one of the considerations.

Q. For entering into that contract.

A. I don't say that we wouldn't have entered into the contract without it, but Mr. Salvati volunteered the information and he seemed very pleased with the work we had done. He outlined all this additional work, and he wanted us to know about it. Mr. Salvati said he wanted us to go into the thing with our eyes open, that it was going to be a rough, tough, mean job to do, and that in deciding whether we would take it he would like us to know about this additional work which he wanted us to do, and that he said he would agree for us to do.

Q. The next contract that you received after October 28, 1948, was a contract to build a telephone line, was it not?

A. It was either a telephone line or the 25 houses.

Q. The evidence shows that the telephone line was dated December 8. That was a written contract, was it not?

A. Yes, sir.

Q. It specified the work—

A. Yes, sir.

Q. —the estimated cost, your compensation, and other conditions.

A. Yes, sir. They asked us to fix up an agreement on that, and we did it. I prepared the paper myself.  
page 566 } Sometimes we had written agreements, and sometimes we didn't.

Q. When the company determined to build the 25 houses you also had a written contract, did you not?

A. Yes, sir.

Q. Specifying the estimated cost, your compensation, and other conditions.

A. I was asked to prepare that contract and did it. I submitted it to them, and they turned it over to Mr. Raleigh Campbell of their legal department, and he approved it.

Q. With these contracts were you furnished any plans and specifications?

A. On the work in Kentucky we were furnished some sort of sketches and rough drawings.

Q. Do you know who made those sketches?

A. They were made in the office of Mr. Menk or Mr. Sachs. I think. Mr. Menk was the general engineer for Pond Creek and Island Creek, and he was very busy making up drawings

*Alexander Hamilton Bryan.*

and ordering equipment. We were in touch with him a lot. Mr. Menk is the first person who took me to the job site.

Q. You have testified that you also had a contract for a schoolhouse. That was in addition to your contract of October 28, 1948?

A. Yes, sir. That was a part of the work Mr. Salvati discussed with me at the time we entered into the page 567 } contract dated October 28, 1948. There was no written agreement about it. We were told to proceed to construct the schoolhouse using lumber that came off the mountains there that was owned by Pond Creek.

Q. Were you furnished plans and specifications for that?

A. No. They gave us a sketch on that. They told us the approximate size that they wanted. It was a very simple building. They just had to outline generally the size of it and how many doors and windows they wanted. It was a one-story building made of frame, a frame schoolhouse.

Q. When you received the contract for the 25 houses that also was a written contract, was it not?

A. Yes, sir. They said they didn't know at the time who the contract would be with. They said they were forming a land holding company, and they didn't know the name of the company; it hadn't been formed. After that we were told it was Spring Fork Development Company, a wholly-owned subsidiary of Pond Creek. I fixed a contract for that work, sent it to Huntington and it was submitted to their legal department, approved, and it was executed.

Q. After you had constructed the 25 houses I believe you have testified that by reason of having been constructed with green lumber they were not as air-tight, and so forth, as they should have been.

page 568 } A. The lumber dried out and shrunk. The houses were unsightly.

Q. You were directed to put shingles on the sides, were you not?

A. Yes, sir.

Q. In construction contracts it is quite customary, is it not, that changes in the course of construction regularly occur?

A. During almost every job.

Q. And the contractor is instructed to make changes, and this additional work is compensated?

A. That is true.

Q. The instruction to you to put on those shingles was of that character, was it not?

A. If we had not had any understanding with Mr. Salvati

*Alexander Hamilton Bryan.*

at all, it would still have been considered a normal change which would be treated as additional work for which we would have been compensated, that is as far as the shingles are concerned, and the contract for the 25 houses.

Q. Did you ever receive or enter into any written contract for any other part of this additional work which you claim was promised you?

A. No. We only had three contracts written for the work in Breathitt County. There was one dated October 28, 1948, for the coal preparation plant, a contract for the page 569 } telephone line, and a contract for the 25 houses.

Q. When the Pond Creek Pocahontas Company in all of the contracts that it had let you for that work required written contracts, isn't it fair to assume that if they considered they had a contract with you for \$600,000 worth of work they would have required it to be put in writing?

A. No, not according to the way those people work. We did a lot of other work for which we didn't have any contract. Practically every job we had there was extra after extra after extra. They were using us almost as maintenance men in connection with some of their work. Sometimes whole buildings would be put up without a scratch. They were told in advance what we thought it would cost, and we would build them and they would pay it. They had confidence in us and thought we wouldn't cheat them. We don't hold ourselves out as being architects and engineers, but a lot of the buildings that we put up for Island Creek in West Virginia were from drawings and specifications which we prepared ourselves. A number of times they told me afterwards they wouldn't have done that with anybody else. The drawings were to sketchy. The specifications were not definite enough. If they didn't have confidence in us they wouldn't have worked under that arrangement.

Q. Those plans and specifications that you prepared were submitted to them for approval before they told you to go ahead with the work, weren't they, that you spoke of?

A. Oh, yes, they were submitted to them and they approved them, but the point I am trying to bring out is that they were not the finished product which you would get from an ordinary architect who would pin the thing down.

Q. You sent the plans in, and their men in charge of the construction would go over them and approve them where you prepared the plans and specifications, is that correct?

A. Yes, sir.

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Q. They would initial them or mark approved on them?

A. They would attach them to the contract. They are not attached to the contracts put into evidence. We have taken them off, but we have them, and if you want them we can produce them.

Q. No, but I understood you were speaking of where you said you did not have any contracts, where you didn't have any written contracts, you had drawn the plans and specifications.

A. After you put up some of those buildings you knew pretty well exactly what they wanted. You reached an understanding. We knew what they wanted, and they knew that we knew what they wanted. Based on that, we would submit a proposal. They might say "We want you to put up a colored lunch room, and the general outline will be like  
page 571 } the appliance warehouse or store building No. 15,  
except it will be smaller, so many feet wide and so many feet long. How much will you put it up for?" It happens that I think that particular job we did have a written contract on, and it was done on a cost-plus basis. A lot of the work was very simple. You almost didn't need to have drawings and specifications.

Q. But I gather from what you have said that there was always either some written contract or proposal accepted or plans and specifications submitted, approved by endorsement thereon, and instructions to proceed.

A. Not in every case. Of course we were instructed to proceed. If we just went out and voluntarily did work on our own that nobody told us to do, I suppose there would be some question about it. In getting instructions to proceed we were told what to do. Sometimes it was done on a cost-plus basis, and sometimes it was done on an estimate, a guaranteed price. If the work was such that we could guarantee it, we would. If we couldn't, we wouldn't. There was an enormous amount of work that was just added on to practically every job we did that really wasn't covered by any written agreement, that they just had us do. An account was kept of the time and the value of the materials, and we would bill them for it plus the usual mark-up, and the bill would be paid.

Q. It is customary in contracts for construction  
page 572 } to add for extras, is it not?

A. It is customary, but it is not customary on a wholesale basis the way they worked it.

Q. Do you know whether any more of that additional work

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in Breathitt County has been done other than that which you were working on and which was finished up by someone else?

A. Well, we were asked to prepare specifications and plans for a heating plant to be installed in the tippie at the No. 1 mine, including some set-up by which they could thaw out frozen coal when it came in to the tippie in the wintertime. It was suggested that we take a trip to St. Paul, Minnesota, to see some contractors there named Butler—I think that is the place—to find out how they had worked it in connection with another coal preparation plant in another location. We didn't go out there, but we gave a lot of thought to it. I believe that some of our people were in touch with them on the phone, and we came to the conclusion that it is best to handle it by means of live steam. About the time, while all that was under discussion, this trouble came up, and then our agreements were terminated and we had to move everything away. After that, we were invited to submit a lump sum proposal, which we did. We did not do the work, and I don't know who did it. Maybe Pond Creek did it themselves.

Q. That was for the steam—

page 573 }

A. For the heating plant.

Q. You were not told why the contract was not awarded to you?

A. No. I never had an answer.

Q. You don't know whether you were low bidder or not?

A. I don't know whether there was any other bidder. We never heard. At about the same time we were invited to submit a bid for the construction of a store and some other dwellings that were much nicer than the ones that we had put up before. The first dwellings were just shacks, to tell you the truth. They were not much, but that is what they wanted and that is what the people out in that section seemed to be used to. On the second houses, which were for supervisory employees, they were supposed to be a little nicer. We submitted a bid for that work, and we didn't get it. I heard that the work was given to another contractor. I don't know the contract amount or what happened. I have heard that he lost money on the job.

Q. You are referring there to a bid you submitted under date of September 7, 1949?

A. That is right.

Q. For two six-room dwellings?

A. Yes, sir.

Q. And 13 five-room dwellings and a store?

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page 574 } A. That is right.  
Q. Your bid was \$205,047?

A. Yes, sir. I don't have that in front of me. It has been put in evidence, but I think that is right.

Q. You don't know that your bid was the highest bid?

A. I don't know. I know this, that we worked out there and had plenty of experience working in winter conditions under that set-up, using that green lumber, with all the costs involved. If somebody else wanted to come in and give a firm lump sum price without taking account of those considerations, they were welcome to do it.

Q. Didn't you say just now that the person who bid on the contract lost money?

A. That is what I was told.

Q. Were you told what his bid was?

A. No, I don't.

Q. Were you told that your bid was \$75,000 above his?

A. No, I never heard what his bid was.

page 575 } Q. You were not awarded the contract?

A. No.

Q. You were not given any reason?

A. No.

Q. You were not told it was because of any of the difficulties you had already had there, were you?

A. No, we were not given any reason. We, frankly conditioned the bid in certain ways that I think were objectionable to Pond Creek. For one thing, we said that we expected them to keep those roads in passable condition so we could get in and out, and I don't think they liked that very much.

For the second thing, we asked that they provide builder's risk insurance with extended coverage, which would protect the buildings against loss or destruction from malicious mischief or acts of vandalism. That was put in there purposely in order to get some protection in case the United Construction Workers and that crowd should come in there and burn the building down.

Q. But the Pond Creek Pocahontas people never told you that you were turned down because of the trouble you had had there prior to that?

A. No, we were not informed. We never had an answer, I don't believe.

Q. Were you at that time still performing some work in West Virginia?

page 576 } A. We had started work on the boiler plant at Bartley, West Virginia, down near Welch.

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Q. At Buckley, you say?

A. Bartley. B-a-r-t-l-e-y. It is a little place near Welch where Pond Creek has some mines.

Mr. Mullen: I have been in all that country, myself.

Mr. Robertson: So have I.

By Mr. Mullen:

Q. You were never interfered with in that work, were you?

A. Interference was threatened.

Q. You completed your work, didn't you?

A. Yes, we finished it.

Q. There was no actual attempt made to organize any of your workmen there by anyone else, was there?

A. As far as I know, there wasn't. We were using A. F. of L. people. Protest was made, but in the meantime we had started this case. Whether that acted as a deterrent, I don't know.

Q. In this additional work which you claim was promised you, the largest item is 200 houses at \$300,000. Do you know whether they have been built?

A. I don't think they have all been built. Some of them have been built.

page 577 } Q. The 25 that you built, plus the 15 that you said you bid on—they are all the houses that have been built, aren't they, to your knowledge?

A. I don't know. I know that they have been built, and what else has been built, I couldn't say.

Q. You don't know that they have decided not to build those houses, those 200 workmen's houses?

A. No. I don't think they have. They might have postponed it for a while. I bet they build them before they are through.

Q. Or it is possible that they have decided to let the miners live at their homes instead of building company shacks and a company village?

A. They might change their mind.

Q. You testified that on September 29, 1949, your company submitted a proposal to Pond Creek Pocahontas Company to construct an addition to a store building at Bartley, West Virginia, either on a cost-plus basis or with 8 per cent or a lump sum. You state you were not awarded that contract?

A. Let me get my schedule here. (Referring to papers.) No, sir.

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Q. Do you know whether there were any other bids for that work?

A. Well, they seemed to want to have the work page 578 } started on that store right away, and because of the location of the store it was uncertain as to exactly how much work would be necessary. We didn't have time to go into it fully enough, and submitted a proposal on the basis of cost-plus.

After that, they decided that they would attempt to fix up some drawings and specifications themselves. So, no action was taken on that bid, as far as I know.

Q. But you were never notified that your bid was not considered because of any happenings in July and August prior?

A. No.

All we knew was that we had gotten an enormous amount of work before. Every bid we made, we seemed to get.

From the time this thing happened in Kentucky, we were trying our best to maintain our connection, and were doing everything we could, didn't want to let any opportunities slip—if we stopped bidding, we knew we would be out, so we kept trying, but we never could get any more.

Q. Mr. Bryan, you have stated a number of times, in the course of your testimony, that the United Construction Workers would not recognize an A. F. of L. contract; that they would try to organize men even if they had an A. F. of L. contract.

Have you ever worked employees in the A. F. of L. union on work for a company where either the employees of other people on the work, the same as you were, were page 579 } U.C.W. members?

A. We have worked in various plants where the employees of companies were represented by the CIO, sometimes by A. F. of L., sometimes by District 50, sometimes by United Mine Workers. I don't recall anyone was represented by the United Construction Workers. I never heard of United Construction Workers before October, 1948, when Mr. Robert Fohl came to see me. I didn't know what they were.

Q. Where were you working then?

A. Solvay Process in Hopewell.

Q. Who is Mr. Robert Fohl?

A. Robert Fohl is Regional Director for United Construction Workers and District 50 in Richmond. I forget the number of the region. It is shown on the tabulation of Regional Directors as Region 19.

Mr. Fohl said he had organized our workers and laborers

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over at the Solvay plant in Hopewell. I told him we couldn't deal with him; that I would check into the matter. He and a man named Walter Shuey came to see me, and I called in Jack Joinville in the meantime. Jack Joinville, President of the Building Trades Council in Richmond, met with those men in my office in Richmond, with me.

After some discussion they went out, and I never heard any more from Mr. Fohl. It developed that none of our laborers had joined United Construction Workers at all.

page 580 } Q. Was there a Hopewell office at that time, of the UCW?

A. The office was in Richmond, the regional office. They may have had a branch office in Hopewell. I think they did. He said he didn't have any agreements with Richmond contractors. He mentioned two Hopewell people.

Q. Now, Mr. Bryan, didn't Mr. Fohl phone you in the week of October 23, 1948, advising you that he represented your common laborers on the Solvay job, and asked for a conference with you?

A. If you will let me look at my notes, I will tell you.

Q. Go right ahead.

A. It was sometime in the latter part of October or the first part of November, but I will give you the exact dates in a minute. (Referring to papers.)

Yes, sir, October 21 is the date.

I didn't have a memorandum as to whether or not Mr. Fohl called me or came to my office, but I do have a memo of 10-21-48, Mr. Robert R. Fohl, United Mine Workers, District 50, United Construction Workers, David Hunter, Hopewell representative, Utilities Engineering and Construction Company, Coastal Stevedoring Company. He did telephone me first. That must have been the first date.

Q. All right.

Didn't you tell him that you were going out of town and couldn't talk with him then, but you would talk with him about the matter on October 27?

A. I told him, my recollection is, that I was busy and couldn't see him, but that I would see him later. I didn't know who he was or anything about it. I never heard of United Construction Workers.

Q. But he told you on the phone who he was?

A. He told me on the phone. He must have, or I wouldn't have written it down here.

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Q. And told you what he was phoning for?

A. He said that they had organized our laborers in Hopewell and wanted us to recognize them.

Q. Have you a memorandum of the next day you saw him?

A. The next memo I have is October 26, 1948. Whether that is a memorandum of another telephone call or a conference, I don't recall. My recollection is that it was another telephone call.

Q. Whether a telephone call or a conference, you again put him off until November 1, did you not?

A. That is right. He said—I have it written down again—“Robert R. Fohl, 311 West Grace Street, 7-7592, Regional Director, United Construction Workers, UMW; Joseph O'Hara, representative, Local 655-A, Hopewell, Virginia. No agreements with Construction Companies in Richmond. Have agreements with Utilities Engineering and Construction Company, Hopewell, Virginia, Coastal Stevedoring Company, Hopewell, Virginia.”

He mentioned the man who was Assistant Manager at the Solvay plant, Mr. George Owen—I think he is dead now. He claimed that he had 20 men signed up on our job at Hopewell. He was anxious to see us. I think that was a telephone call.

I put him off. I was anxious to have Mr. Joinville there when he came in.

Q. That was the 27th?

A. 26th, I have.

Q. 26th, all right.

Then you got in touch with Mr. Joinville, didn't you?

A. Yes, sir.

Q. And you and Mr. Joinville, working together, had him sign up those common laborers, and you gave them a raise of 9 cents, and that was between the time of the 27th or 26th, and November 1st that you had put Mr. Fohl off to, was it not?

A. No, I think you are wrong about that. The wage rate for laborers in Richmond was 90 cents, and it has been 90 cents for a long time. It recently has been raised. The A. F. of L. union rate has been raised to a dollar in the last week or so. I don't recall any wage rate increase. The Business Agent for the laborers' local union in Richmond was Mr. Kendig. He was at that time. He is not now. I got in touch with Jack Joinville and said that the United Mine Workers people were after us to recognize them as the representative for our laborers at Solvay,

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and I was afraid it would cause trouble. Under our agreement with the Building Trades Council in Richmond, we couldn't do that.

Q. Did they get busy and sign them up?

A. Certainly. I don't know whether you are familiar with conditions in the building trades, but it leads to all sorts of trouble among the various crafts.

Q. On November 1st, then, you finally met with Mr. Fohl. You had Mr. Joinville there in the office, too, did you not?

A. Joinville, yes.

Q. You told Mr. Fohl then, "I am sorry, but these men are now members of the American Federation of Labor union," did you not?

A. No. I told him that we had an agreement with the Building Trades Council, and we couldn't make an agreement with him, but that my investigation showed that the laborers were not members of the United Construction Workers anyway, and I had gotten in touch with Mr. Kendig. I think I told him that. There is no reason why I shouldn't have, and told

Kendig if these men were not in his union he had  
page 584 { better get busy; that somebody else was going to  
take them in.

Q. He got busy and got them in?

A. I don't know whether he did or not. I know Mr. Joinville and Mr. Fohl had quite a pow-wow in my office, and they went out together, and that was the last I ever heard of it.

Q. Didn't Mr. Fohl tell you at that time that as long as you said they were signed up by the A. F. of L., he would honor the A. F. of L. contract and he would return to the common laborers the money they had paid him to join UCW?

A. No, sir. He certainly did not. I don't know what kind of deal or arrangement Mr. Joinville or Mr. Fohl made when they went out. Joinville just asked Mr. Fohl to lay off.

Q. By "lay off," he meant recognition of the A. F. of L. by UCW?

A. I don't know what you could say about that, because United Construction Workers certainly didn't recognize the A. F. of L. at Wheelwright when they went there with 200 or 300 men and broke up a job.

Q. I am asking you what your own personal experience is. You did go to the A. F. of L. after Fohl had phoned you, and took steps to block him off from your laborers?

A. Mr. Mullen, United Construction Workers is in direct competition with the A. F. of L. unions in organizing building

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page 585 } trades workers, and if the United Construction Workers came in on a job, there is no telling what trouble and confusion would finally be the result. You either have a United Construction Workers organization or have an A. F. of L. organization. We happened to be lined up with the A. F. of L., and I wanted to keep it that way. There were plenty of other people that Mr. Fohl could try to organize, and I saw no reason why he should come and pick on me.

Q. As long as you had unorganized labor, any union was free to try to organize them, weren't they?

Mr. Robertson: I call to the Court's attention that Mr. Mullen is getting right much into points of law. I don't object to it. I just wanted you to know that I knew what you were doing.

The Witness: I say they are free to organize in a peaceful sort of way. They haven't a right to go there with guns and threaten them.

By Mr. Mullen:

Q. There were no guns and no threatening at Hopewell, were there?

A. No, but there have been at other places.

Q. And you did succeed in having them blocked off at Hopewell?

A. I didn't succeed in blocking them off. I just told Mr. Fohl I couldn't recognize him; that I was dealing with the

A. F. of L. unions, and for him to go work on page 586 } somebody else, and let me alone.

Q. You didn't tell him that until after you had put him off long enough to get the A. F. of L. people to get on the job?

A. Of course, I got in touch with the A. F. of L. people. I would have been very derelict in my duty if I hadn't.

Q. Yet you left him under the impression that you would talk with him about representing your laborers?

A. No, I don't think so, necessarily. He said that he represented them, and I said, "I will check into it," and I did check into it, and found out he was wrong. He either told me a story or was mistaken, because he didn't represent the laborers.

Q. How do you know he didn't represent them?

A. Because we checked, and they said so.

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The Court: Mr. Mullen, I hate to break in on this examination, but I promised one of the jurors that I would recess at 12:45. It is 12:45 now, and we will recess until 2:15.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m., of the same day.)

page 587 } AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: If Your Honor please, Mr. Mullen hasn't come yet, but my attention has been called to the fact that I failed to offer these applications in evidence and I would like to offer them now.

The Court: Do you want to wait for Mr. Mullen?

Colonel Harris: I don't think that is necessary. I don't think he would object to it.

Mr. Robertson: I ask that the 16 applications be marked Plaintiff's Exhibit No. 57, sub 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16.

Colonel Harris: Judge, we might put in an objection, that no proper and sufficient predicate has been laid.

The Court: Very well.

Colonel Harris: And an exception to Your Honor's ruling.

(The documents referred to were marked Plaintiff's Exhibit 57, sub 1 through 16 and received in evidence.)

Mr. Fred G. Pollard: I want to apologize to the Court for our lateness, Your Honor. We were tied up in a parking lot and couldn't get our car.

The Court: That is perfectly all right, Mr. Pollard.

page 588 } Whereupon,

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the witness on the stand at time of recess, resumed the stand and testified further as follows:

Mr. Mullen: Mr. Reporter, will you read the last few questions and answers, please?

(The last few questions and answers read by the reporter.)

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CROSS EXAMINATION—continued.

By Mr. Mullen:

Q. Do you think that when on October 21 you told him you would talk to him later, that you had nothing but the A. F. of L. Union, and again on the 27th when you told him you would still talk to him later, that he did not have a right to assume that in the meantime you were not going to do anything to prejudice his position?

A. I didn't tell him on October 21 that our employees were not represented by the A. F. of L. On the contrary, I told him that they were, and he insisted that he had organized our labor. So I said I would look into it and talk to him again. I try to be polite to people.

Q. Between that you got hold of Mr. Joinville and had him go to sign them up in his union?

A. I certainly did.

Q. Then on November 1 you said "I am sorry, page 589 <sup>1</sup>/<sub>2</sub> they are in the A. F. of L. union."

A. I told him on October 21 that we had our contractual agreements with the A. F. of L. unions, and that we couldn't deal with his crowd. Mr. Fohl insisted he had already organized our laborers on the Hopewell job, and I said I would have to look into it. I did look into it and I found that Mr. Fohl was wrong. Later Mr. Fohl kept insisting and said he wanted to come down and talk to us. I said I would see him, and I had Mr. Joinville there, and I told him finally once and for all.

Q. And you had had Mr. Joinville in the meantime sign up the laborers?

A. I don't know what Mr. Joinville did. I told him that representatives of the United Mine Workers were trying to cause us trouble over at Hopewell on our job, that all of our employees were members of A. F. of L. unions. Let's be practical about this.

The Court: Just answer the question, Mr. Bryan.

By Mr. Mullen:

Q. Did you have skilled laborers and common laborers on that job?

A. We had practically every classification of labor involved in all types of work in a chemical plant.

Q. Prior to that conversation with Mr. Fohl were your

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common laborers members of any union?  
page 590 } A. I think that some of them were, maybe some  
of them were not.

Q. You don't know?

A. The A. F. of L laborers local union around here has not been as strong as it might be.

Q. How many common laborers did you have on the job there?

A. Of course that varied. The job started out very small, and before it was over we had spent a million and a half dollars in labor alone. I don't mean for common laborers but for pipefitters and electricians and on millwrights and iron workers and brick masons and carpenters and everybody else.

Q. How many common laborers did you have on October 21?

A. Mr. Mullen, I couldn't tell you to save my life without looking at the payrolls. If you want that information I will try to find it for you.

Q. I would like to know how many you had.

A. When I get back to my office I will try to get the information.

Q. Will you also ascertain whether or not there was an increase in their wages at that time?

A. Yes, I will. My recollection at the present time is that there was no wage rate increase, but I might be mistaken.

If there was, it wasn't just for that job. It was  
page 591 } a general increase all over.

Q. During the course of the testimony you have spoken of carpenter helpers and common laborers. Is that a different classification?

A. They have carpenter apprentices who are learning the carpenter trade, and they also have laborers who sometimes assist the carpenters and wait on them and perform very much the same duties that a carpenter apprentice would. A carpenter helper is a term broad enough to take in laborers that specialize in helping carpenters and also carpenter apprentices, I think.

Q. Is there a different wage rate for carpenters' helpers and laborers as between the two?

A. In some localities I think that is true. We have made no distinction there on the jobs in Breathitt County.

Q. You class them all as common laborers in Breathitt County?

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A. They were classified on our payroll as laborers, but many of them were particularly occupied in helping carpenters rather than in digging ditches and doing things of that sort.

Q. In my opening statement I referred to the several large international unions besides the railroad brotherhoods. Do you know what the difference is in the organization of the CIO, the Congress of Industrial Organizations, page 592 } and the A. F. of L.?

A. I think I do.

Q. The CIO is what is known as an industrial organization. They organize a whole industry, do they not, such as the automobile workers and steel workers, regardless of crafts?

A. The United Mine Workers have an organization that is organized on an industrial basis, and for a long time, certainly from 1898 up until 1935 or 1936 the United Mine Workers was affiliated with the American Federation of Labor. At about that time after the National Industrial Recovery Act was passed Mr. John L. Lewis and some of the other officers and leaders of the international unions affiliated with the American Federation of Labor were very anxious for the American Federation of Labor to endorse a program for the organization of workers on an industrial basis rather than on a craft basis. The International Brotherhood of Carpenters and Joiners is a union organized on a craft basis. The plumbers and pipefitters, the United Association of Plumbers and Steam Fitters, is organized on a craft basis. The same thing applies to the Iron Workers International Union, and the Painters International Union. But the printers, the United Mine Workers, the clothing workers, and some others were very anxious to take steps to organize workers in the mass production industries such as automobiles, page 593 } radios, rubber, on an industrial basis. At the

A. F. of L. convention in Atlantic City in 1935, November or October, 1935, a major quarrel developed on that issue. The Committee on Resolutions voted 8 to 7 in favor of organizing on a craft basis instead of on an industrial basis. At that time Mr. John L. Lewis, Mr. Dubinsky, and some others, decided to form what was known as the Committee for Industrial Organization. Mr. Lewis was made chairman of that committee. It was composed of the presidents of eight international unions affiliated with the American Federation of Labor and commanded about a million workers. From that time on, Mr. Lewis, who was a vice presi-

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dent of the American Federation of Labor, resigned shortly after that Atlantic City convention in 1935. The American Federation of Labor opposed the organization of workers on an industrial basis opposed the committee for Industrial Organization, and expelled from the American Federation of Labor at a later date the unions that were affiliated with or connected with the Committee for Industrial Organization. Also, the United Mine Workers in turn expelled from its organization Mr. William Green, who had been in the United Mine Workers for many years and at one time was president of District 6. After that, the Committee for Industrial Organization held a convention and the name was changed to Congress of Industrial Organizations. The two unions have been in competition with each other from that time on in the organization of workers.

Q. Mr. Bryan, I didn't want to interrupt you, but the Congress of Industrial Organizations is an industry-wide union, isn't it?

A. That is correct.

Q. And the American Federation of Labor is a craft union?

A. That is correct. Primarily. There may be some unions in it that are not.

Q. The United Mine Workers for their mine workers is also an industrial union.

A. That is right.

Q. District 50 and the UMW take in both, either industry or crafts or unskilled workers, don't they?

A. No. When this quarrel over the method of organizing workers was developing, it was at the 1936 convention of the United Mine Workers that they amended their charter so that the jurisdiction of the United Mine Workers would include not only coal miners and people working on coke ovens, but would include coal processing plants.

Q. Mr. Bryan, I don't want to interrupt you, but without going into that—

Mr. Robertson: Excuse me one minute. If Your Honor please, he asked him the question and I think the witness is entitled to answer it without being caught off in the middle.

Mr. Mullen: It is not responsive to the question.

Mr. Robertson: I think it is responsive.

The Court: Read the question back.

(The pending question was read by the reporter.)

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Mr. Robertson: If Your Honor please, I don't want to argue against the ruling of the Court.

The Court: I am not ruling that he can't answer further, but he has answered the question. If he wants to qualify it, he is entitled to do it.

Mr. Robertson: I don't want to keep on interrupting, but I have studied this thing very much myself, and I know that a lot of these questions just can't be answered yes or no and then quit.

The Court: If the witness desires to qualify his answers, he has a perfect right to do so, but make it as brief as possible.

The Witness: What I was trying to say is this: That the UMW amended its constitution so that its jurisdiction would include coal processing plants. After the quarrel with the American Federation of Labor over the method to be used in organizing workers came to a head and a show-down, the United Mine Workers of America took steps to organize district 50 pursuant to the change made in the constitution early in 1936, and District 50 was organized, its charter was finally issued in September, 1936. It was then while  
page 596 } affiliated with the United Mine Workers considered itself in a sense a part of the CIO. That is shown by the fact that one of the publications is called the CIO news, district 50 edition. The workers employed in District 50 were organized on an industrial basis, although they included a multitude of types of businesses. It was not considered a craft union in any sense of the word.

By Mr. Mullen:

Q. You are now speaking of the CIO?

A. I am speaking—

Q. I am speaking of District 50 after it was chartered by the United Mine Workers of America as a district.

A. They represented gas and coke workers on an industrial basis.

Q. And also took in any others?

A. Later on, the charter was further amended to include any other industries approved by the International Executive Board, and then they went to town to take in everything in sight that didn't include mining coal.

Q. All right. That is what I am getting at. You testified at length as to the different classes of workers that they took in. Wasn't that entirely within their right to do that?

Mr. Robertson: I object, Your Honor.

*Alexander Hamilton Bryan.*

The Witness: Nobody I know of has denied the page 597 } right of District 50 to try to organize anybody they want to. The only question is the methods used in doing the organizing. After all, between these three big unions you have spoken about there is the keenest type of competition in connection with the organizing of workers. District 50 was organized as an arm or branch of the United Mine Workers to compete first with the A. F. of L. and then after the CIO and the United Mine Workers split, it was then to compete with the CIO.

By Mr. Mullen:

Q. And it does compete with both of them?

A. It competes with them repeatedly. It is their agent to do it, that is, the agent of the Mine Workers.

Q. You have stated that from your study of the United Mine Workers and the United Construction Workers and District 50, supreme power is vested in an international convention which meets every four years.

A. It used to meet every two years, but now it is every four years.

Q. That under the international convention there is an International Executive Board which corresponds to the Board of Directors of a corporation,—

A. Well—

The Court: Let him finish the question. Finish the question, Mr. Mullen.

By Mr. Mullen:

page 598 } Q. And that there are a president and other officers. You have been asked as to the chairman of the organization committee of District 50, secretary-treasurer and comptroller of District 50, and the national director and national comptroller of the UMW, as to how they were appointed or elected. You replied that each of these were appointed by the international president with the approval of the International Executive Board.

Where the International Executive Board has approved or designated a person for a certain position, it is merely a form for the international president to issue a commission in accordance with those directions of the international board, isn't it?

A. The constitution of the UMW—

*Alexander Hamilton Bryan.*

The Court: Can you answer that yes or no and then qualify it, Mr. Bryan?

The Witness: No, I can't answer it yes or no, Your Honor.

The Court: All right, sir. Go ahead.

The Witness: The constitution of the United Mine Workers of America provides that between international conventions the complete management and control of the organization of the United Mine Workers, including all of its districts and district 50, the various divisions, is vested in the international executive board, which has supreme  
page 599 } judicial and executive power over all of those districts and over all of its members. Under that you can say that the International Executive Board could appoint anybody it wants. But there is another provision in the construction which provides for Mr. Lewis, the President, the international President, to make appointments that are necessary, with the approval or subject to the approval of the International Executive Board. I would say that both of them make appointments, but it is customary for Mr. Lewis to do the appointing subject to the approval of the Board.

By Mr. Mullen:

Q. Coming back, then, to the question, when the executive board has approved or designated a person for appointment to any of the jobs mentioned, it is purely a matter of form for the president to carry out the orders or approval of the international board and issue proper commissions?

A. If the International Executive Board did that, I am certain that Mr. Lewis would carry through the appointment. If he didn't all the International Executive Board would have to do would be to disapprove Mr. Lewis' appointment.

The constitution further provides that between meetings of the International Executive Board Mr. Lewis is to run the show.

Q. It is no different from the President of a  
page 600 } corporation running it between meetings of the Board of Directors.

A. Mr. Lewis has power to remove the international board members if he wants to.

Q. That is a matter that you have no knowledge of.

A. It is provided in the constitution. Ordinarily the president of a corporation can't do that.

Q. Your contract with the Richmond Building and Construction Trades Council which you have put in evidence is dated May 15, 1947, is it not?

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A. Yes, sir.

Q. And was executed at that time?

A. At about that time, yes, sir.

Q. At about that time. What is the Richmond Building and Construction Trades Council?

A. It is an association of local unions affiliated with the building trades department of the American Federation of Labor having their principal offices in Richmond.

Not all of the A. F. of L. local unions, Richmond A. F. of L. unions in the building trades, are affiliated with the Building Trades Council. There are some that are not, but there are a lot that are, and those that are make up the Building Trades Council.

Q. What is the territory in which the Richmond Building and Construction Trades Council has jurisdiction?

A. There is no jurisdiction. The jurisdiction page 601 } of the Council as such, each local union affiliated with the Council has jurisdiction, supposedly, over certain areas. Those areas differ depending upon the local union involved.

Q. An act was passed by the General Assembly of Virginia in 1947 known as the Virginia Right to Work Law, which was signed by the Governor on January 21, 1947, but did not become effective until April 28, 1947. Your contract with the Richmond Building and Construction Trades Council was signed just a few days before that law became effective, was it not?

A. It was signed about April 15. I know it was signed before the law became effective.

Q. You and the Richmond Building and Construction Trades Council purposely entered into it in order to get in before that law became effective, did you not?

A. Well, we were anxious to have an agreement that would be within the law, and we were advised that this could be done. It wasn't unlawful if we wanted to do it that way and if it wasn't unlawful, there as no reason why we should not do it.

Q. But the purpose was to get a contract before the Virginia law which had already been passed became effective?

A. We had a contract with the Building Trades Council before that time, and this contract was prepared and signed on or about April 15, 1947, and we purposely page 602 } tried to make it in such a way that it would be within the law, which I believe it is.

*Alexander Hamilton Bryan.*

Q. Could you have entered into such a contract after April 28, 1947?

A. I can only express my opinion about it, if you want it. I will tell you I think that it probably would be unlawful and in violation of the Virginia Right to Work Act, but because it was entered into before the law became effective and it never has been extended or renewed, the contract is good and is not in violation of the Virginia Right to Work Act. We have sought the advice of counsel on the subject, and that is what they think.

Q. How long has that contract run?

A. The contract with reference to duration provides as follows. Do you want me to read it?

Q. Yes, you can read it.

A. "This agreement shall become effective April 15, 1947, and shall continue in full force and effect until terminated by the written notice provided for in the paragraph next below.

"Either party to this contract shall have the right to terminate same on April 15, 1949, by giving three months' prior or written notice to the other. After April 15, 1949, either party to this contract shall have the right to terminate this contract on its anniversary date, that is, April 15, page 603 } by giving three months' prior written notice to the other. It is expressly understood and agreed that this contract shall continue in full force and effect without interruption until such time as it may be terminated by the written notice hereinabove provided for, and that the failure of either party to give notice to terminate shall not be construed as a renewal or extension of this contract."

So the contract runs indefinitely until terminated.

Q. Did either you or the Richmond Building and Construction Trades Council ever give notice to terminate it?

A. We have never given notice to terminate it. The Building Trades Council did give us notice to terminate it about a year ago, but it was too late, and afterwards they agreed to it.

Q. The agreement provides that the contractor agrees with each local union to employ only members of that local union when working in the area over which it, the local union, has jurisdiction and when performing work over which it, the local union, has jurisdiction.

A. Which article is that, Mr. Mullen?

Q. That is Article 2, section 1, the first sentence.

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A. Yes, sir.

Q. Is that in labor parlance a union contract, a union shop contract?

A. It is a closed shop contract.

page 604 } Q. That is a closed shop contract.

A. That is a closed shop contract. It has not been strictly enforced in all particulars at all times.

Q. The contract uses the words "local union" and "other local unions". What is the difference between those?

A. That is covered by Article 1 under the heading "Definitions." Look on page 1. As used herein the words 'Local union' shall mean a local union now or hereafter associated with the Council. As used herein the words 'other local unions' shall mean a local union which is affiliated with the National Building Trades Department of the American Federation of Labor, but which is not associated with the Council.

Q. When you got out to Kentucky there were other local unions under the definition of this contract, were they not?

A. Yes, that would be covered by that.

Q. There was not a wage scale in this contract, was there?

A. No, sir.

Q. So this contract was merely a contract to make contracts with either unions in the local council or other local unions if you got beyond its jurisdiction.

A. There is a provision in the contract about wages, I believe.

Q. Article 4.

page 605 } A. It doesn't state what the amount shall be, but that we agree to pay the prevailing wage rate in whatever rate in whatever territory might be involved.

Q. So when you went—

A. As a matter of fact, it says "prevailing wage rate is the same as may have been established as the result of collective bargaining."

Q. When you went then into Kentucky you had to make a contract with the local union, and that was a contract that provided for the wages that would be paid?

A. It wasn't always customary to make a contract. The only contract that we actually made on the Kentucky job was for the carpenters, and they specifically asked for it. We have gone to a lot of other places, and I would say that it is not customary to make a contract with each local union every place you go. On the Kentucky job when we started we got in touch with the Charleston, West Virginia, Iron Workers Union. We found out what the scale was. We asked for men,

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and they were sent, and we paid the scale. The same thing for the electricians. We called the Lexington Local and said that our subsidiaries, Virginia Mechanical Corporation had an agreement with the IBEW, International Brotherhood of Electrical Workers, and we would appreciate it if they would send us men, and found out about the wage rate, the terms and conditions. The men were sent to us. The page 606 } same thing happened for the plumbers and pipe-fitters. In the case of the carpenters there were two local unions very close together, and it was a question which one was closest to the job, whether it would be the Prestonburg local or the Paintsville local. At that time there was no Salyersville local. After checking into it, it looked like the Paintsville Local was closest to the job and so we did make an agreement with them and I think that they wanted the agreement because of some question that might be raised as to whether it was Prestonburg or Paintsville that had jurisdiction over the work.

Q. There was no Salyersville Local at that time?

A. No.

Q. When was that organized, do you know?

A. Not of my own knowledge. I have heard it was in May, 1949.

Q. At the later date, though, you did have some negotiations or talk with the agent for that local?

A. After the Salyersville local was chartered by the United Brotherhood of Carpenters and Joiners, the Salyersville Local was anxious to claim jurisdiction over the job because it definitely was the closest local union, but under the contract which we had with the Paintsville local, the Paintsville Local did have jurisdiction. So there was some friction there between those two local unions as to who was going to have the jurisdiction. We continued to recognize the Paintsville Local in accordance with our agreement. After our work was interrupted and the men were threatened and intimidated and we couldn't get the Paintsville carpenters to go back to work, we did approach Robert Poe and asked him please to try to man the job.

page 608 } Q. In other words, there was friction between those two unions over your work?

A. That was something over which we didn't have any control, but that would have been straightened by the international representatives.

Q. When you got the iron workers and the hoist operator, the millwright foreman and millwrights, which I believe you

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say you got from various unions, did they transfer to the Paintsville union and become members of the Paintsville union?

A. I don't know whether they made them transfer into the union or not. Some unions require people to get clearance cards and come in, and some don't. Those millwrights came out of the Ashland local, I think. Anyway, they reported to the Business Agent of the Paintsville Local, through the facilities of the Paintsville Local.

\* \* \* \* \*

By Mr. Mullen:

Q. This contract that you had with the Richmond Council you testified is, with regard to the local unions, a closed shop contract. With regard to other local unions, that page 609 { is, those that are not in the Richmond Building and Construction Trades Council, it is what is known as a preferential shop contract?

A. The agreement says on that point: "With respect to work which the contractor may have in any area over which a local union does not have jurisdiction, the contractor agrees to contact the other local union which has jurisdiction over that area to request that other local union to furnish qualified workers, and to give preference to members of that other local union in employing workers."

Q. It is, then, what is known as a preferential shop contract with regard to other local unions?

A. I say that is right. I don't know exactly what a preferential contract is, but this says that we would give preference to the other local unions.

Q. When going out to Kentucky, you entered into a contract with the Carpenters' Local Union No. 646, United Brotherhood of Carpenters and Joiners of America, did you not?

A. Yes, sir.

Q. That reads, does it not: "Carpenters' Local Union No. 646, United Brotherhood of Carpenters and Joiners of America, on behalf of each member thereof"?

A. Could I get my copy of that contract?

Q. Surely.

page 610 { (Witness obtaining document.)

Mr. Mullen: Will you read him the question?

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(The question was read by the reporter.)

The Witness: The opening paragraph of the agreement reads as follows:

"This agreement made and entered into this 14th day of December, 1948, by and between Construction contractors, builders, and associations, signatory hereto, hereinafter referred to as Operators, parties of the first part, and Carpenters Local Union No. 646, United Brotherhood of Carpenters and Joiners of America, on behalf of each member thereof, parties of the second part, and covering all the operations of the said parties in the territory or jurisdiction of said Local Union No. 646."

By Mr. Mullen:

Q. The signatory association referred to as the operator was the Laburnum Construction Corporation?

A. That is right.

Q. That provided for an exclusive bargaining agency with that local union, did it not?

A. The next portion of the contract reads as follows:

"It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties as defined and set out in the agreement. It is agreed that the Local Carpenters Union No. 646, United Brotherhood of Carpenters and Joiners of America, is recognized as the exclusive bargaining agency representing the employees of the parties of the first part in the territory and in connection with work over which the parties of the second part have jurisdiction."

Q. The contract being for the exclusive joint use and benefit of the contracting parties, and one of the contracting parties was that union, acting on behalf of each members thereof?

A. That is right.

Q. It didn't cover anybody else than those designated in the contract, isn't that right?

A. That was an agreement that covered work over which the United Brotherhood of Carpenters has jurisdiction, within the area over which that local union has jurisdiction.

Q. But as you read, it was for the exclusive use and benefit of the contracting parties; and the contracting parties were the Laburnum Corporation and the members of that union,

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and the contract specifically states it is made on behalf of the members.

A. That is what the agreement says.

Q. It didn't cover anybody but members of that union, did it?

A. This agreement just covered the members of that union. It didn't have anything to do with iron workers or anybody else.

page 612 } Q. It didn't have anything to do with common laborers?

A. It did have something to do with the millwrights, because they are part of the United Brotherhood of Carpenters. They are members of that international union. Other than the carpenters and millwrights, this agreement didn't affect anybody else.

Q. And didn't affect the common laborers specifically?

A. No, not specifically. Indirectly it might, but not specifically.

Q. Was Local Union No. 646 ever certified by the National Labor Relations Board to you as the bargaining agent for your employees?

A. Not that I know of. If they were, I haven't heard of it.

Q. You would have been given notice if they certified them to you as the bargaining agent, so as to bind your company, would you not?

A. I don't know much about that. If they had been certified, I feel sure I would have known about it. How I would have known about it, I don't know.

Q. You don't know whether they ever made application for certification, whether the union ever made application for certification?

A. I doubt very much that they did. I don't know of a single local union in the City of Richmond that  
page 613 } ever has made application for certification. It is almost not customary. That is the way it works.

Q. You don't know of unions in Richmond that have applied for certification—

A. In the building trades. I don't mean in other lines.

I might say about that, that the matter had been taken up from time to time with Mr. Denham before he got put out, and nobody yet had been able to figure out how to work the thing out in the building trades. Employees shift around too much. They are not personal employees like you would have in a plant.

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Q. When you entered into this contract, had you already employed your skilled laborers?

A. Which contract are you referring to?

Q. The contract with Local No. 646.

A. When this was a question as to which union would have jurisdiction over the work in Breathitt County, that is, the Prestonburg Local or the Paintsville Local, one of our representatives got in touch with the international representatives in Louisville. I think I am correct about this. And it was decided by him that Paintsville would be the proper Local to deal with.

We had started to work before this agreement was signed, but we also agreed orally to recognize the Paintsville Local as having jurisdiction over the work in Breathitt County before this agreement was signed, dated December 14. We started to work in the first part of November.

Later on, after the Salversville Local was organized, the two locals sort of divided up the work.

Q. If a carpenter who was not a member of the union had applied for employment, would you have employed him?

A. We would have told him to go get a referral card from the Business Agent.

The Court: From whom?

The Witness: From the Business Agent.

By Mr. Mullen:

Q. By "referral card," you mean telling him to join the local union?

A. We would have said that we were getting our carpenters through the Business Agent of Local Union 646, and we would tell him to go see the steward on the job. The steward would probably ask to see his book, whether his dues were paid up.

Q. In other words, if he was not a union member, you would not employ him?

A. No, not unless there were some very extraordinary circumstances where you couldn't get any men. If you want to deal with the local union, you might as well go whole hog.

Q. Don't you know that that was a violation of page 615 of the Kentucky law and of the Taft-Hartley Act, both?

A. I do not.

Q. It never has been brought to your attention that that was a violation of both of those?

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A. Under the provisions of our agreement with the Building Trades Council, that was what we were obligated to do.

Q. I am talking about your agreement with the local brotherhood entered into on the 14th of December, 1948.

Mr. Robertson: If Your Honor please, I have sat here now for an hour and 15 minutes. They have been questioning Mr. Bryan on questions of law, and Mr. Mullen is bound to know, just as well as Your Honor and I do, that it is for the Court to construe written instruments. I think it has gone far enough. I would like to get on with the facts of the case and let the Court work out the law.

Mr. Mullen: If Your Honor please, I don't think we have been asking him to construe any statutes. I asked if it had been brought to his attention that it was in violation of the law, of the Taft-Hartley Act, of the Kentucky law; and he said it had not been brought to his attention. I didn't ask him to construe the law.

Mr. Robertson: Then he asked him if he didn't know he was violating the Taft-Hartley Act and if he didn't know he was violating the Kentucky law. My limited knowledge is that on the facts of this case, he wasn't violating page 616 } either of them, so there can be a difference between us right here.

If you haven't asked him a question of law, I don't know what a question of law is. "Don't you know you have violated the Taft-Hartley Act?" Isn't that the question?

Mr. Mullen: I asked if it had been brought to his attention.

The Court: I think it is proper to ask him if it was brought to his attention.

Mr. Robertson: I don't object to that.

The Witness: It was brought to my attention that we were not in violation of any law.

By Mr. Mullen:

Q. If you employed a carpenter and the Paintsville Carpenters Local Union objected and said the person was not a member of their union, did you discharge him if they asked you to do so?

A. The question never came up.

Q. Would you have done it?

Mr. Robertson: If Your Honor please, that is getting right into the realm of speculation. You can get into all sorts of things.

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The Court: I will sustain that objection.

The Witness: We were trying our best to cooperate with the Paintsville Local.

The Court: I sustained the objection.

page 617 } The Witness: To try to have friendly relations.

Colonel Harris: Will Your Honor exclude that statement made after you had ruled?

The Court: Gentlemen, the statement made by Mr. Bryan after the Court sustained the objection should be disregarded by you.

By Mr. Mullen:

Q. What wage rate did your contract with the local union provide for?

A. The contract, with reference to wages, provides as follows:

"It is agreed that the following wage scale be established as the prevailing wages to be paid under this contract: The parties of the first part agree to pay wages in accordance with the scale asserted in this contract for all work performed by parties of the second part as follows: \$1.75 per hour for straight-time up to 8 hours' work performed in one day. Time and one-half per hour for all time worked over 8 hours in any one day. Time and one-half per hour for all time worked on Saturdays. Time and one-half per hour for all time worked on Sundays or holidays. Holidays shall include the following named days: New Years Day, 4th of July, Labor Day, Thanksgiving, Christmas Day."

Q. That is the sole wage scale contained in the contract, isn't it?

page 618 } A. Yes, sir.

Q. What did you pay your laborers?

A. Ninety cents an hour.

Q. So you wouldn't claim that they came under that contract?

A. Oh, no.

The agreement says it is also made subject to any laws, State or Federal, which may be applicable.

Mr. Mullen: There is no question, Your Honor. I object to that.

*Alexander Hamilton Bryan.*

The Court: I sustain the objection.

Mr. Robertson: I don't want to press the point, Your Honor, but in fairness to the witness, I think I ought to say that if Mr. Mullen picks out a sentence here and there in a legal instrument, in all fairness to the witness he should complete his answer.

The Court: Of course, when you take the witness back, you may ask him that question if you want to.

Mr. Mullen: He has read the complete paragraph about labor wages, and so stated himself, and then he volunteered something else.

Mr. Robertson: He hasn't read the modifying clause.

Mr. Mullen: It had nothing to do with it.

Mr. Robertson: That is what you say.

Mr. Mullen: Your saying it doesn't make it so.  
page 619 { The Court: Let's move along, gentlemen.

By Mr. Mullen:

Q. The contract provided that it was for the duration: "This agreement shall be effective for the duration of this job from and after the date of this agreement, the job being work for Pend Creek Pocahontas Company in connection with a coal preparation plant at its No. 1 Kentucky Mine, Breathitt County, Kentucky."

A. That is right.

Q. That contemplated, then, that the only work you were to do under that contract was the preparation plant, according to its terms, did it not?

A. I construed that to mean work incidental to the construction of the coal preparation plant at the No. 1 mine, and would include the 25 houses, school house, and other work going on at the same time in that area.

Q. That is not what the contract said, though, is it?

A. It might have been worded a little better, but you wouldn't have one local union recognized as the bargaining agent for the employees on the coal preparation plant, and have another carpenters' local union or another union recognized on the same type of work on a school house a half mile away, going on at the same time. That just wouldn't work out.

Q. You were asked on direct examination:

"Did it ever come to your attention during the progress of the work that your laborers were contemplating a strike against Laburnum Company?"

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You stated "No."

"By Mr. Robertson:

"Q. I mean, did you ever hear anything about a strike until you heard his opening statement yesterday?"

That refers to Mr. Mullen's statement.

You answered: "This was the first time I heard it."

You didn't mean that, did you?

A. I certainly did. We never did have a strike.

Q. You never heard about a strike until I made my opening statement here?

A. I didn't call it a strike.

Q. You had the picket sign that you took down, didn't you?

A. Mr. Mullen, when the employees that are working for you are dissatisfied and quit work and go off, you have a strike; but when a bunch of hoodlums come and run them away, that is not a strike, and that is what happened to us.

Q. That is simply your statement of the case.

A. That is my idea, that we didn't have a strike and never did have a strike.

Q. And you never heard a strike mentioned until I spoke of it in my opening statement in this case?

A. The United Mine Workers called it a strike page 621  $\frac{1}{2}$  on one of their placards that they put up at the job, but it never was a strike at any time.

Q. The question asked you, though, was if you had ever heard of a strike until I mentioned it in my opening statement. I ask you if you really meant that?

A. I was assuming that it meant—of course, I have heard of a strike. We have had lots of strikes all over the country, but I was assuming that it referred to a strike in connection with our work.

Q. That is exactly what I am asking you.

A. We never had a strike in connection with the work, regardless of what anybody calls it.

Q. That is purely your opinion. Didn't you take down at least three picket signs saying "Strike"? Didn't the very first one say, "On Strike"?

A. My memory may be faulty, but I think that the first one said, "UMWA Picket Line—Contractor Laburnum." We didn't have any dealings with the UMWA.

Q. You are now claiming that you did have; that the UMWA was a party to this, aren't you?

A. I meant by that, that our employees were not members

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of the U.M.W.A. Not a single employee ever approached us making a complaint about anything. As a matter of fact, when some of them left, they had some very complimentary things to say. Not one sour note.

page 622 } Q. Those picket signs didn't mean to you, a strike?

A. No. It only meant one thing: that the Mine Workers and the United Construction Workers were just trying to break up our job, just like Mr. Hart said they were going to take over.

Q. You have testified throughout that they told you they were going to close down the work. Isn't that, in labor parlance, the same as a strike?

A. No. You can have a strike without closing down a job.

Mr. Mullen: May I see those exhibits, please, the picket signs that were torn down?

(Exhibits handed to Mr. Mullen.)

page 623 } By Mr. Mullen:

Q. The only use of a picket line is in connection with a strike, isn't it?

A. I don't know whether it is the only use. You generally associate a picket line with a strike.

Q. When you found the notices of a picket line at your work you didn't associate it with a strike?

A. Mr. Mullen: to repeat what I said a minute ago, regardless of what the United Mine Workers called it, as far as we knew our employees had made application to join the Salyersville Local. They had never protested to us, they had never complained there about it. The work went on in a proper manner until Mr. Hart led that big bunch of men out there and threatened and intimidated everybody and stopped the work. Just because Mr. Hart's crowd put up a sign saying there was a strike didn't make it a strike. Yes, I saw those, but I still don't think there was a strike. In fact, I say there wasn't a strike.

Q. You say you never heard of a strike. That was the question you were asked.

I show you this while I have it here. You took that down.

A. Yes, sir.

Q. It has been in your possession or in the possession of your company ever since?

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page 624 } A. Yes, I turned it over to Mr. Flippen and  
he put it in the safe.

Q. There have been no changes made on the signs you took  
down?

A. None at all.

(Referring to Plaintiff's Exhibit No. 25)

Q. And there is on it, is there not, an arrow connecting the  
word carpenters with helpers?

A. It is just like it is here.

Q. It is there, isn't it?

A. Whoever wrote it said carpenters and then helpers and  
laborers and then decided they wanted to make a little re-  
vision.

Q. And put an arrow from carpenters to helpers to qual-  
ify it?

A. That is right.

Q. You referred to Breathitt County as bloody Breathitt?

A. Yes, sir.

Q. Have you ever heard any other county out there called  
bloody so and so?

A. Yes, bloody Harlan.

Q. Bloody Harlan. Doesn't that go back to the ancient  
fend days when they got those names?

A. It is not so ancient. Those people out there have a  
reputation of being ready to shoot you just as  
page 625 } soon as they will look at you.

Mr. Robertson: Judge, I don't think I am going to ask for  
a view.

The Court: Do you promise the Court you won't? It is a  
long way to go.

Mr. Mullen: A view of the country?

Mr. Robertson: Yes.

Mr. Mullen: I went through Devil Anse Hatfield's yard  
one morning at four o'clock in the morning before daybreak.  
I didn't know whether I was going to be shot.

Mr. Robertson: I know you won't mind my telling you this.  
I went up this hollow with Monroe Sublett to see somebody  
up there last September and took the automobile just as far  
as we could and it played out and we went on up the creek  
bottom at night and we walked about two miles and every  
time we would come to a light Monroe Sublett would holler,  
"Taint nobody but Monroe Sublett!" (laughter).

*Alexander Hamilton Bryan.*

The Court: All right, gentlemen, let's proceed.

By Mr. Mullen:

Q. Mr. Bryan, on the 14th of July, did Mr. Hart phone you?

A. Yes, sir.

Q. Did he tell you that he represented the United Construction Workers and that they represented your common laborers?

page 626 } A. Mr. Hart said that he represented United Construction Workers in District 50. He didn't say that he represented our laborers. He said we were working in United Mine Worker territory and he was going to take over, that he was going to shut our job down just like he did the people in Wheelwright unless we recognized the United Construction Workers.

Q. Didn't he tell you specifically that he represented only the common laborers?

A. He definitely did not, because in connection with the original conversation with Mr. Hart I asked him about it, and he said that he was going to take over our work and represent all the employees, including the iron workers and the pipefitters and the electricians and the carpenters and everybody else.

Q. What did you tell him?

A. I told him that we had agreements with A. F. of L. unions, and it wouldn't work out, that I didn't see how we could do it. So he said that—I told him I would think about it. I didn't see how I could do it. I asked him to think about it and to let me hear from him again before he did anything. Mr. Hart said that he wasn't so much interested in the present work, but that he was thinking mainly about all the additional work which he understood we were going to do, that he was going to close down our job unless we page 627 } recognized them.

Q. You say that you asked him to let you hear from him before he did anything?

A. I certainly did.

Q. All right. Did he ask you to write him as promptly as possible what you would do?

A. No, I don't think he did. He asked me to get in touch with him again, and I asked him to get in touch with me again, and didn't either one of us get in touch with the other.

Q. As soon as you finished the conversation with him, what did you do?

*Alexander Hamilton Bryan.*

A. Called Mr. Delinger. I either called to Mr. Delinger or called Mr. Joinville. I think I called Mr. Delinger.

Q. You did that just as soon as you finished talking to him?

A. Yes, I did that right away.

Q. What did you tell them, whichever man you called?

A. If you are referring to Mr. Delinger, I asked him if he knew anything about United Construction Workers or District 50 trying to organize our workers. Mr. Delinger said he didn't know anything about it. So I told him about my conversation with Mr. Hart and asked him to watch the situation very closely and to keep me fully informed. That was on the 14th of July, which was a Thursday. I called Mr. Joinville and told him what Mr. Hart had said  
page 628 }

he was going to do and asked him for suggestions. Mr. Joinville said that they would try to help us and suggested that I call Mr. Herbert Rivers, who was the Secretary-Treasurer of the Building Trades Department of the A. F. of L. in Washington. I called Mr. Rivers up.

Q. Did you ask Mr. Delinger if the laborers  
page 629 }

were in any union?

A. I think I did.

Q. What did Mr. Delinger reply?

A. My recollection is that he didn't think they were in any union. I asked Mr. Delinger to take it up with the representatives of the Paintsville and Salyersville carpenter locals and see if he couldn't get them in one of those unions of carpenters helpers, and he took steps to do that.

\* \* \* \* \*

Q. What did you instruct Mr. Delinger to do when you phoned him on July 14?

A. I asked him if he knew anything about the United Mine Workers, District 50, and the United Construction Workers organizing our workers, and he said he didn't. I asked him to keep in close touch with the situation and told him about Mr. Hart's conversation, that Mr. Hart had said he was going to organize all of our employees, including everybody. I inquired especially about the laborers. Mr. Delinger seemed uncertain about the laborers. So I asked him or suggested, rather, that he talk to the business agents of the two carpenter locals, the one in Salyersville, 697, and  
page 630 }

the one in Paintsville, 646, and that he tell them about my conversation with Mr. Hart and see if arrangements couldn't be made for the laborers to be taken

*Alexander Hamilton Bryan.*

into one of those locals as carpenter helpers. I inquired about what happened at Wheelwright because Mr. Hart had referred to it, and received information about it.

Q. Mr. Bryan, did Mr. Delinger tell you that there had been contact between some of the organizers of the United Construction Workers and your common laborers?

A. He said he didn't know anything about it at all, that the first he heard about the United Construction Workers or any of those organizations was from me in my telephone conversation with him that day.

Q. Then you instructed him, you said, to take it up with one of the local unions to see if he couldn't get your laborers into the union as carpenters helpers.

A. That is right. He said he would do it.

Q. Then did Mr. Delinger report to you what he did?

A. That was on a Thursday. I will refer to my little book here. That was Thursday, July 14, and while I don't remember any specific calls to Mr. Delinger on Friday, I am almost positive I did talk to him, because I did talk to him practically daily. I think I talked to him again on Monday, the 18th. I think it was reported to me that some UCW representatives had been out to the job. On the 16th, which was page 631 } Saturday, Mr. Ragan, our chief clerk, mailed in to me an application blank form for membership in District 50 which one of our laborers had turned over to Mr. Ragan. On the night of the 18th I left for Kentucky on the train.

Q. Let's come back to July 14. Did Mr. Delinger report to you that he had talked to Monroe Sublett, President of the carpenter's union No. 646 at Paintsville, Kentucky, about the matter of having laborers taken into the Paintsville local as carpenter helpers?

A. I don't know whether he told it to me then or told it to me on the 18th, but thereabouts he told me that he had discussed it with a representative of the union.

Q. Did he tell you that Mr. Sublett thought that the general idea was good, but that the laborers would be taken into the Salyersville local union as carpenter's helpers?

A. I think he told me something to that effect. I can't remember the exact words. He told me that neither one of those business agents had the forms for these fellows to sign and that they were getting in touch with an international representative in Louisville. As soon as the forms came in, they were going to talk to the laborers about it.

*Alexander Hamilton Bryan.*

Q. Robert Poe was one of your carpenters at that time, wasn't he?

A. Yes, sir. Robert Poe had been working for us a good time, I think since around November 1948.

Q. Mr. Delinger reported to you he had also page 632 1 discussed it with Robert Poe?

A. I think he first talked to Mr. Sublett, and Mr. Sublett thought it would be better to have that part handled through the Salyersville local.

Q. Then did Mr. Poe agree to try to have the laborers taken into his local as carpenter helpers?

A. That was the general idea. He went out and was allowed time to go and talk to them.

Q. You were going to change the classification from laborers to carpenter helpers in order to get them in the union.

A. That is right, and maybe give them a wage rate increase.

Q. Neither local union 646 nor local union 697 had the necessary application forms to be signed, did they?

A. That is what I was told, Mr. Mullen. They came in later and they were signed.

Q. So then they phoned to Louisville and asked them to rush them out, didn't they?

A. That is right.

Q. You instructed that Mr. Poe be given time to get the laborers together and sign them up, didn't you?

A. I don't know that I gave instructions. Mr. Delinger told me that that is what he did. I had asked page 633 1 that arrangements be made to do it, and pursuant to that discussion that is what Mr. Delinger did.

Q. Mr. Poe was given time off, and he got these applications and got the laborers together and got them to sign up.

A. Robert Poe talked to the laborers. They said they would like to join his union. I am informed that Mr. Poe told them that if they joined his union, he would try to get them a wage increase to a dollar, which would be improved by Pond Creek Pocahontas Company.

Q. What chance did the laborers have of refusing to sign when you as the head of the Laburnum Corporation had instructed your superintendent out there to get them signed up? You had taken one of your workmen and given him time off and sent him with cards to get your laborers together and to say, "Here, the boss wants you to sign up." What chance did they have to refuse?

A. They had plenty of chance. They could have said they

*Alexander Hamilton Bryan.*

didn't want to join the union if they wanted to. They could have said they wanted to join another union.

Q. They were working there because they wanted a job, weren't they?

A. Most of them had been working there since November 1948. This was sometime in July, almost nine months, and there never had been any discussion, no trouble. Everything was going smoothly, as far as things could go on a job of that kind.

page 634 } Q. I am not asking you that question. I am asking you what chance was there that they would refuse when they were put on the spot by an employee of the company undertaking to say what union they must go in and presenting it to them at the direction of the boss of the job?

A. Nobody was being put on the spot at all.

Q. That is what you may call it.

A. They were being given—

Mr. Robertson: If that is what you call it, it doesn't make it so. That is what you said.

The Court: You gentlemen are even now.

Mr. Mullen: That is a matter of inference for the jury.

The Witness: Those laborers had sense enough to know that the United Construction Workers and the A. F. of L. people wouldn't work out very well together.

Colonel Harris: Your Honor, will you exclude that statement as not responsive to any question?

The Court: Gentlemen, I instruct you to disregard the last statement which was made by Mr. Bryan.

By Mr. Mullen:

Q. Those cards that were introduced here today were procured in that manner.

A. Robert Poe said he got them signed. That is what he told me. I asked him if I could have them.

page 635 } Q. He was your employee.

A. He had been working for me since November, 1948.

Q. So your company was undertaking to pick out the organization that these men must have.

A. Mr. Mullen, it is clearly indicated by our agreement with the Building Trades Council in Richmond exactly what labor organization we were lined up with. Everything that we had done had been more or less pursuant to that arrangement.

Q. These men were not organized before.

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A. We had talked to the business agent for the laborers over in Lexington, and it was recognized that it would be necessary to get local help. They are not skilled workers. They are not paid as much as skilled workers are. The business agent for the Lexington laborers local—we told him that 90 cents was the rate that we had, and we thought that would be proper. He said, well, that would be all right. I don't know, the man didn't come back, and it just stayed that way.

Q. But when you had that talk with Hart on the phone you immediately recognized, didn't you, that your laborers were not organized and they were open to organization.

A. As soon as I had that threat from Mr. Hart I knew that my job was in danger, and I knew that I had better take steps to see that everything was lined up, and that is  
page 636 } what I was trying to do.

Q. You went out to Kentucky on the 19th or 20th of July, didn't you?

A. I certainly did.

Q. Did you get in touch with Mr. Hart?

A. No, I didn't get in touch with Mr. Hart.

Q. You had asked Mr. Hart not to do anything until—

A. —he got in touch with me.

Q. —he had a further talk with you.

A. That is right.

Q. Did Mr. Hart have a right then to assume that you were not going to do anything to go behind his back during that period?

A. I don't think so. I told Mr. Hart in my conversation with him that we were lined up with the A. F. of L., that we had an agreement with the A. F. of L. unions, and I didn't see how we could make an agreement with his organization, and he knew that was what the score was. I asked him please not to do anything. He practically threatened to go over there and close my job down. It wasn't practically. He did threaten. He said he would do that, just like he did over in Wheelwright, where they took 300 men there and shut down a job.

Q. Yet you testified earlier you had never heard of a strike.

Wasn't that a strike right there?

page 637 } A. I was testifying about a strike in connection with our work. Everybody in the room has heard of a strike.

Q. Of course we are talking about hearing of a strike at your place of work, not all over the United States. You know that just as well as I do.

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So you don't think he had a right to assume that you wouldn't take steps to go behind his representation of the laborers when you asked him not to do anything until you talked again.

A. Mr. Hart never told me that he represented the laborers. He said we were working in Mine Worker territory and he was going to take over everybody.

Q. You knew your laborers were your danger point.

A. We knew that was a weak spot, sure.

Q. Weren't you following identically the same plan that you followed in Hopewell, which we have had in evidence here today?

A. I don't think I was, but if I was, was entirely within my rights to do it and was supposed to do it.

Q. Didn't you mislead them into thinking that you were going to talk with them about recognition when they called and asked you about it, when you put them off until a certain date?

A. I didn't mislead anybody. I told Mr. Hart I couldn't make an agreement with his organization.

Q. But you could make an agreement with his organization.

A. I couldn't make an agreement with his organization without breaking up my operations all over the country, and particularly in Breathitt County. It wouldn't have worked out.

Q. Didn't the people who followed you work with common laborers in the United Construction Workers and their skilled laborers in the American Federation of Labor?

A. I don't know. I have heard that they did.

Q. Yes.

A. On the other hand, down at Wheelwright the United Construction Workers came in there with about 300 men, led by Mr. Hart and Mr. Hunter and all that crowd, stopped the work of the iron workers, the carpenters, the painters, the laborers, the millwrights, everybody, and demanded that Beckett Construction Company, and Nelson Baldrige, Painter, and Link-Belt Company all recognize United Construction Workers, and got those fellows behind the eight-ball and they had to do it.

Q. You don't know anything about that if your own knowledge, do you?

A. I know what is reported to me. I have heard what was testified to in the depositions that have been taken.

*Alexander Hamilton Bryan.*

Q. The depositions are not in evidence here.

A. I know what Mr. Hunter testified when his page 639 } deposition was taken. He was questioned about it.

Q. You followed the identical same plan in Hopewell to block off the Construction Workers, who had a perfect right to organize your unorganized labor, and you followed the same thing in Kentucky. Instead of sitting down and talking with them to see if you could reach an agreement, you immediately set out to fight them, didn't you, and to block them?

A. United Construction Workers and the Mine Workers are outlaw organizations when you come down to it.

Mr. Mullen: I object to that, if Your Honor please.

Mr. Robertson: I think he has a right to say it, Your Honor. He asked for it, and he gave it to him.

The Witness: They can't get any—

Mr. Mullen: I refer to "outlaw."

Mr. Robertson: They *are* an outlaw organization. I state that. They are outlawed under the Taft-Hartley Act. I will talk a little law on that.

The Court: The judge will ask you not to argue the case, Mr. Bryan. Just answer the questions.

By Mr. Mullen:

Q. You went out to Kentucky on the 19th and you didn't communicate with Mr. Hart. Did you ask Mr. Delinger what had been done?

A. Mr. Mullen, I would just as soon negotiate page 640 } with Mr. Hart as I would negotiate with a robber that threatened to rob my house.

Q. You simply want to have your way as to who should represent your laborers. That is all it is, isn't it?

A. No, sir. I have tried to say repeatedly that we are lined up with the A. F. of L. There are some contractors who are lined up—

The Court: We have been over that.

The Witness: —with the United Construction Workers.

The Court: I don't think it is necessary to repeat that.

The Witness: I told Mr. Hart that in advance, and he said he was going to take over anyway. I asked him not to do it until he talked to me again, and he said he wouldn't.

*Alexander Hamilton Bryan.*

page 641 } By Mr. Mullen:

Q. Then you went right behind his back to get your men signed up that he was organizing.

A. I don't think I was going behind his back at all.

Q. You went out there on the 19th and you didn't go to see him. Did you communicate with him any more before the 26th?

A. No. I never heard from him, and he didn't hear from me.

Q. You didn't try to negotiate, didn't try to get a peaceful settlement of it.

A. There wasn't anything to negotiate about. I told him I couldn't do it.

Q. That is just your idea.

A. He said he didn't care, he was going to take it over.

Q. He told you he was going to take over the job?

A. Yes, sir; which is exactly what he finally did.

Q. Yet he was representing your laborers and simply trying to get them a better wage.

A. I don't think he represented my laborers. If he did, he might not have represented more than one or two out of 15 and 16.

Q. Don't you know he had them all signed up?

A. I don't know anything of the kind. You page 642 }

Q. have admitted that they never were in the union. Because you discharged them, wasn't that the reason?

A. I never discharged a soul.

Q. Didn't you put a qualification on there?

A. I never discharged a soul.

Q. That will be developed later that you did discharge them.

Mr. Robertson: Are you going to testify?

Mr. Mullen: Nothing like as much as you have testified if I do. If Your Honor please, we have reached the point now where we go into all the doings in Breathitt County. It is going to take quite a long while. It is now 4:30. I think if Your Honor could see fit to adjourn now, we could go on with it later.

Mr. Robertson: I was going to I think that is all right because they want it to go over until Monday anyway, you see, to keep Mr. Bryan on the stand.

Mr. Mullen: Wouldn't you want to go over until Monday?

*Alexander Hamilton Bryan.*

Mr. Robertson: Not if I were getting it like you are.

The Court: It is true, this case has gone one week, and I can't give you gentlemen any encouragement that it won't last another one. It is a lengthy case.

Mr. Robertson: I think it is going to run into page 643 } week after next as far as I can tell.

The Court: I have set aside three weeks for the trial. If you gentlemen have matters to take care of, you might make your plans accordingly.

Juror: I understand, Your Honor, you will hold Court until five o'clock. I feel that everything that we get over here is that much less on the other end.

Mr. Robertson: So do I, Your Honor.

The Court: Would you prefer—

Mr. Fred G. Pollard: Your Honor, I feel if we start in on this situation that comes next, we will have to review it Monday morning and will just have to go over it again, sir, to bring the connection together.

The Court: I think that the request of Mr. Mullen's is a reasonable one in view of the continuity of the situation. We are getting into Breathitt County, as I understand, Monday morning.

Mr. Robertson: I just want to say this, Judge. I am just as anxious to get through this case as anybody and I am just as willing to start as early as anybody else will and run just as late.

Mr. Allen: If Your Honor please, I would like to say that we will try to save time on our cross examination. We will try to cut them short and I think we can. I am not a long cross-examiner and don't believe in it. We will page 644 } save all the time we can on our cross examination.

The Court: I am sure you gentlemen will cooperate with the Court and with the jury, and so far as the Court has been able to ascertain counsel on both sides have cooperated with the Court. There have been many problems which the Court has had to pass on and some big questions that it has had to pass on, and it takes time. Mr. Mullen, did you have some further comment?

Mr. Mullen: Your Honor, if you please, we are going to finish the cross examination as rapidly as we can. They had him on the stand four days. We have had only a part of a day. We will certainly finish, I reckon, by midday Monday. We will try to do it. I think it would expedite finishing it by adjourning at this time.

*Alexander Hamilton Bryan.*

The Court: I am in accord with you—Mr. Harris?

Colonel Harris: Mr. Mullen said what I was going to say, that we had occupied only about five hours of the time of the Court, and the reason we have been here so long is because counsel for the plaintiff took so long in examining Mr. Bryan. I am extremely anxious to speed it up because I am away from home and I have got to stay away from home until this case is over. I can assure the Court and the jury that I want to get back with my wife and not leave her down there in a house by herself. If I can do anything to expedite it, I will certainly do it.

page 645 } The Court: The plan was not to hold Court on Saturday, and we are not going to hold Court tomorrow. One or two of the jurors planned to go away tomorrow. These gentlemen who are preparing the case work at night while you gentlemen go home. Counsel for both sides stay up late at night and get up very early in the morning to get ready for you the next day. Then there are times when we are not in the Courtroom when we are in the Chambers, which you have heard so much of, and I can assure you we are not playing. It is all work. I want to cooperate with the jury as much as I can, and I think have done so, but you can go but so fast and do justice. I am here to see that justice is done along with you gentlemen.

Mr. Allen: If it please your Honor, I did not mean to intimate that these gentlemen were conducting a lengthy cross examination at all. I am perfectly willing to concede that the principal witnesses for the Plaintiff require lengthy cross examination. I simply meant to say in view of what we know about the witnesses which they may put on, we do not think lengthy cross examination will be necessary and we will make it as short as possible.

The Court: I see. If possible, we will go along until about ten minutes to five next week. There are going to be times when we are going to have to adjourn, when it will be necessary, and you just can't keep on hearing evidence  
page 646 } when questions arise. They have to be passed on. That is just the story.

Gentlemen, the Court is adjourned until ten o'clock Monday morning.

(Whereupon, at 4:35 p. m. the Court recessed until 10:00 o'clock a. m., Monday, January 29, 1951.)

. . . . .

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Hearing in the above-entitled matter was resumed pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 29, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., William A. Johnson, Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

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## PROCEEDINGS.

(The following proceedings were had in Chambers:)

Colonel Harris: If the Court pleases, we have a motion for mistrial, a motion to discharge the jury and declare a mistrial, and I want to sign the certificate that I served counsel and ask that it be marked filed, and we would like to argue it, if the Court please.

Mr. Fred Pollard is somewhat sick and I think he may not be here.

(Discussion off the record.)

Mr. Mullen: Before we take that up, there is another matter we would like to take up. Mr. Holt, the CPA that we employed, was not given access to what the Court said he should have. We are in great difficulty now. We can't always get CPA's here. We got him for Friday, Saturday and Sunday. They wouldn't let him start on Friday. You remember, we had him up here and asked that he start. On Saturday they wanted to give him photostatic copies of portions and not what Your Honor had ordered him to have.

The reason I bring it up first is because Mr. Holt was taken off another job. The people he was working for did not like it. He has to go back on that now, and it will be toward the end of the week again before we can get him. We want to let

him know. We asked him to appear up here this morning, and he may be out there, I don't know.

page 649 } Mr. Robertson: If Your Honor please, I ask that they have Mr. Holt here to speak for himself and that the Court question him.

The Court: I understand he is coming.

(Off the record.)

The Bailiff: Mr. Holt doesn't answer, Your Honor.

The Court: All right.

Shall we proceed without Mr. Holt?

Mr. Robertson: I have a matter that I want to take up first, Your Honor.

The Court: We will pass that by, then, for a few moments.

Colonel Harris: Unless they have some matter of priority, I should think this would come up first.

The Court: The motion for a mistrial would be first, I imagine.

Mr. Robertson: All right.

Colonel Harris: Shall I wait until Your Honor reads it?

The Court: I haven't read it. This is the first I heard of it.

(Court reading document.)

Mr. Mullen: Here is Mr. Holt.

(Mr. Holt entered the room.)

Mr. Robertson: I suggest that Mr. Holt be page 650 } sworn and the Court ask him whatever he wants.

The Court: Will you raise your right hand, Mr. Holt. Do you solemnly swear the evidence you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Holt: I do.

Whereupon,

C. HOWARD HOLT,

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Holt, will you state what happened when you sought the information that you asked for to review and report on?

A. I went over to the office of the Laburnum Construction Company Saturday morning, and I was under the impression I would have access to the audit reports, but the only thing they submitted to me was photostatic copies of certain portions of the report, and that information, which I have with me, shows the contract price, the cost of the work on the job, and the gross profit or loss by job for the years 1947, 1948, and 1949, I believe, and 1946 is in here, too. I was seeking information on some particular jobs applying to the exhibit that was submitted, and that was to establish the net profit for the job, but this information doesn't give that.

page 651 } The Court: Just what do you want now, Mr. Holt?

The Witness: I think I would have to see the complete audit report before I could verify—

Mr. Allen: What was that? I didn't catch that.

The Witness: The complete audit report before I could verify any of the information that we would like to have.

Mr. Robertson: Are you through?

The Witness: Yes.

Mr. Robertson: If Your Honor please, I would like you to hear Mr. Bryan as to what he did, and if there is any misunderstanding to clear it up. Mr. Bryan, you are under oath, too.

Mr. Bryan: As soon as the Court ruled the other day that we were to make available data on these jobs amounting to some \$20 million, about which we testified, I asked our counsel and auditors to get together all books back beginning with 1941. That was done, and they were there available for Mr. Holt when he came to the office on Saturday morning. In an effort to make things easier, we also prepared a statement based on the information shown in the audit reports of Leach, Calkins & Scott, listing in detail every job on which we had performed work from January 1, 1941, to December 31, 1950.

## Supreme Court of Appeals of Virginia.

*C. Howard Holt.*

showing the gross income on each job, the direct page 652 } job costs, and the profit or loss on each job. Mr. Holt saw the work papers which we had prepared and which were being typed at that time.

We told Mr. Holt that any information shown on the statement, we would try to help him to verify from the books. We had representatives of Leach, Calkins & Scott there. In addition to that, we had photostatic copies made of the portions of the Leach, Calkins & Scott audit reports which showed this detailed information by job. They were all turned over to Mr. Holt, and it wasn't just for 1947 and '48, but it was from 1941 down to date. If Mr. Holt didn't get them, it was a mistake, because I understood that they had been turned over to him.

The statement that we were preparing and which Mr. Holt didn't have because it was being typed while he was in the office, I have here in my hand this morning (producing document), and shows the information. It is a 21-page report, showing total work amounting to over \$24 million in total and net job profits of \$822,095.33. We called Mr. Holt Saturday afternoon to find out if he was coming back to get any more information, if it was necessary for us to keep people there to help him, either that afternoon or on Sunday, and Mr. Holt said he had all the information that he needed. Mr. Holt did call for general overhead costs, main office operating expenses.

We said we didn't understand that we had to page 653 } furnish that, that what Mr. Mullen and Colonel Harris and Fred Pollard wanted was information about this \$20 million worth of work to show whether or not we had made a loss on those jobs. That is what we furnished.

Frankly, it is detailed information that we have always regarded as strictly private, and it is rather embarrassing to make it available. Some of the people that we have been doing business with, we have lost money on some jobs as every contractor does, and we have made money on some jobs, but this shows the exact amount to the penny. It is in balance with the books. We have here today a representative of Leach, Calkins and Scott who assisted in the compilation of this. I am ready to make oath to it that we have our general Comptroller, Mr. Williams, available, and he is willing to make oath to it. We believe this is the information they have asked for. If they are not satisfied with it, if they want to check any figure on here, we will be glad to assist anybody at any time.

In addition to that, I might add that with reference to the

*C. Howard Holt.*

work in Kentucky and West Virginia Mr. Holt made a detailed examination of that information which we have put in, that is the jobs showing a net profit aggregating approximately \$58,000 over a 28-month period. That is the work at Pond Creek and Island Creek Coal companies and its subsidiaries and affiliates. Mr. Holt found a 10-cent mistake.

page 654 } I would like to add at this time that the figures shown on that exhibit which has been offered in evidence showing net profits of approximately \$58,000 represents the combined net profits and losses per job of Laburnum and its subsidiary, Virginia Mechanical Corporation. That was explained to Mr. Holt. He checked that information not only from the audits, but I understand from the books themselves. That took up the major portion of the time during the morning on Saturday. I told Mr. Holt I was sure that Mr. Pollard and Mr. Mullen and Colonel Harris would want that done because some question had been raised about it, and we were there to help him, and that is what we have done.

Mr. Mullen: The catch there is the use of the words "net job profits." We want the net profits. The net job profits are a different thing. They have used big figures, and have left the jury under the impression they made \$58,000 on these jobs when they didn't do it because they have not allocated to it the proper proportions of overhead, and so forth. We think that as long as they have put in there, as we have stated, \$20 million and they claim that \$58,000 was made on jobs, and they claim that they have done some \$650,000-odd of work over a certain period, we are entitled to see the books, to see the audit, and not to have them make up statements for us and say "Here is what you can have." We are entitled to see the original documents.

page 655 } Mr. Robertson: If Your Honor please, I think it is perfectly obvious that what they want is not relevant here, for this reason: Of course, the net job profit that they got out of it, if they hadn't made it, they would have been that much worse off. As I understand it—and the accountants here can testify on this, and I might say I don't think there is anybody in this room other than the accountant who is really qualified to speak with any authority on this matter—but as I understand it on each job the proper overhead in the form of salaries and expenses of people working on that job is charged as an item of expense to that job. That is all separate and distinct from the general office overhead. I think I am correct when I say that according to sound

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principles of accounting it is just ABC as to how much percentage of general office overhead could be charged out in to operations such as this. They can argue from it anything they want, 10 per cent, 20 per cent, 30 per cent, 50 per cent. It is a matter of sound accounting principle as to what that amount would be. I don't know, and I doubt very much that anybody here knows. I think anybody from Mr. Leache's office who knew the set-up of this company could say.

Mr. Allen: If Your Honor please, I would like to say, what they are really complaining about is the failure of Mr. Bryan's books to show an allocation or the failure of this page 656 } statement to show an allocation of the general office overhead. That is an impossibility. Mr. Bryan, according to my information has made no allocation on the books, and it would be utterly impossible for him to say how much of the general overhead should be allocated to any specific job.

He doesn't ask them to accept the statement which he has made. He has opened the books wide. They can go there and check every job that they want to check to see if these figures are correct.

Mr. Bryan in this statement has covered a 10-year period. Every job that he has done during that period is put down, the gross income for the job, and the costs of the job and the profit or loss on that particular job. That is all the way through. It winds up and shows the gross business to be some \$4 million more than he testified to, and it shows what his net profits on the whole were. It is not but an addition of the profits and a subtraction of the losses on the particular jobs.

The only thing left out is the allocation of the general overhead to the particular jobs. As we understand, under your ruling we are not required to go into that, and if we were, I just don't see how it could be done. They can make any allocation they want, by the size of the job, and argue anything they want from it.

page 657 } The Court: All right.

Mr. Mullen: Mr. Holt, have they furnished such information as we asked you to get for us?

The Witness: No, sir.

The Court: That statement which has just been presented to will suffice?

The Witness: This is the same type of statement, Your Honor, that applies to the exhibits which were submitted,

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which shows the gross income for the job and direct costs and general, the job profit and loss. I was asked to get the net profit per job. In other words, the general office expenses would have to be allocated in some manner to the particular jobs in question for that period in order to arrive at the net profit per job.

The Court: Just what is it now that you want to see, the audit reports of each job?

The Witness: The audit report for each—I would have to see the audit report showing the general office and overhead expenses. In other words, I have it down to the gross profit per job. From that we would have to deduct the additional expenses involved in arriving at the net profit.

The Court: Will the audit report show that?

The Witness: It should, yes.

The Court: You would like to see the audit report?

Mr. Robertson: I would like you to hear Mr. Bryan on one more thing before you rule on it.

The Court: All right.

Mr. Bryan: Mr. Holt came in on Saturday, and he said that he had instructions to find out what our general net profit was before taxes and what our profit was after taxes. I told Mr. Holt that Your Honor had ruled that we were not to make available the tax returns, that I understood that Mr. Mullen and Mr. Harris were interested in the \$20 million figure that we mentioned and whether or not we had made or lost money on those jobs. The way our books have been kept and maintained—and I think the same applies generally to all construction companies—we have of course a gross income on each job, we have the direct job costs. Those direct job costs include the cost of all labor on the job, that is, the money we paid the carpenters, laborers, iron workers, and the resident staff people. It also includes the job overhead, which is the cost of the superintendent's salary, if the job is big enough and you have a field clerk, it would include his salary. It also includes the cost of your insurance, workmen's compensation insurance applicable to the job, the cost of payroll taxes, the cost of any bonus that you pay subcontractors. It includes the cost of all rentals. All direct expenses and costs in connection with the job. You deduct the total costs from the total gross income on the job and you get your job profit or loss.

In addition to those expenses and in operating a construction business you are bound to have certain general

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operating expenses. No attempt is made to allocate those expenses to the job. In most cases, especially in the case of large jobs, they are not just completed on a calendar year basis, but they extend from one year to another. The information which we gave to Mr. Holt is the same as the information which is shown on the statement which we just handed to you, except that the information on the statement which I just handed to you, is compiled in a little different form. In order to see whether or not we made a loss or profit on the job, it was necessary to take the figures for probably a couple of years, two or three years and compile them together. That has been done very carefully and accurately and the figures submitted are in balance with the books. There is no way I know that a person can intelligently allocate portions of the main office operating expenses to the jobs. There are all sorts of figures which might come into it. Mr. Holt might have one idea as to how it is to be done. Mr. Leach might have another *ide* as to how it is to be done. Mr. Durham might have another idea as to how it is to be done. We might have still another. Actually speaking, that was not done. The company tries to keep its overhead costs down as low as it can ordinarily, but whether it was large or small, page 660 { it seems to me that that is beside the *point*. The main point is whether or not we made or lost money on our jobs that we had. That is where we got the revenue from which to run the business.

Mr. Mullen: It is allocated on a percentage basis.

The Court: I think Mr. Holt is entitled to that information, gentlemen. I will ask that you make it available for him.

Mr. Robertson: We save the point, Your Honor.

Mr. Allen: You mean the general overhead expenses?

The Court: Yes. I think he is entitled to see the books, any books that have anything to do with your profit or loss. One auditor may determine whether the loss is computed one way or the profit is computed one way, and another auditor may determine it another way. That is a question of argument. But I think he is entitled to see the books.

The Witness: Thank you, sir.

The Court: Do you want me to deliver this statement you just tendered to the Court to Mr. Holt, Mr. Bryan?

Mr. Bryan: I have no objection to that.

The Court: Would you like to have it? Do you think it would be helpful?

The Witness: It probably would be helpful.

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Mr. Robertson: It can't hurt us.

Mr. Bryan: I make only one request in that connection. I know this is going into the Court now and it is to be made a public record, but it does contain information that normally is considered to be private and confidential, and it would be embarrassing to me and embarrassing to a lot of other people to have some of that information bandied around.

Mr. Robertson: It is the same thing I said about financial transactions.

The Court: If they mention anything in the proceedings about that, I give you the same opportunity.

Mr. Bryan: I can't help it, but I just ask that cooperation.

The Court: All right, gentlemen.

The next on the agenda is the motion for mistrial.

Mr. Allen: May we read it through first?

Colonel Harris: Whichever you like.

The Court: I think it might save time of Colonel Harris read it.

Colonel Harris: If I read it.

The Court: Yes.

Colonel Harris: "Now come the defendants separately and severally and jointly and move the court to discharge the jury and to declare a mistrial in this cause, and for grounds of this motion assign the following separately and severally:

(1) Counsel for the plaintiff has engaged in highly prejudicial, inflammatory, poisonous and false argument to the jury injected for the purpose of prejudicing the jury and piling up punitive damages as part of the verdict sought by the plaintiff.

"On Friday, January 26, 1951, near the conclusion of these proceedings, counsel for plaintiff used this language in the presence and hearing of the jury:

" 'They (referring to the defendants, United Construction Workers and the Mine Workers) are an outlaw organization. I state that. They are outlawed under the Taft-Hartley Act. I will talk a little law on that.'

"(2) Immediately preceding the utterance of counsel for the plaintiff, made the basis of Ground No. (1), Counsel for

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plaintiff made the following statement in the presence and hearing of the jury:

“ ‘I think he has a right to say it, Your Honor, He (referring to Mr. Mullen, Counsel for Defendants) asked for it, and he (the witness, A. Hamilton Bryan) gave it to him.’ ”

“(3) At or near the close of the day's proceedings in this case on January 26, 1951, the question of adjournment to Monday, January 29, 1951, was under consideration. Counsel for the plaintiff used the following language in the presence of and in the hearing of the jury:

“ ‘I was going to say that I think that is all right because they want it to go over until Monday anyway, you page 663 } see, to keep Mr. Bryan on the stand.’ ”

“And further in reply to Mr. Mullen's question as to whether plaintiff's counsel would want it to go over, plaintiff's counsel replied:

“ ‘Not if I were getting it like you are.’ ”

“Defendants separately and severally and jointly assign as additional grounds for this motion to discharge the jury and declare a mistrial the statements made by A. Hamilton Bryan, witness for the plaintiff, and President of plaintiff corporation, while on the witness stand testifying as a witness as follows, to-wit:

“(4) In response to the following question by Counsel for defendants:

“ ‘Q. You followed the identical same plan in Hopewell to block off the Construction Workers, who had a perfect right to organize your unorganized labor, and you followed the same thing in Kentucky. Instead of sitting down and talking with them to see if you could reach an agreement, you immediately set out to fight them, didn't you, and to block them?’ ”

“The witness, A. Hamilton Bryan, made answer:

“ ‘A. United Construction Workers and the Mine Workers are outlaw organizations when you come down to it.’ ”

“And to this statement of the witness, Counsel for the

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defendants then and there in open court in the  
page 664 } presence and hearing of the jury stated:

“ ‘I object to that, if Your Honor please.’

“ (5) Defendants charge that the statement of the witness, A. Hamilton Bryan just quoted in the preceding ground hereof, was not responsive to the question asked him, was entirely voluntary, was highly inflammatory and prejudicial, was for the purpose of injecting poison and prejudice against the defendants in this cause, and that said statement was false and also injected for the purpose of wrongfully and illegally prejudicing the jury against the defendants and piling up a verdict for punitive damages.

“ (6) The witness, A. Hamilton Bryan, President of the plaintiff, and while testifying as a witness for the plaintiff, was asked by Counsel for the defendants the following question:

“ ‘You went out to Kentucky on the 19th, and you didn’t communicate with Mr. Hart. Did you ask Mr. Delinger what had been done?’

“ And to said question the aforesaid witness, A. Hamilton Bryan, made answer as follows:

“ ‘Mr. Mullen, I would just as soon negotiate with Mr. Hart (referring to Mr. Hart, the District Representative of United Construction Workers affiliated with United Mine Workers of America and District Representative of District 50, United Mine Workers of America) as I would negotiate  
page 665 } with a robber that threatened to rob my house.’

“ And defendants do herewith and hereby charge that the quotation just made was not in response to any question by Counsel for defendants, was highly prejudicial, poisonous and inflammatory, and was injected for the purpose of piling up a verdict for punitive damages against these defendants.

“ (7) Defendants charge and represent to this Court that the foregoing remarks of both Counsel for plaintiff and of the witness, A. Hamilton Bryan, are each of such highly prejudicial, poisonous and inflammatory nature that the poison and prejudice injected in this cause thereby cannot be removed by any direction or instruction of this Honorable Court, and the only way these defendants can obtain justice

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and a fair and impartial trial is for this Court to order the jury discharged and to declare a mistrial in this cause.

“(8) Defendants allege that the conduct hereinabove set forth, as a basis of grounds (1) through (7) inclusive, occurred near the close of the proceeding on January 26, 1951, and were cumulative of a course of conduct which had been indulged in by Counsel for plaintiff and by the witness, A. Hamilton Bryan, from the beginning of the testimony of the witness up to and including the occurrences hereinabove listed, said prior statements and testimony being as follows, to-wit:

“When Counsel for defendants asked the witness, A. Hamilton Bryan, the following question:

“‘Q. You were not told it was because of any of the difficulties you had already had there, were you?’

“He made answer as follows:

“‘A. No, we were not given any reason. We, frankly, conditioned the bid in certain ways that I think were objectionable to Pond Creek. For one thing, we said that we expected them to keep those roads in passable condition so we could get in and out, and I don't think they *linked* that vedy much.

“‘For the second thing, we asked that they provide builder's risk insurance with extended coverage, which would protect the buildings against loss or destruction from malicious mischief or acts of vandalism. That was put in there purposely in order to get some protection in case the United Construction Workers and that crowd should come in there and burn the building down.’

“(9) During the examination of the witness, A. Hamilton Bryan, President of the Plaintiff, by Mr. Archie G. Robertson, Attorney for the Plaintiff, on January 23, 1951, the aforesaid attorney made the following statement in the presence and hearing of the jury:

“‘We are suing here in all earnestness and good faith for the biggest lawsuit that I personally have ever been in.’

page 667 } “And the defendants allege that the aforesaid statement of counsel was wholly without any evidence in the cause to justify this statement.

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“(10) During the direct examination of the witness, A. Hamilton Bryan, President of the Plaintiff corporation, by Mr. Archie G. Robertson, Counsel for Plaintiff, a colloquy arose when defendants’ counsel made objection as follows:

“Colonel Harris: We object to the witness reading from a document. I notice he keeps looking at the document and then turning the pages.”

“During the aforesaid colloquy Mr. Robertson, the aforesaid counsel for Plaintiff in the presence and hearing of the jury made the following statement:

“It seems to me, Your Honor, that the real purpose of my friend here is to break in on this story and destroy the effectiveness of the testimony.”

“And the defendant alleges that the purpose imputed to counsel for defendant was not the real purpose of counsel and the statement so made was false and highly prejudicial.

“(11) During the direct examination of the witness, A. Hamilton Bryan, President of the Plaintiff, by Counsel for Plaintiff, on January 24, 1951, counsel for defendant made the following objection:

“Mr. Mullen: If Your Honor please, if the only part relevant is the telephone number, it is improper page 668  $\frac{1}{2}$  to put in a whole newspaper in evidence in the record.”

“Whereupon, Mr. Robertson, Counsel for Plaintiff, in the presence and hearing of the jury made the following statement:

“Mr. Robertson: If Your Honor please, I brought it here—of course, if I had brought one sheet they would have said that looked mighty fishy.”

“(12) During the course of the direct examination of the witness A. Hamilton Bryan, President of the Plaintiff, Counsel, Mr. Fred G. Pollard, objected to a question by counsel for Plaintiff, which objection the court then and there overruled. Whereupon, the following occurred:

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"Mr. Robertson: You ought to go to night school, Freddie."

"Mr. Mullen: We object to a remark like that. We are trying to facilitate the case."

"The Court: The jury will disregard sidebar remarks."

"And the defendant alleges that the personal remark about Mr. Fred Pollard, one of the defendants' counsel, was highly prejudicial and was made for the purpose of intimating to the jury any further statement or argument made in their presence and hearing by Mr. Fred Pollard was not worthy of belief or consideration by them because he was an ignorant lawyer and needed to go to night school."

page 669 } "And defendant further alleges that the remark was false and unjustified for the reason that Honorable Fred Pollard has already gone to Law School and received his LL.B. degree from the Law School of the University of Virginia during the year 1942, and defendants further allege that said Law School has a high reputation not only in the State of Virginia, but among educated and experienced lawyers throughout the boundaries of the United States."

"(13) During the course of the cross examination of the witness, A. Hamilton Bryan, by Mr. Mullen, Attorney for the defendants, he asked the witness the following question:

"Q. By 'lay off', he meant recognition of the A. F. of L. by U.C.W.?"

"A. I don't see what you could say about that, because United Construction Workers certainly didn't recognize the A. F. of L. at Wheelright when they went there with 200 or 300 men and broke up a job."

"And defendants allege that the quoted answer was made in order to arouse prejudice against the defendants, and particularly against United Construction Workers, and was the gratuitous introduction of a transaction which was not a part of the transactions complained of by the Plaintiff in its Notice of Motion for Judgment."

"(14) During the course of the cross examination of the witness, A. Hamilton Bryan, President of the Plaintiff, said witness disregarded the rulings of the Court, for instance, Counsel for the plaintiff

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objected to a question by Mr. Mullen whereupon the following proceedings were had:

“Q. Would you have done it?

“Mr. Robertson: If Your Honor please, that is getting right into the realm of speculation. You can get into all sorts of things.

“The Court: I will sustain the objection.

“The Witness: We were trying our best to cooperate with the Paintsville Local.

“The Court: I sustained the objection.

“The Witness: To try to have friendly relations.

“Colonel Harris: Will Your Honor exclude that statement made after you had ruled?

“The Court: Gentlemen, the statement made by Mr. Bryan after the court sustained the objection should be disregarded by you.”

“(15) During the course of the cross examination of the witness, A. Hamilton Bryan, President of the Plaintiff, the following proceedings were had:

“Q. They were working there because they wanted a job, weren't they?

“A. Most of them had been working there since November, 1948. This was some time in July, almost nine months, and there never had been any discussion, no  
page 671 } trouble. Everything was going smoothly, as far  
as things could go on a job of that kind.

“Q. I am not asking you that question. I am asking you what chance was there that they would refuse when they were put on the spot by an employee of the company undertaking to say what union they must go in and presenting it to them at the direction of the boss of the job?

“A. Nobody was being put on the spot at all.

“Q. That is what you may call it.

“A. They were being given—

“Mr. Robertson: If that is what you call it, it doesn't make it so. That is what you said.

“The Court: You gentlemen are even now.

“Mr. Mullen: That is a matter of inference for the jury.”

“The Witness: Those laborers had sense enough to

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know that the United Construction Workers and the A. F. of L. people wouldn't work out very well together.

"Colonel Harris: Your Honor, will you exelude that statement as not responsive to any question?

"The Court: Gentlemen, I instruct you to disregard the last statement which was made by Mr. Bryan.' "

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Mr. Robertson: They have made personal remarks about me, Your Honor, and I will address myself right to the heart of this situation as I see it.

Referring first to Mr. Harris, I say with all truthfulness that I never heard such a jury harrangue under the guise of a legal argument. It looks to me like his dramatics and theatricals are trying to influence this court. It looks to me, the way they come here with some sort of  
page 685 } affidavit or some sort of motion after every recess of this Court, and come here and kill more than an hour this morning, that they are trying to stall this trial.

If Your Honor please, Your Honor knows the Virginia decisions, and so do I. What have they done? Your Honor knows the spirit that has pervaded this trial as to whether it is anything of willful defiance of the rulings of the Court, or trying to evade the rulings of the Court, or trying to circumvent the rulings of the Court. Your Honor can look at the attitude in this jury in this trial as von sit there, and look at them and notice their reactions to different phases of the trial, and their good humor and good spirit, and see whether or not they have been influenced by any prejudice or passion against anybody.

What have they done? It reminds me of a case that I had, the Cornell case before Judge Lamb. They said it took Billy Cornell 6 months to make up his own mind whether or not he had been defrauded by the actions of his wife, and if it took him 6 months to make up his mind, how could they ask a court to believe that the testimony was clear and cogent.

What have these gentlemen done? It has taken them a week-end to do it. It has taken a conference between the four of them to do it. It has taken them to search this rec-

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ord as it is evident they have done, to do it. It page 686 } has taken them, coming down to what is fair and square, they have lifted isolated statements out of their context. They have misconstrued the tone in which they were uttered. They have injected a venomous and wicked misconstruction of the meaning of words in here in an attempt to get a mistrial, because, as I have said from the outset of this thing, all they want is to get away from a trial on the merits by any means they can.

Mr. Mullen: I object to that.

Mr. Robertson: I don't care whether you object to it or not. You have said some very mean things about me.

The Court: Gentlemen, let's be calm and proceed.

Mr. Robertson: It has taken them over a week to search and gimlet-eye this record to try to find something that they think they can take offense at. They are bringing up everything here that Your Honor would expect to be brought up in argument of instructions, in argument to a jury, in argument upon a motion to set aside a verdict, in argument upon an appeal of any case which any lawyer loses; and they haven't lost it yet.

I submit that when Mr. Bryan was asked as to why he had to put those provisions in that proposal about the protection of the property while it was under construction, one of the reasons he did that was that it was his duty to tell the whole story if he was going to tell any part of it. It is page 687 } utterly different from where you are suing somebody in a personal insurance suit, and they won't let you mention the insurance company because they can't get a fair run for their money if you do. No insurance company is involved anywhere in this case.

By what authority does Mr. Harris step out here and talk to Your Honor about people who have accumulated property sitting on that jury? What does he know about it? By what warrant does he, an experienced lawyer who won the Jewel Coal Mine case, and with the association he has had in the practice of law, by what authority does he come here and make any such statement as that?

I think I know the Virginia decisions. I think I know the rights of counsel here. I don't expect them to like our testimony. I don't expect them to like what we say. We have a whole lot more coming, and they are not going to like that, either.

As the Court has said here, the Court has time and again

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said that it appreciates the spirit that counsel have shown in this case in trying to cooperate with the Court. I think the Court can search back through its own memory and see whether anything has been done here by counsel for this Plaintiff that warrants any such attempt as is being made here to sidestep a trial on the merits.

When they single out and lift from their con- page 688 } text and twist and distort and misconstrue what I have said in the spirit in which I have said it,

they don't quote one single thing that called for those remarks, what was said to counsel over here, what was said by Mr. Mullen to me, what was said by Mr. Harris to me.

They ask the Court on any such thing as they have brought forward here, to declare a mistrial without even reading the record in the case, which they have studied meticulously over the week-end to resurrect what they have brought forward here and stated.

It took four counsel a week-end to think up these things.

My remark that Mr. Mullen has gotten himself wrought up over, after 48 hours, was made in response to a question that he asked me. I said it, and I think I was right, and I still think so, that they wanted to keep Mr. Bryan on the stand today. They have killed over an hour here this morning.

He turned to me and said, "Wouldn't you want to do it?" I replied, "Not if I were getting it like you are."

If Your Honor please, I say they are not entitled to a new trial, and if the Court grants any new trial here it would just be a laughing stock everywhere for anybody who knows about this case; just another case where you couldn't get the United Mine Workers before the court and page 689 } hold them there. I think the motion should be overruled.

I am going to ask Mr. Allen to address himself to it.

Mr. Allen: If Your Honor please, let us get entirely out of the atmosphere that naturally and sometimes inevitably there is generated in a controversy of this kind, and let us see where we are legally.

Some years ago, I had occasion to take a case to the Court of Appeals on the very question involved here. I was then on the same side that my friend, Colonel Harris, is on now. I was complaining of a remark that Mr. Buford made in the course of the trial, whom Your Honor knows was one of our outstanding lawyers in Virginia. I looked up all the authori-

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ties and went to the Court of Appeals. I got a reversal of the case on that ground, and that ground alone.

The remark there was—I will have to go back just a little bit to give you the setting of the case so you will understand. There was involved in the case a widower and a widow whom he had employed as a housekeeper. None of their conduct between themselves was involved, and Mr. Buford makes the statement before the jury that when a widower and a widow were in the same household or under the same roof, indicating that something improper might have happened. There was no foundation in the evidence for it, none whatsoever. It was brought, not purposely, I don't think, by Mr. Buford, but anyway the remark was made, and I contended that it influenced the jury and that there was no foundation for it, and the Court of Appeals reversed the case on that ground, and went into all the authorities.

That was about 20 years ago. Since that time I have had occasion in a number of cases to look up the authorities on the same question. The courts since that case have gotten very much more liberal. They are coming around to this viewpoint: They are judging each case on the particular facts in that case, and they are judging the remarks made by virtue of what preceded or what occasioned the remarks. They reach this conclusion: that it is to be inevitably expected that in the heat of the trial of a case, remarks are going to be made, and I would say certainly 9 times out of 10 they say and hold that the instructions of the judge to disregard the remarks will be sufficient; that if you declare a mistrial for all these remarks that may be held to be improper in the course of the heat of a trial, you will never get to the end of the case.

Coming to the remarks that they complain about most seriously and the one about the robbers and the one about burning down the house, you will remember that when Mr. Bryan said that he would just as soon negotiate with a robber as to negotiate with the United Construction Workers, Mr. Mullen was asking him why he wouldn't negotiate with the United Construction Workers. All the authorities on cross examination say that if a lawyer on cross examination asks a witness a question of why, the witness can answer anything that shows his reason why he did a thing. Mr. Bryan said that from his experiences with the United Construction Workers and what he knew about the United Construction Workers, he just couldn't ne-

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gotiate with them. He would just as soon try to negotiate with a robber.

That was answering the question that Mr. Mullen asked. If Mr. Mullen didn't want the real answer that was in the brain of Mr. Bryan, he shouldn't have asked the question "Why?"

The same thing applies to the question about burning the house down or burning the property down. That wasn't all the answer. Mr. Mullen was asking Mr. Bryan why; if he didn't know why he didn't get those bids, and he was trying to tell Mr. Mullen why he didn't get them. He said maybe one reason was that the roads were so bad that there had to be roads in there, and that was one of the requirements. Another reason was that after his experience there, he insisted on putting in the contract a provision for carrying insurance against arson and vandalism; that he didn't know what these people would do.

That was perfectly responsive to Mr. Mullen's question. Mr. Mullen had risked the question "Why," and all the authorities say when you risk that question "Why," page 692 } you take your chances on the answer. A man may answer out of his imagination, and there is nothing under the law of evidence that you can do about it.

Another case in Virginia in which this question arose about improper argument—and these things come up so often that I have made a practice of carrying around in my pocket a little memorandum book listing the cases. I picked this one out of the list, 161 Va., and Mr. Moore has just handed it to me. Your Honor knows how zealous courts are about guarding against the mention of insurance in the trial of automobile accident cases. In this case, 161 Va., *Majestic Steam Laundry and others v. Puckett*, 161 Va. 524, the lawyer for the defendant was arguing to the jury that the plaintiff wanted to take out of the pocket of this man from Chicago—the defendant was from Chicago—were asking this jury to give the plaintiff \$10,000 out of that man's pocket. This man, coming from Detroit, was traveling around down there and had an accident.

The lawyer for the plaintiff replied and said, "If you just give me \$10,000, I promise you I won't go into this man's pocket for the dime."

They made a motion for a mistrial upon the ground that that was furtively bringing insurance into the case. The Court of Appeals said, "No, you invited it, you invoked it and got the answer, and it was a legitimate argument."

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I say that principle applies exactly to Mr. Mullen's questions asking Mr. Bryan "Why this, that, and the other," and Mr. Bryan had a right to tell him why, and he told him why.

In a situation of that kind, it is an ideal situation. If the Court should differ with me on that, it is certainly not such a departure from what a man had a right to do as to require a mistrial. An instruction to the jury would be entirely sufficient, but we don't think that is necessary.

Mr. Mullen brought it out by the questions he asked, and the same principle applies to a number of other things that they complain of here.

We are at the beginning of the trial, and what has taken place here, before the trial is over I suppose the jury will forget all about it. To declare a mistrial at the beginning will place untold expense on the Plaintiff and the loss of a week's time. I don't think the remarks, under the circumstances under which they were made, are sufficient.

It takes a studied effort over a week-end, with the transcript before them, taking a number of the words out of their setting or context, to give them the meaning which would justify the Court in declaring a mistrial. I submit the motion should be overruled.

The Court: Is there anything further you gentlemen want to say?

Mr. Mullen: If Your Honor please, I have never asked Mr. Bryan "Why." I have carefully refrained from "Why." Here is a question I asked him:

"You went up to Kentucky on the 10th and you didn't communicate with Mr. Hart. Did you ask Mr. Delinger what had been done?"

There is no "why" there, nothing asking why he didn't do it.

"Mr. Bryan: I would just as soon negotiate with Hart as I would negotiate with a robber that threatened to rob my house."

That was not responsive.

Mr. Robertson: You are still taking it out of context. Go back far enough to get the context.

Mr. Mullen: I didn't ask him "why."

*C. Howard Holt.*

Mr. Robertson: The sense of it was you did ask him "why."

Mr. Mullen: There is no "why" there. I asked him what he did, where he got his report.

Mr. Robertson: Make him read that.

Mr. Allen: Read your question at the top of page 639.

Mr. Mullen: It reads:

"You followed the identical same plan in Hope-page 695 } well to block off the Construction Workers, who had a perfect right to organize your unorganized labor, and you followed the same thing in Kentucky. Instead of sitting down and talking with them to see if you could reach an agreement, you immediately set out to fight them, didn't you, and to block them?"

I didn't ask him "why."

Mr. Allen: You say, "It is exactly the same thing." You are in effect asking him why he didn't negotiate with them, because you say, "Instead of sitting down and talking with them to see if you could reach an agreement, you immediately set out to fight them, didn't you, and to block them?"

If that didn't call for a reason for what he did—

Mr. Mullen: There is a whole page between them.

Mr. Allen: Then he says right there, the immediate answer:

"United Construction Workers and the Mine Workers are outlaw organizations when you come down to it."

That was his answer.

Mr. Mullen: I asked him if he didn't set out to fight instead of sitting down and trying to reach an agreement. That is not a "why."

If Your Honor please, of course the question of how long we took to get this has nothing to do with it. The page 696 } Court was not in session since then. This is the first time we could bring it up. We haven't had to have four lawyers digging through this to dig this up. I never even read the motion, and took no part in it. I worked until 12:30 Saturday night, and I worked all day yesterday at my home except for a few minutes in the afternoon. It was the independent opinion of all of us that what happened there made this necessary.

Colonel Harris: May I add a word, Judge?

The "why" rule is where counsel for the adverse party,

*C. Howard Holt.*

counsel for the party against whom the improper statement is made, is based on the fact that he invites and provokes it. There is no provocation and there is no invitation. Mr. Mullen has read you one.

Let's go back to another one on page 575. Here is a whole page.

"Q. You were not awarded the contract?

"A. No.

"Q. You were not given any reason?

"A. No.

"Q. You were not told it was because of any of the difficulties you had already had there, were you?"

He answers it in one word, and then makes a speech.

"A. No, we were not given any reason."

Now he starts relating what is in his mind:

page 697 } "We, frankly, conditioned the bid in certain ways that I think were objectionable to Pond Creek." That is pure guesswork and speculation. "For one thing, we said that we expected them to keep those roads in passable condition so we could get in and out, and I don't think they liked that very much."

That is still merely speculating as to the mental operation of a third party.

"For the second thing, we asked that they provide builder's risk insurance with extended coverage, which would protect the buildings against loss or destruction from malicious mischief or acts of vandalism."

He could have stopped there, but he goes ahead to state that he wanted protection against—"malicious mischief or acts of vandalism" isn't sufficient. He said "That was put in there purposely in order to get some protection in case the United Construction Workers and that crowd should come in there and burn the building down."

"Q. But the Pond Creek Pocahontas people never told you that you were turned down because of the trouble you had had there prior to that?

*C. Howard Holt.*

"A. No, we were not informed. We never had an answer, I don't believe."

It is a remarkable statement that one of the counsel made, and that is, where he has found any facts in human nature to justify that statement is a mystery to me—where  
page 698 } counsel stated that for Your Honor to discharge the jury and order a mistrial would make Your Honor's court a laughing stock. I submit that people in Virginia do not laugh, and they find no occasion for merriment when the judges of the Virginia courts hold counsel and litigants to the highest standards. I have never heard of people laughing at a just and upright Judge who holds counsel to the duty which they have violated.

We submit, if the Court pleases, if that sort of argument should be made, it is not the kind of argument that should swerve Your Honor, and I don't believe it ever would swerve Your Honor away from the path of duty and justice as Your Honor sees it.

The Court: Gentlemen, the Court overrules the motion for a mistrial.

The Court also instructs counsel to discontinue any side remarks throughout the balance of this trial.

Colonel Harris: We reserve an exception to your ruling.

Mr. Robertson: If Your Honor pleases—

The Court: How long is your proposition going to take?

Mr. Mullen: Let me ask one thing, Judge. What was your ruling as to reporting what occurred here in chambers?

The Court: You mean in the newspapers?

page 699 } Mr. Mullen: Yes.

The Court: I requested Mrs. Morse not to publish anything that took place in chambers, because the jury might read it.

Mr. Mullen: The reason I asked was because—

Mr. Robertson: I think it is much better not to publish anything that happens here.

The Court: I think they understand that it is confidential in chambers.

Mr. Robertson: Here is what I want to say, Judge. On Friday afternoon when we adjourned, it was perfectly obvious that one juror felt that the case was dragging. We are frankly in this position: We are doing all we can to expedite the trial, but it is necessarily a lengthy trial, and there are many things in it which are going to be tedious and boring that we cannot eliminate. To our best judgment, our case

*C. Howard Holt.*

will certainly run into Thursday. You see, we have lost an hour and a half this morning. It may well run all this week. If we do that, that will have meant that putting on our case will have taken two weeks. Suppose the other side takes two weeks, and then I think it probable that the instructions will take a day and perhaps the argument a day.

This case, as Your Honor knows—and I think what I am saying now is to the benefit of everybody on all sides—the case is obviously a very important one to us. It is obviously a very important one for the three defendants. It goes to the very heart of the way they are organized and do business, and I think it is going to be a test case for perhaps years to come. That has nothing to do with this except for a matter of general interest and information. My information is that the case is being featured in the various newspapers throughout Southwest Virginia coal fields, and the West Virginia coal fields, and Kentucky coal fields, and out to Cincinnati and Louisville.

I think it would be a service to everybody in the case if the Court would explain to the jury that this is going to be a trial which it looks like is going to keep them here maybe three weeks longer, and that they have to put up with it; and also, my suggestion is that the Court ask the jury whether they would prefer, for instance, to start at half-past 9 in the morning and run to 6 in the evening, with one hour out for lunch, and sit on Saturday, or do something else.

Frankly—and I say this now in a friendly spirit—I think if we hit that pace, the jury will very soon get to where they don't want it, because I think what the Court, either consciously or unconsciously, has been doing has been a service to the jury, giving them time to go by their places of business in the morning before they come here, to go back at their lunch hour, and to go back there in the afternoon before they shut up, if they want to.

After we put our case in, they are going to be a week tireder than they are now, and they are going to be restive and all, with the defendants as much as with us.

That is the suggestion I wanted to make.

The Court: Do you gentlemen have any observations on that?

Mr. Mullen: I am very anxious to get the case through as quickly as possible. Frankly, at my age, it is a strain on me. Instead of trying to delay the case, as Mr. Robertson may think, I have just the opposite desire.

Mr. Robertson: I think you just got mad at me.

*C. Howard Holt.*

Mr. Mullen: 9:30 to 6:00 o'clock are pretty lengthy hours. Saturday is the time to try to gather together loose ends of things that have occurred all during the week. I don't want to make any—

The Court: I question whether it is physically possible for you gentlemen to start out at 9:30 and work until 6:00 and then stay down at your office until 1:00 o'clock at night and come back again.

Mr. Robertson: Judge, I am doing it anyway. It doesn't make any difference to me.

Colonel Harris: I would like to make an observation on our side of it, too, Judge.

There is an inherent unfairness to the defendant page 702 } ants to start the case off with a certain tempo and let the Plaintiff have the benefit of that tempo, no matter whether a juror likes it or not, and then start increasing the speed and increasing the speed until the time the defendants begin to put on their case. There is an entirely different tempo and atmosphere in the trial from that which was accorded to Plaintiffs.

Mr. Robertson: I am not asking it. I offered it as a suggestion. I do think it would be well, in fairness—

The Court: I thought I told the jury just before we adjourned on Friday that this was a case that couldn't be rushed, and that I had set aside three weeks for the trial of this case.

Mr. Mullen: I am willing, Judge, to do anything that Your Honor wants. Of course, when it gets down to putting on our defense, we have to have some time to talk with our associates.

The Court: I realize that. We all want to go along as fast as we can, but it is necessary to confer with you gentlemen often during the trial of this case, and I have explained to the jury that it is necessary, and I am going to tell them this morning.

Colonel Harris: But I suggest—

The Court: I don't think there is but one juror who is in a big hurry.

page 703 } (The following proceedings were had in open court:)

The Court: Gentlemen of the jury, I regret the delay this morning, but I assure you it was necessary.

(Roll call of the jury.)

Whereupon,

A. HAMILTON BRYAN

a witness for Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

CROSS EXAMINATION—continued.

By Mr. Mullen:

Q. Mr. Bryan, on Friday, referring to Mr. Hart, I asked this question: "Yet he was representing your laborers and simply trying to get them a better wage?"

Your answer: "I don't think he represented my laborers. If he did he might not have represented more than one or two out of 15 and 16."

I ask you to refer to page 7-A of your prepared statement and read paragraph E.

A. Which one?

Q. Paragraph E.

A. Let me see if we are looking at the same thing.

(Counsel and witness conferring.)

By Mr. Mullen:

Q. It is 7-B. I beg your pardon. I didn't read my own handwriting correctly. 7-B, paragraph E, please.

A. 7-B. "At about 12 noon on July 26, 1949"—page 704 }

Q. 7-E.

A. I thought you said B.

Q. No, 7-B page, paragraph E.

A. Excepting the superintendent, the chief clerk"—

Q. No, E, please.

A. I am sorry, sir. "Excepting the laborers, all our employees approached by Hart and his group refused to become members of the United Construction Workers."

Q. On your direct examination—

Mr. Robertson: What day is that, Mr. Mullen?

Mr. Mullen: On the 23rd, page 253.

By Mr. Mullen:

Q. You were asked: "Did you give any instructions to Delinger or Ragan as to what they should do regarding the situation over the week-end?"

Your answer was: "Yes, I gave instructions that they should watch the situation closely and keep me informed of any developments."

*A. Hamilton Bryan.*

Will you refer to page 5 of your prepared statement and to the last line of the first paragraph on there and read that sentence, please.

A. "He suggested to Mr. Delinger that he ignore the United Construction Workers."

Q. On the 26th you got to the job around three o'clock?

A. Approximately that. I believe it is stated page 705 } in this memo about three. It might be 2:30, around a quarter of three.

Q. You met on the road a number of automobiles which you state contained the men who had been there earlier, is that correct?

A. Yes, we met a perfect caravan of automobiles headed in the opposite direction, leaving the mine, rather going back toward Royalton, in the opposite direction from which we were going toward the mine.

Q. You know nothing, do you, of your own knowledge, as to what happened there prior to three o'clock or, say, around three o'clock? All you have are reports made to you?

A. That is correct. I didn't get there until after the big trouble had all happened. Of course I inquired about it and was informed, but I didn't see it myself.

Q. You heard Mr. Robertson's opening statement here in which he said, "A crowd of men, a nondescript group of men, some of them carry *uns*, came to the plant," and your testified that you had a report that a lot of them were armed. Will you please refer to your prepared evidence, page 7-C, and read paragraph II?

A. "Many of our workers believed that some of the group headed by Hart were carrying guns or pistols. While nobody saw any guns, some of our employees thought page 706 } that they saw the outline of pistol handles or bullet cylinders concealed under the shirts or in the pockets of some of the group. Our carpenter foreman on the schoolhouse said he heard shots after the group left the schoolhouse and went around a bend in the road as they were going toward the tippie."

Q. Was it reported to you that on the morning of the 26th before you arrived, that Bert Preston, legal representative of the local Paintsville union, but not an employee, as you have stated, said to Mr. Hart that he could not strike because he had a contract with you, but that if he established a picket line he would honor it?

A. No, it wasn't reported to me before I came to the job.

Q. Was it reported to you that Bert Preston asked "Will

*A. Hamilton Bryan.*

there be a picket line tomorrow?" and he said that if there is not a picket line our men will work?

A. It was reported to me that Bert Preston said something to that effect. However, there is a question as to what Bert Preston meant by picket line.

I might add, Mr. Mullen, that that is what Mr. Preston said at the job site. I heard that he said something like that at the job site at that time.

Q. Then later in the afternoon you met Mr. Hart on the page 707 } 26th and had a talk with him. Did Mr. Hart tell you that he had received the message which you had phoned to Mr. Hunter, that you had had plenty of time to talk to his office, and that not having heard from you that plans for a strike had been made and it was too late to stop?

A. I don't know that you got that exactly right. I called Mr. Hunter—Rather, I placed a call for Mr. Hart early on the morning of July 26 at about 7.15 a. m. I was in Huntington and placed a long distance call for Mr. Hart in Pikeville. I had his telephone number. Mr. Hart wasn't there, and I was told I could talk to Mr. Hunter, who was the regional director. So I talked to Mr. Hunter and told him that I had had this report that Mr. Hart was leading a large crowd of men to our job for the purpose of stopping the work and closing the job down. I told Mr. Hunter that I was trying to get to the job site just as soon as I could. I asked him please to ask Mr. Hart not to interfere with any of our workers until I could talk with him at the job site. Later when I talked to Mr. Hart I told him about my conversation with Mr. Hunter, and Mr. Hart said yes, he knew it, that Mr. Hunter had informed him, Mr. Hart, about my telephone conversation, and then Mr. Hart said that he had already made his arrangements and it was too late to change them. After that Mr. Hart referred to his telephone conversation with me on July 14, in which he then said that he was going to organize all of our workers and close down the job unless we page 708 } recognized the United Construction Workers. He said that I hadn't—

Q. I don't want to interrupt you, Mr. Bryan, but it is not responsive to the question. I simply asked, did Mr. Hart tell you that you had had plenty of time to talk to his office.

A. He said he hadn't heard any more from me since July 14, and so United Construction Workers had decided to close down the job.

Q. All right. Now we come to the 27th. You went to the

*A. Hamilton Bryan.*

job and you testified you took 25 carpenters with you. Who did you find there at the job when you got there?

A. When we got there, there wasn't a soul there. That is at our office, which you passed before you went down to the tipple.

Q. You say there was no one there when you got there?

Q. When we first got there, there was no one there. There might have been—Maybe I should qualify that. I don't think I was the first person at the job. We all left at about the same time. Maybe some of our people got there a minute or two before I did, but outside of our own group I didn't see anybody.

Q. Didn't you say you saw two men sitting on a log there?

A. Well, I said that that was up at the office. You went down the road from Evanston—as you go down the road from Evanston toward the coal preparation plant  
page 709 } which we built you first passed the temporary buildings which we put up to take care of the men, the barracks, the mess halls, office, bathhouse, cook's quarters. You turn right there and go down another road which leads to the tipple. We all stopped at our office, and there wasn't any one there. When I got down to the tipple there were two men sitting on a pile of lumber.

Q. Do you know who they were?

A. I didn't know who they were. Some of my fellows talked to them. I didn't know who they were.

Q. Were there only carpenters who went with you to the job on the 27th?

A. No, sir.

Q. Were any of your laborers with you?

A. I didn't see any laborers. Most of those fellows lived in Breathitt County around Decoy. Some electricians went with us, and some iron workers went with us. That is about all I can think of.

Q. Then Mr. Harvey J. Robinson, you testified, arrived. Who is Mr. Robinson?

A. He showed his credentials. He was a field representative of the United Construction Workers and District 50, working in Region 58. I understood he was on par with Mr. Hart.

Q. Who was with him?

A. I didn't know, Mr. Mullen. After we got  
page 710 } there to the job we found a picket sign sitting on a barrel or on some rocks by the office, and I picked up the picket sign and threw it in the bushes, and lead about

*A. Hamilton Bryan.*

seven or eight or ten carpenters down to the tipple. I was down there with them for a while, while they were getting ready to go to work. Then I went back to the office. When I got back there I found Mr. Robinson. I don't know who came with him. There were a few more people there, though.

Q. Those people who were with him, were they not the men who had been working there as common laborers?

A. No, sir; I didn't recognize the common laborers. I mean by that I wouldn't—if I had seen one on the street I wouldn't have known whether he was a laborer or not.

Q. In other words, you didn't know personally all the people working on your job?

A. No, sir; I didn't.

Q. Didn't you say to that group there with him, "If you want to work at 90 cents an hour, go on to work"?

A. No, I don't remember that. I remember going back up there. I wanted to get more people to go back to work and I tried my best to persuade them to go to work.

The Court: You don't remember making that statement?

The Witness: No, sir.

The Court: I think that answers the question.

page 711 } By Mr. Mullen:

Q. Do you remember their stating they didn't want to work for 90 cents?

A. No, I don't remember that.

Q. Did you tell a group of them then, "All right, if you don't want to work, go get your time"?

A. No, sir. That was a Wednesday, and it was regular payday. Some of the men went in to the office, the people around there, to get their wages for the preceding week. The chief clerk, Mr. Ragan, will be here to testify. I feel certain that some of the men went in there and got their money because it wasn't due them until that day. I wanted to get men to work.

Q. Neither Mr. Robinson nor any of the men with him at that time made any threats, did they?

A. I don't recall Mr. Robinson's making any threats. I talked to him. I don't have a very clear recollection of what my conversation was with Mr. Robertson. I feel sure that he showed me his credentials, and I feel sure that I told him that we were trying to get men to go to work.

Q. Did he tell you who they wanted you to recognize the UCW as representing?

*A. Hamilton Bryan.*

A. No. My conversations have always been that all the workers would be organized, and I just assumed that they would all be organized by the United Construction page 712 } Worker<sup>d</sup> and the same thing applied.

Q. But there was no conversation between you on that subject at that time?

A. No. I thought at the time that Mr. Robinson was a sort of assistant to Mr. Hart, and I expected Mr. Hart would be coming out a little bit later, but he never did come.

Q. When the Paintsville carpenters—and by Paintsville carpenters I mean the carpenters who were members of the local union at Paintsville—didn't go back on the job, did you try to get Salyersville carpenters, members of the Salyersville union that had been established?

A. Yes, sir; I did.

Q. You have testified that Mr. Freeman, I believe, the International Representative of the Carpenters Union, was present at a meeting later, I think on the 2nd of August. Did he tell you you had to deal with Paintsville and not with Salyersville?

A. He took the position at that meeting that we had an agreement with the Paintsville local and that we would have to continue to obtain carpenters through the facilities of that local.

Q. You have testified that on Sunday, the 31st of July, you went to the job site with a man named Charlie Williams, who was a contractor, and that you offered to make page 713 } him an assistant to Mr. Veltry who was coming to take Mr. Delinger's place. You testified that later on, after you had returned to Salyersville, he came to you and said that he could not take the job, it would make his wife nervous. Will you turn to page 23 of your prepared evidence there, the ninth line, and read what Mr. Williams said to you?

A. Will you give me that reference again, sir?

Q. Page 28, 9th line, I think it is, sir.

A. I don't see it there. There are two references in here about conversations with Mr. Williams.

Q. I will ask for the reply he gave you on page 28, the 9th line.

A. I think that is the wrong page.

Q. That is the wrong page. I will give it to you in a minute. Page 23, the last two lines of the last paragraph.

A. "Mr. Bryan told Charlie Williams that Mr. Delinger had gone to Richmond and that he had another superintendent, Mr. Louis G. Veltry, coming to the job. Mr. Bryan asked Mr.

*A. Hamilton Bryan.*

Williams if he would like to work on the job as assistant to Mr. Veltry. Mr. Williams indicated he would like to do so, but that he would give the matter further thought. After supper Charlie Williams said he had decided not to take the job with us because his wife said that it would make her nervous. He also said that he had considerable contract work which needed his attention."

page 714 } Q. When you were testifying before you left out that last sentence, I believe.

A. I hadn't memorized that thing, and I was doing the best I could.

Q. On Monday, August 1, you again went to the job, got there about seven o'clock. Did you find anybody there then?

A. Yes, sir; there were some people there at that time.

Q. Do you know who they were?

A. Some of them were our carpenters. They had heard a report abroad that we were going to make another effort to go back to work.

Q. They were men, I believe you said, that Mr. Poe sent over there.

A. When it became apparent that the Paintsville local men were afraid to go back to work I had asked Robert Poe, the business agent of the Salyersville Local, to help us out and he said he would try to. A lot of our carpenters were members of the Salyersville local anyway.

Q. While you were waiting over there to see if these men would go to work you put in a call for Mr. Joinville in Richmond, did you not?

A. Yes, sir.

Q. In your testimony-in-chief you have testified, "I told Mr. Joinville about our trouble and asked Mr. Hart if he would like to speak to Mr. Joinville."

page 715 } So Mr. Hart got on the phone. Of course I didn't hear what Mr. Joinville said, but I did hear Mr. Hart tell Mr. Joinville that we couldn't do any more work unless we used United Construction Workers men."

I will ask you to refer to page 27 of your prepared testimony and read the first sentence that you have underscored in red thereon.

A. My copy is not underscored in red here, sir.

(Document provided to the witness.)

"Mr. Hart told Mr. Joinville that he and his group would stop us from working unless we recognized his laborers."

*A. Hamilton Bryan.*

Q. Unless you recognized his laborers it says there, does it not?

A. That is what it says.

Q. Later on, in talking on that day with Mr. Hart, didn't you inform Mr. Hart and say to Mr. Hart that the work could go along without any laborers since the carpenters on the job would be willing to do the work which normally a laborer should do?

A. I had a conversation with Mr. Hart about that. I told Mr. Hart that I had heard from Robert Poe that at the meeting at Tiptop the day before when they had the gathering of about 250 people, Mr. Hart had indicated that he might let the laborers go on back—I mean the carpenters  
page 716 } go on *go on* back to work. Mr. Hart said, "Yes, that he had, but that they had changed their minds and that the carpenters could not go back to work unless we agreed to recognize United Construction Workers as the bargaining agent for the laborers." I don't know whether that is the exact language, but it was words to that effect.

I then told Mr. Hart that we probably could get along without the laborers if necessary and that the Carpenters could do this work, which consisted mostly of helping carpenters, carrying materials and doing things like that.

Mr. Hart said no, that he represented the laborers and that we would have to recognize him. I think I told Mr. Hart that I wasn't so sure that he represented the laborers. I think we had a discussion again about the application blanks the laborers had signed for joining the Salyersville local. He said he had represented them anyhow and he was taking over.

Q. But he told you at that time that he was only representing the laborers, and if you recognized those you could go back to work, didn't he?

A. Yes. That was the first time he took that position in his conversations with me, but he did take it then.

Q. But at that time you asked him to call off the strike because you would employ only carpenters and didn't need any laborers, and the carpenters would do the work normally done by the laborers?

page 717 } A. I never asked Mr. Hart to call off his strike. He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. He said he would do that unless we signed a paper recognizing his organization as the representative of the laborers. I said I

*A. Hamilton Bryan.*

wouldn't do it and couldn't do it. I tried to explain my position to him and he said, well, we had to do it if we continued to work. I said I wouldn't do it.

Q. Mr. Bryan, didn't you ask him to leave your work alone if you employed only carpenters?

A. I don't think I asked him just that. I told him—in the conversations before he always said he was taking over all the work, representing all the employees. In the conversation on August 1 he shifted his position for the first time that I knew about and then said that the other people could go to work if we would recognize them for the laborers. I think that is about what it was.

Q. Didn't he tell you if the carpenters did the work that was normally done by the laborers, that that would be scabbing?

A. I told Mr. Hart that the little work which remained to be done at that time on the coal preparation plant and the houses, finishing up the schoolhouse, could be done by the carpenters.

Mr. Hart said no, that he wouldn't agree to that.

page 718 } Mr. Mullen: Mr. Reporter, will you read the last question?

(The pending question was read by the reporter.)

By Mr. Mullen:

Q. Did he tell you that?

A. I don't remember Mr. Hart's mentioning the word "scabbing." I know that we had a conversation about the carpenters going ahead and doing the work which would normally be done by laborers in helping carpenters. I said it could be done.

The Court: You don't remember his using that word, That is the question.

The Witness: He said he wouldn't agree to it.

By Mr. Mullen:

Q. The next day you had the meeting of a group of some thirteen A. F. of L. people?

A. That is right.

Q. You had requested Mr. Hart to be there, and he came there and waited 45 minutes, didn't he, something like that?

A. I believe the meeting was scheduled for 10 o'clock at the Carpenters Hotel. I had asked Mr. Hart to come and would he please ask Mr. David Hunter to come. We went into the

*A. Hamilton Bryan.*

meeting in the dining room at the Carpenters Hotel, and I asked Mr. Ragan to wait outside and let me know when Mr.

Hart arrived, if he did come. After we had been  
page 719 } in the meeting for a while Mr. Ragan told me he  
was there, and about 45 minutes after the meeting  
started I went out and talked to Mr. Hart. I couldn't leave  
the meeting before that.

Q. The meeting refused to talk to him?

A. Well, after I found out that Mr. Hart was outside, at the first appropriate chance I informed the group that Mr. Hart was outside and I suggested that they talk with him. Various business agents and other A. F. of L. representatives—I don't know whether they all got up or just some of the leaders got up and went back into the kitchen behind the dining room. The kitchen was not in use. They had a little chat back there. They came back, and I was told that they had nothing to talk to Mr. Hart about and did not care to see him.

Q. Mr. Hart was so advised?

A. I went outside and told Mr. Hart that that was their position, right away as soon as they told me.

Q. That is what, on the 2nd of August. On the 3rd of August you went to Huntington and talked with the Pond Creek Pocahontas people, I believe.

A. Yes, sir.

Q. And on the fourth you state they wrote a letter terminating the job?

A. That is right.

Q. That letter you have put in evidence.

A. I think it has been offered.

page 720 } Q. Who wrote that letter?

A. Mr. McDonald, the Assistant Counsel.

Q. Were you present in his office when it was written?

A. I was in the room, but I did not dictate it.

Q. But didn't you make some suggestion as to some of the language in it?

A. I think the only suggestion that I made was that Mr. McDonald in originally dictating the letter mentioned United Construction Workers and United Mine Workers, or maybe it was that he mentioned District 50 and United Mine Workers, and I said that I thought the proper way to say it was United Construction Workers, a division of District 50 of the United Mine Workers.

Q. The recital in there is that about noon July 26, 1949, we understand that your men were prevented from continuing to work on the tippie by threats and other action of the

*A. Hamilton Bryan.*

representatives of the United Construction Workers, a branch of District 50, United Mine Workers of America. That was based on what you had reported to them the day before, wasn't it?

A. Well, they knew it. Mr. Salvati had been out to the job the very day all this happened, and they had been kept in close touch with the situation all along. I suppose it was partly based on what I had reported to them the day before and partly on what they already knew.

Q. The next day, August 5, you went to Pikeville, I believe it was, to have a conference with David Hunter.

A. That is right.

Q. And you conferred there from 4:30, I believe, to about 8 o'clock.

A. Roughly. It was a rather long meeting.

Q. He gave you a form of contract that they use as the basis for agreements with the United Construction Workers, didn't he?

A. Yes, sir; he showed me an executed copy of a contract with Beckett Construction Company, and gave me another form of contract. There were some little differences between them, and we compared the two.

Q. In other words, this form of contract was a form as a basis for negotiation, and he had made changes in the actual one negotiated?

A. He presented to me two types of forms of contracts. One was you might say a form of preliminary agreement under which a contractor or employer would agree to recognize United Construction Workers and would then agree to negotiate with the United Construction Workers for terms and conditions. That was simply—it was on the letterhead of the United Construction Workers and was in the form of a letter, as I recollect. It is in evidence. Then he presented to me

the more formal type of contract which would be entered into pursuant to the preliminary recognition. He presented to me a blank form of contract, and he also showed me an executed contract. The two forms of the more elaborate contracts were not the same, outside of various other changes.

Q. You went over with him paragraph by paragraph the forms?

A. We read them, yes, sir. I think that I read the unexecuted form of contract that he gave to me instead of the one which had been executed by Beckett. I might have read them both.

*A. Hamilton Bryan.*

Q. Then toward the end of your conference you told him, did you not, that you didn't see how Laburnum Corporation could make an agreement with UCW or told him that you might sue him. Will you please turn to your memorandum of conference which A. Hamilton Bryan had with David Hunter in Pikeville, Kentucky on August 5, 1949, starting on page 6 at the sentence beginning in line 18, and read that paragraph, please.

A. Page 6?

Q. Page 6, starting at line 18.

A. "I told Mr. Hunter that for many years we had worked under agreements"?

Q. You can read the whole paragraph if you wish.

A. "I told Mr. Hunter that for many years we page 723 } had worked under agreements with an A. F. of L. local union and that Laburnum had a contract with Richmond Building and Construction Trades Council which required us to do so. I told him that I did not see how Laburnum could make an agreement with United Construction Workers. Mr. Hunter said that if that was the case I had wasted a lot of my time and his time, too. I then told Mr. Hunter that there was a possible way out by forming another corporation which would make an agreement with United Construction Workers, but that I did not believe that A. F. of L. workers would work in harmony with United Construction Workers. Mr. Hunter said that they had been working in harmony on the job that Beckett Construction Company has at Wheelright."

Q. Mr. Bryan, will you please turn to Page 9 and read the second paragraph beginning with the words "As the situation stands"?

A. "As the situation stands now, Mr. Hunter knows that we may bring legal action against the United Mine Workers of America, but he does not know how, when or where we may start. He also understood that we may consider forming another corporation and make some kind of agreement with his group."

Q. Then you had an interview on May 15, 1950, to which you have testified, with Mr. Hunter, and you have a memorandum of that conversation, is that true?

page 724 } A. Yes, sir.

Q. From which you were testifying here before?

A. Yes, sir.

Q. Will you please turn to page 3 and read the last para-

*A. Hamilton Bryan.*

graph on that page, which paragraph extends over on to page 4?

A. "Mr. Hunter said that if we got additional work in Mingo, Paintsville or elsewhere in his area, he would attempt to organize our laborers and our other workers, and that if he was successful he would expect us to make a contract with UCW granting recognition to it. He said that he would not undertake to tell us that we could not bid for work in Mingo, that as American citizens we had the right to bid, but that if we got the work he would expect it to be done with UCW workers. Mr. Hunter said that he would not permit us to bring in outsiders, that we would have to use local UCW labor."

Q. Will you also read the last paragraph on page 4, "Mr. Hunter again emphasized \* \* \*?"

A. "Mr. Hunter again emphasized that it would be o. k. for us to bid for the work in Mingo County, that if we got it, he would try to organize the job and have us sign an agreement with UCW."

Q. Where is Louisa, to which you referred in your testimony?

A. Louisa, Kentucky, is right on the Big Sandy page 725 } River, right across the West Virginia line. The little town across the river in West Virginia is called Fort Gay, on the main road from Huntington to Paintsville.

Q. Is that where the job you referred to as being handled by the Hamill Company was?

A. That job was an office building near Ragland, West Virginia, in Mingo County.

Q. That was not the job at Louisa?

A. No. In connection with the job of the Hamill Company on the office building at Ragland, Mr. Hunter said that he had met—

Mr. Mullen: I haven't asked him about what Mr. Hunter said, if Your Honor please. He has been over that. I was simply trying to locate the place.

The Witness: I am sorry.

By Mr. Mullen:

Q. You have put in evidence the statement listing damages amounting to \$29,478.86, the item being loss of fee on contract for construction of 25 dwellings, \$534.19—

*A. Hamilton Bryan.*

Mr. Robertson: What page?

Mr. Mullen: Page 418.

By Mr. Mullen:

Q. —damage from loss of fee on work in connection with the construction of schoolhouse, \$319.67, damage from loss of fee in connection with the installation of as-  
page 726 } bestos shingles of 25 dwellings, \$250, damage from loss of fee in connection with work for the installation of concrete foundations for coal preparation plant for No. 2, now called No. 3 mine, \$1,250, damage from the loss of fee on other additional work in Breathitt County, Kentucky, amounting to approximately \$542,500 which Pond Creek Pocahontas Company had agreed to have Laburnum Corporation handled on the basis of cost plus a fee of 5 per cent, \$27,125. Total \$29,478.86.

In regard to that last item, the work amounting to approximately \$542,500, you have testified elsewhere it was \$617,500. What makes up the difference?

A. Just a minute, Mr. Mullen.

(Witness computing.)

I took off \$50,000 to cover the approximate cost of the work in connection with the 25 dwellings. I have a statement or schedule made out showing how I arrived at it, but I can't remember it all right now. I would have to look at it.

Q. Do you recall what the 25 dwellings cost? I think you have testified to that somewhere.

A. I think I have it here. Our billings on the 25 dwellings amounted to \$21,285.05. In arriving at the figure of \$542,500 I allowed credit for some of the work which we had done so it wouldn't be too big.

Q. You are suing for \$500,000 damages.

A. Yes.

page 727 } Q. Here is \$29,478.86. How do you divide up your other items?

A. The other items are made up for loss of profits in connection with additional work which we would have received in view of our business connections with Pond Creek Pocahontas Company, Island Creek Coal Company, and its affiliated companies.

Q. Have you a specific amount for that?

A. You asked us to give an itemized statement, and we furnished our idea of approximate amounts.

*A. Hamilton Bryan.*

Q. Will you state, please, what those approximate amounts were?

A. The other three items?

Q. Yes.

A. Making up the total of \$500,000: Damage by reason of the destruction of the business relationship and connection which Laburnum Construction Corporation had developed and built up with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies, \$120,000. Damages to plaintiff's reputation \$100,000. Punitive damages, \$250,521.14. Adding all those items together you get \$500,000.

Of course the last items were necessarily approximate.

Q. Mr. Bryan, during the period from July 26 through August 5, when you were out in Breathitt County page 728 } and in that general neighborhood, did anybody shoot at you?

A. Nobody shot at me, that I know of.

Q. Did anybody try to beat you?

A. No, nobody made a pass at me.

Q. And you went all through that country day and night, which you say is so wild, and you were the head of the business that the trouble was about, and no one offered to interfere with you or to stop you in any way, did they?

A. Mr. Hart threatened to.

Q. I asked if anybody did stop you or if anybody did prevent you from going around.

A. No, nobody actually did it.

Q. Nobody offered you any violence of any kind while you were going around on the roads and all?

A. It depends on what you mean by offering violence. If that means threatened violence, I would say yes. If it doesn't the answer is no.

Q. Were any of your employees beat up?

A. I didn't hear of anybody getting a mauling.

Q. Was anybody shot at?

A. No, I didn't hear that anybody got shot at.

Q. Was any property destroyed?

A. No, I didn't hear of any property being destroyed.

Q. Were any automobiles overturned?

A. No, I didn't hear of it that I know of.

page 729 } Q. In other words, it was all talk and no action.

A. Well, I guess you just don't understand the situation

*A. Hamilton Bryan.*

out there. When they tell you not to do something, you had better not do it.

Q. Yet nobody was hurt, nobody was shot at.

A. I tried to get my people to go back to work by every way known to man, and I couldn't do it.

(Defendants' counsel conferring.)

Mr. Mullen: If Your Honor please, that is all that we have to ask Mr. Bryan at this time. We serve the right, of course, to cross-examine him on the information that he was requested to furnish this morning when we get that. With that exception, we are through, and I believe I kept the promise to Your Honor to get through by midday today.

Mr. Robertson: Stand aside.

Now, if Your Honor please, Mr. Mullen has cross-examined Mr. Bryan from the original memorandum that Mr. Bryan used as his guide when he testified in chief and I therefore now ask that this memorandum be introduced in evidence for what it is worth.

Colonel Harris: We object to that and call the attention of the Court to the fact that Mr. Robertson in the examination-in-chief had a copy of it that he was using from the very beginning. The witness had one copy and Mr. Robertson had the other. Mr. Robertson made the state-  
page 730 } ment in the presence and hearing of the jury that he always prepared such a statement.

Mr. Robertson: I am being quoted inaccurately, but I am not asking that it go in for any benefit of mine. Mr. Mullen used it as the basis of his cross examination of Mr. Bryan, and I think the jury is entitled to have it in evidence in case they want to see it when they go to the jury room, and they can call for it and see the whole thing and determine what credit we will give Mr. Bryan.

Mr. Mullen: Your Honor, I think the law is that where a witness testifies from a memorandum, opposing counsel at the end of the testimony has the right to see it and to cross-examine from it, but that it is not properly in evidence unless opposing counsel requests that it be made so, because it is a narrative form of evidence underscored and emphasized and so forth with various points. We simply asked for certain of the rights that we had to examine it at the close of his testimony, and unless we ask for it to go in I don't think it can be put in.

Mr. Robertson: If Your Honor please, I can shorten this

*A. Hamilton Bryan.*

a great deal, In view of their objection to it and in order to avoid delay, I withdraw my offer,

I ask them if they also object to my introducing in evidence the memorandum from which you cross-examined Mr. Bryan regarding his interview with Mr. David Hunter  
page 731 } on August 5, 1949. I offer that, but I want to know whether you object to it or not,

Mr. Mullen: If Your Honor please, it is exactly the same.

Mr. Robertson: All right, I withdraw it for the same reason,

Mr. Mullen: He has testified to the contents of them and we asked him about what had been left out,

The Court: Very well, the offer is left out.

Gentlemen, we will recess for lunch and be back at 2:15.

(Whereupon, at 12:45 o'clock p. m. the Court recessed until 2:15 o'clock p. m. the same day.)

page 732 } AFTERNOON SESSION,

2:15 p. m.

(The following proceedings were had in Chambers:)

Mr. Robertson: Judge, we are starting now to put on witnesses from Kentucky who are going to testify about specific episodes that occurred there, and they are going to repeat the exact language used. Some of it is pretty rough talk, and I noticed a number of ladies in the room. I think they are members of the families of various people here. There is nobody out there that I recognize at the moment. It doesn't make any difference to me whether they stay in or not. I think the witnesses are going to be reluctant to repeat the language used if ladies are sitting there. I don't know whether the ladies want to hear it or not. I don't think about the lady from the press. I am trying in good faith to avoid all this jockeying in front of the jury, and that is why I am bringing it up here in chambers. I am suggesting it. If these gentlemen object to it, it makes no difference to me.

Mr. Mullen: Just what is it you are going to bring up?

Mr. Robertson: A whole lot of cussing.

Mr. Mullen: You are going to identify the people who did it?

Mr. Robertson: Yes, I am going to have them on the stand and have them repeat what was said.

page 733 } Mr. Mullen: In the presence of Mr. Hart?

Mr. Robertson: In the presence of wherever

~~I think it is admissible.~~

*A. Hamilton Bryan.*

The Court: Your point is that there are ladies in the Court-room and you do not want to see them embarrassed?

Mr. Robertson: And I don't want my witnesses embarrassed by not wanting to repeat this language before them.

The Court: Do you gentlemen have any observations you would like to make?

Mr. Mullen: I haven't any observations.

The Court: The witness is entitled to say what occurred.

Mr. Mullen: I appreciate counsel's embarrassment.

Mr. Robertson: I am not embarrassed. It is all right with me, Your Honor. Let them stay.

Mr. Mullen: Mr. Lewis asked me on Saturday if I had any idea what day he could be put on, that he had been holding himself awaiting your call. He has managed to keep everything open this week except on Thursday, when Mr. Wilson has asked the heads of the unions to meet with him on the matter of controls. You know who Mr. Wilson is.

Mr. Robertson: It is only about two hours from Washington down here. I can tell you that I do not know and will not know until I know how this case develops,  
page 734 } and I am unwilling to commit myself.

Mr. Mullen: He would be glad to come Friday or Wednesday or any day.

The Court: Try to arrange it so it won't hit on Thursday.

Mr. Allen: I don't think it will hit on Thursday.

Mr. Robertson: I will do my best not to have it go on Thursday, but I am unwilling to commit myself.

The Court: You wanted to make a statement?

Mr. Mullen: I have spoken to Mr. Robertson and he doesn't object to it.

page 735 } (The following proceedings were had in open court:)

The Court: Are there any witnesses in the courtroom who have been excluded?

Mr. Robertson: Mr. Dixon, my next witness, is here and I am going to call him to the stand.

(Conference at the bench.)

Mr. Mullen: If Your Honor please, I would like to state in regard to the absence of Mr. Fred Pollard, who is one of the counsel for defendants, that Mr. Pollard was taken ill on Saturday, he is running quite a high temperation today, 103,

*Frank Dixon.*

and I don't know when he will be able to be back. I think it proper that I should explain why he is not here today.

The Court: Let the record show that Mr. Pollard's absence is due to illness.

Mr. Robertson: If Your Honor please, we have reached the stage of this trial where we are going to introduce a number of witnesses from Kentucky to state what occurred in various episodes out there, and there is going to be some rough talk. I don't think from all witnesses, but from some of them, pretty rough expressions. I notice a number of ladies in the courtroom. They might not want to hear it, and the witnesses might not want to say it in front of them. I suggest that they leave.

The Court: As I understand it, it is immaterial to you whether the ladies stay or not.

Mr. Robertson: No, sir; I can stand it.

The Court: Ladies, it is up to you whether you want to stay or not.

Who is the first witness?

Mr. Robertson: Mr. Frank Dixon, who was not sworn.

Whereupon,

**FRANK DIXON**

a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Robertson:

Q. Mr. Dixon, your name is Mr. Frank Dixon?

A. Yes, sir.

Q. Where do you live?

A. I live in Beuchel, Kentucky.

Q. How far is that from Breathitt County?

A. I should judge roughly around 190 miles.

Q. Speak loud enough for the jury to hear you without using the microphone, if you can, please.

Were you born and raised in Kentucky?

A. No, I wasn't.

Q. Where were you born and raised?

A. I was born in West Virginia.

Q. Are you connected with the American Federation of Labor?

A. Yes, sir; I am.

*Frank Dixon.*

Q. What is your position, if any, with that union?

A. I am an international representative of the United brotherhood of Carpenters and Joiners, affiliated with the American Federation of Labor.

Q. How many years have you occupied that position with the union?

A. About four years all together.

Q. What are your duties in that position?

A. As an international representative, my duties are to go around over the state on assignments from our international office where we might have disputes or to organize, maybe to settle some dispute between one local union and another over maybe jurisdiction or territorial dispute, strikes, or what have you that might come up. We would be sent in there maybe to investigate it and find out what the trouble is all about and make a settlement in the matter if possible.

Q. In the discharge of your duties have you from time to time had knowledge brought to your attention of the contests and differences between the A. F. of L. and the United Mine Workers of America?

A. I have.

Colonel Harris: We object to that on the page 738 } ground it would be hearsay.

Mr. Robertson: I think I can explain it in a minute, Your Honor. I am laying the foundation for him to state whether or not he knows that there is competition between these three defendants here and the A. F. of L. for the organization of different crafts, particularly construction workers. I think it is admissible.

The Court: I will overrule the objection.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. I think the question was, in the discharge of your duties have you come to know about the contests and accords and differences between the American Federation of Labor and the United Mine Workers of America.

A. Yes, I have.

Q. Is that also true as to the American Federation of Labor and District 50 of the United Mine Workers of America?

A. That is right.

Q. Is that likewise true as to the American Federation of Labor and the United Construction Workers, affiliated with the United Mine Workers of America?

*Frank Dixon.*

A. That is right.

Q. Does the American Federation of Labor and the three unions that I have named compete to organize in the same geographical territory?

page 739 } A. The United Construction Workers does.

Q. What is the nature of that competition?

A. The United Mine Workers has a set-up of an organization known as the United Construction Workers. They are in direct competition with our organization as far as construction work is concerned. They do attempt to organize construction jobs, in other words what we call reconstruction. That construction would consist mostly, you might say, in the eastern part of the state around the mines. In and around these mines of course we have signed contracts maybe with certain contractors. I don't know whether that is to be brought out here or whether you wish to bring that out. We can say probably in the case of the Laburnum Construction Company. We had a signed contract with this company to build coal hoppers, school buildings and houses and things in Breathitt County.

Q. Mr. Dixon, in union talk what is meant by one union raiding another?

A. That comes under the case practically you might say in the same instance here between the Laburnum Construction Company and our organization. As I stated before, we had a signed contract with the Laburnum Construction Company to furnish the carpenters and millrights on that job. Of course there wasn't any dispute there. At the start of the job the thing carried on nicely for I think a period of

page 740 } around six or seven months. Out of a blue sky the United Construction Workers came on the job and told the men either they were going to get off the job, that it was their work, or else they were going to have to join the United Construction Workers if they wanted to work there.

Mr. Mullen: If Your Honor please, is the witness testifying from his own knowledge. He already has said he was a hundred miles away from there.

Mr. Robertson: I understand the witness is testifying from information that he got in the routine discharge of his duties and reports made to him.

The Court: Is that true?

The Witness: How is that again?

The Court: Is it true that this is information that you re-

*Frank Dixon.*

ceived from reports, or do you know it from your own knowledge?

The Witness: I know it from my own knowledge, sir.

The Court: Go ahead.

Mr. Robertson: I have forgotten where you got to. Read the last sentence or two of his statement.

(The answer to the question was read by the reporter.)

By Mr. Robertson:

Q. Is that an illustration of raiding a union?

A. That is what you might say a definition of raiding, we will say on particular work like that, that is the page 741 } practice that they have. For instance, in this particular case here there was a gang of men of 50 to 100 people who came out there on the job and demanded of these men to join their organization or else they would have to get off the job. That is raiding of a construction job. That is raiding the work. In other words, it is taking advantage of one group of people that already has a contract. It has happened in other instances around the eastern part of the state of Kentucky.

Colonel Harris: We move to disregard that statement.

The Court: You gentlemen will disregard that statement.

Mr. Robertson: Before that, Your Honor, you remember we have set out in our trial brief and I am coming to this in a few other questions, we maintain and I think the Court has heretofore ruled that other instances of the same sort of thing in this Eastern Kentucky area, both before and after that, is admissible to show a pattern of behaviour.

The Court: In what period of time?

Mr. Robertson: Any reasonable period of time, one year, two years, three years.

Mr. Mullen: If Your Honor please, Your Honor has not ruled on that question. It hasn't come up yet for argument. I know because I have a note of argument on it. It page 742 } has not come up and has not been ruled on by Your Honor.

Mr. Robertson: I will ask the Court to defer its ruling because it is going to come up in a very few moments.

The Court: Very well.

By Mr. Robertson:

Q. Mr. Dixon, do you know the policy of the American Federation of Labor about honoring a picket line?

*Frank Dixon.*

Colonel Harris: We object to that, if the Court pleases. It is not a question of policy of the American Federation of Labor. It is a question of what those men out there on that job did about honoring the picket line. If they honored the picket line, whether they are American Federation of Labor or whether the American Federation of Labor had a policy of doing it or not, is immaterial.

Mr. Robertson: Are you through?

Colonel Harris: Yes.

Mr. Robertson: If Your Honor please, it has been stated here by counsel on the other side, I think by Mr. Mullen, that it was a point of honor or an unwritten law among unions to honor each other's picket lines. I am laying the foundation to meet my friend's objection, but I can ask but one question at a time. I am asking him now does he know what the policy generally is about honoring a picket line. I think he is going to say yes, and then I am going to ask him what would the policy of the A. F. of L. be in honoring any kind of picket line under such circumstances as prevailed on this job on July 26.

Colonel Harris: And we expect the evidence to show actually that the men out there honored the picket line. Suppose the policy of the A. F. of L. is not to honor it, but in actual practice these men did honor it, that is the thing that we are enquiring about here, if the Court pleases. What happened out there on that job in Kentucky? We are not trying the different policies of the A. F. of L. or any other international union. What happened. It is a simple problem. The men who were there can then testify what happened there on that day.

Mr. Robertson: If Your Honor please, I stated in my opening statement that I expected them to deny anything we did was right or anything they did was wrong. Now there is going to be a conflict of testimony here. We are going to have testimony which would lead you to believe there was no picket line there, and there was no question of a picket line, but our men were run off by threats of force and violence. I ask this witness here from what he knows of this situation, if he knows the general policy what would be their general policy. I have a right to do it because they have already said in here that it is a matter of unwritten law to observe a picket line. I am going to show now whether it is or whether it is not in circumstances like this.

page 744 } Colonel Harris: The undisputed evidence already shows from the testimony of the President

*Frank Dixon.*

of the Plaintiff that there were three picket signs out there which he picked up, one he threw in the bushes, and he has brought the others here. There isn't any question about that. The plaintiff himself has testified to that. That is the *alter ego* of the plaintiff, the man whom they say owns all the common stock. They are asking this witness to speculate as to what would have been the policy of the A. F. of L., and I respectfully submit that what we are interested in is not what would have been the policy but what actually happened.

Mr. Robertson: If Your Honor please, how can he talk about uncontradicted testimony when we haven't had a chance yet to put the case in? I expect his witnesses to say there was a picket line there like the iron curtain and that we honored it. I expect our witnesses to say no such thing. I think on the evidence that is in here now I say if some responsible person or any person goes and sticks up one picket sign at the office and goes a mile and a quarter down to the school house and sticks up another thing like that out in the bushes and then goes a mile and a half back to the tippie, that that does not constitute a picket line.

The Court: I will overrule the objection and allow the evidence for what it is worth.

Colonel Harris: We reserve an exception.

page 745 } By Mr. Robertson:

Q. Do you know the policy of the A. F. of L. regarding honoring picket lines?

A. Yes, I would be glad to answer that. Take, for instance, where there is a jurisdictional dispute between maybe we will say that my craft and another craft affiliated with the A. F. of L., of course our people would recognize that picket line, but in this instance where we are talking about the Breathitt County job—that seems to be the case here—I will say to you that our international and our people does not recognize such a picket line as that because that picket line was put up there for the purpose of trying to force our membership to give up their card in their brotherhood and join a dual organization which in our general constitution it says that you shall not join, give aid, comfort or support to a dual organization, which the United Construction Workers is a dual organization to our organization. I think that answers your question. We would not under any circumstances recognize a picket line set up there, which has been illustrated I think here if I might use the attorneys' language here, a

*Frank Dixon.*

piece of paper stuck up some place on a rock or nailed up on a tree. We wouldn't recognize such a sign as that anyhow. A man would have to be carrying a picket sign to and fro across the site of the job or something before the men would.

Then of course it is left up to the man's own  
page 746 } choosing as to whether or not he would cross that picket line. Another thing is, in this case here, with the Laburnum Construction Company on the Breathitt County job, I was in the meeting and told these men as far as my orders to them they were that they were to return to work and to continue because they had a contract with the Laburnum Construction Company to finish that job. In the meeting they told me definitely that they were not going to work under those circumstances.

Colonel Harris: We object to what happened in a private meeting that none of the defendants were present at, and the only meeting I have heard about here was one in which Mr. Hart waited 45 minutes and after being invited to come there they wouldn't let him in. So we object to bringing testimony to this jury of something that happens in a secret and private meeting of their own.

Mr. Robertson: If Your Honor please, Mr. Dixon was a little ahead of what I am trying to develop there, but to relieve my friend's lack of knowledge, we are talking about the Salyersville meeting on August 2, where Mr. Bryan made the speech and tried to get the people back to work and we are going to come to that in due course.

The Court: I overrule the objection.

Colonel Harris: We reserve an exception.

page 747 }

. . . . .

By Mr. Robertson:

Q. I think you have already said that you are familiar generally with the facts of this case.

A. That is right.

Q. Do you know a man named Tom Raney, who lives in Pikeville, Kentucky?

A. I don't know Mr. Raney personally.

Q. Do you know who he is?

A. Yes, I know he has some kind of official capacity I guess probably like myself. He is probably international represen-

*Frank Dixon.*

tative for the United Mine Workers.  
page 748 } Q. Since this case was set for trial has Mr. Raney sent you a message that if your witnesses from the Paintsville area would not testify, you wouldn't have any more trouble out in Eastern Kentucky?

Colonel Harris: We object to that statement: Mr. *Raney* has no authority and no authority is shown from any one of the defendants to engage in any discussions of that sort. If he did, he stepped outside of his agency.

Mr. Robertson: That doesn't make any difference to us, Your Honor. The undisputed testimony thus far is that Tom Raney is a member of the International Executive Board of the United Mine Workers of America, that he did whatever duties were assigned to him by Mr. John L. Lewis, that he lived in Pikeville and maintained an office there.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Have you received a message such as I have mentioned in my question?

The Court: As him what message he received.

Colonel Harris: Judge, I am not familiar with the Kentucky practice. In the other states in which I practice if I object to a question and counsel repeats it then I have to repeat my objection, and the custom is to let the stenographer read it in order to preserve the objection and the  
page 749 } exception. Is that the rule up here?

The Court: That is a question that you gentlemen will have to determine for yourselves as to how you want to save your point, but the Court will be very liberal with you in that respect, and you rise at any time you care to to save your point.

Colonel Harris: I want to conform to the Virginia rules, and every time he repeats his question I will have to repeat the objection.

Mr. Robertson: I would say that the general practice is just to have a continuing objection to the entire line of testimony.

The Court: That is done frequently, Mr. Harris.

Colonel Harris: But some of these questions will be different, and at the time he asks them will suggest the specific

*Frank Dixon.*

and precise objection that applies to it, and if I put in a general objection and I come to read them I probably wouldn't get the same idea. So I prefer to state my objection.

The Court: You feel free to state your objection at any time, Mr. Harris.

Colonel Harris: Thank you, sir.

By Mr. Robertson:

Q. What message did you receive from Tom Raney?

Mr. Harris: Same objection, if the Court please.

The Court: Go ahead and answer.

page 750 } The Witness: I received a message in a round-about way that Mr. Tom Raney wanted to meet with me and suggested that we meet and talk this matter over and we would arrive at some kind of settlement where the United Construction Workers would lay off the carpenter work in the eastern part of the state, and the understanding was that I was to get hold of my men at Paintsville and keep them from testifying in this case, that they just couldn't afford to have the carpenters testify in this case in Richmond.

Colonel Harris: We move to exclude that because the witness says that he got that in a round-about way, and nobody can possibly tell what is meant by a round-about way. That means it did not come directly from Tom Raney, and I think if a man comes in and says I got a rumor or a round-about report, they should be more specific and lay a better predicate for it.

Mr. Robertson: Just a minute before you rule, if Your Honor please. If you want to ask him, the round-about was in a way that the person giving the message won't get hurt physically through violence. If you want to pursue that I will pursue it right now.

Colonel Harris: I challenge the definition. I never heard that round-about meant that you weren't going to get into a fight. That is a new definition of round-about, to me anyway.

page 751 } By Mr. Robertson:

Q. What do you mean by what you said?

A. The way the message came to me this man happens to hold a pretty high position in the labor movement in Kentucky, and of course the way the message was delivered to me was that "I don't want you to say anything about this to anybody else. I ate lunch with Tom in a certain city and he talked this matter over with me and suggested that I come down here

*Frank Dixon.*

and get hold of you and see if you want to get in conference with him." I started to interrupt there a minute ago and try to make a clear explanation to that effect. Probably Tom didn't know me and doesn't know my address. I guess the attorney might object, but I will say I am glad of it.

The Court: Gentlemen, disregard that last statement.

Colonel Harris: I don't move to exclude his statement that he is glad of it because it shows his personal ill-will toward Mr. Raney, and I think the jury is entitled to know it.

The Court: I thought you were rising for the purpose of asking the Court to disregard that statement.

Mr. Robertson: I am going to ask that they do regard it.

By Mr. Robertson:

Q. Mr. Dixon, has your life been threatened since this case started on account of your connection with the case?

page 752 }

. . . . .

page 753 } (The following proceedings were had in chambers.)

(The last several questions and answers were read by the reporter.)

Mr. Mullen: I think he should go back to the point where objection was made to his saying that.

Mr. Robertson: Let me add this here, because I didn't feel that I should say this in the presence of the jury. What he means by "around-about way" is that that man, if he reveals his name, thinks his life would be in danger, and the man was afraid not to deliver the message, and he was afraid to deliver it for fear that his name would leak out. He says that if it becomes known, that that man's name was mentioned in this case, it will cost him his life.

Wait a minute, I haven't finished.

I told this man Dixon that I would not ask him on the stand to reveal that name, for that reason.

Mr. Mullen: We will.

Colonel Harris: We certainly will.

Mr. Robertson: That is up to you and him and the Court.

*Frank Dixon.*

Mr. Mullen: You are making a very serious charge.

Mr. Robertson: I am.

Mr. Mullen: On the basis of hearsay. The man who he claims told him isn't even willing to back it up by having his name stated.

Mr. Robertson: It is a rough case, and I have page 754 } done my part now. If it comes out through you all, that is—

The Court: What observation do you have to make, Mr. Allen?

Mr. Allen: If it please Your Honor, I suppose it will be conceded on all sides that you have a difficult problem here. It is exceedingly difficult any way you go about it, but the case itself makes it difficult. We are willing to be guided by any instructions to counsel that Your Honor may think are fair, but I think this should be borne in mind first, last, and all the time: according to the nature of the case itself, we certainly have a right to bring out the conflicting jurisdictions, so to speak, between these two unions. We have certainly got a right to bring out the antagonisms between the two unions. We certainly have a right to prove, according to the issues that have been drawn here, that our men left the job because of threats, intimidation, and fear of bodily harm, and not because of their desire to honor a so-called picket line, not because of their desire to join the United Construction Workers because the scale of pay was greater.

How are you going to prove those things? You might say, "You can prove them by proving the practice or the custom or policies of the United Construction Workers to raid people that didn't join their unions." I don't know how page 755 } you are going to get at it. The evidence ought to be confined to somewhat a general nature, and specific instances ought not to be gone into too much unless they bring them out themselves on cross examination.

How are we going to show the motive of these people? How are we going to show that they made up their minds to come there and did run these people off the job by threats, violence and intimidation?

You come back to this man Dixon. He holds a high position in the American Federation of Labor. A man comes to him and brings him this message, and promises him, "I don't want my name mentioned. If my name is mentioned as coming to you about this, I might be killed."

That is right much of detail to go into, it is true, the same way something was brought out about one of the meetings

*Frank Dixon.*

there, when the man started to mention something that was said at the meeting. It is certain that we have a right to bring out that this representative of the American Federation of Labor, an International Representative, came there and urged these people to go to work, and they refused to go to work because of threats, intimidation and fear. We certainly have a right to go that far.

Then these gentlemen have the right to ask them, if they want to, "what was done or said to show that fear?"

If, Your Honor doesn't think that we have a right to go into that detail on direct examination, limit us to statements to the effect that, "I urged these men to go back to work, and they wouldn't go back to work."

"Why wouldn't they go back to work?"

"They were afraid. They were afraid of being killed."

We have a right to go that far. The question is just how far we have a right to go in order to prove the issues on our side of the case which have developed here. I submit that Your Honor give that serious thought and confine us to the rules which you think give us the right to bring out what we have a right to bring out without an infraction of any rules that are made for the benefit of the defendants in cases of this kind.

Mr. Mullen: If your Honor please, I think we are confusing two things. The question has been asked him as to what he said at a meeting, and that was objected to. There were one or two other questions as to what happened there in Breathitt at the time. They are asking him here about a matter that occurred after the suit was brought, long after the suit was brought, and are asking the witness to testify that Tom Raney tried to prevent a witness from coming here to testify. All his authority for that is that "some man, whose name I can't mention, told me that he talked with Tom Raney, and that is what Tom Raney would like to do; he would like to meet with me to see if we can get together."

It isn't a part of what happened at the time. It is a matter that came up long afterward. Clearly, so far as he is repeating what Tom Raney said, it is hearsay, and he certainly has no right to go on the stand and try to prevent, even if he could testify of his own knowledge, us from asking the source of his message and the authority on which he is making these statements.

*Frank Dixon.*

If that is going to put a man in jeopardy, they are doing it, not us, and the burden should not be put on us.

The Court: What is the materiality of this question that threats have been made since the alleged cause of action arose?

Mr. Robertson: I can't think of anything that would be more relevant. They are trying to scare us out of proving our case. It just hooks up the whole thing from beginning to end. I can't think of anything more relevant.

The Court: The witness is here testifying what he knows about it.

Mr. Robertson: I have a right to show their efforts to scare us out of proving our case. They are not all here.

Mr. Allen: The materiality is this, Your Honor: It is exactly the same as old Judge Keats said in one of our famous slander cases. Slanders, even after the suit has started, are admissible to show the motive. You can't re-  
page 758 } cover on those slanders, but they go back and  
show the motive. This is just the aftermath and  
continuation of the same sort of thing, and it comes out of  
the same atmosphere that they created.

Mr. Robertson: It shows the pattern. The trial of this case has taken the pattern that every one I have ever been in takes. It is the same pattern. I am not talking about counsel. I am talking about on the facts, and the way they try to scare you out of coming to court, the way they try to scare your witnesses out after you get there.

I think it shows, as we have said in our trial brief, a pattern of conduct from before this case right on down through it and right down here into this trial. I think it is a great element of punitive damages.

Mr. Mullen: Assuming that it was material to show that, you are confusing the question of materiality with the method of proof. Speaking of slander cases, and the proof of subsequent slander, it is assumed that they had the proper witness to prove it. The question here is the method that they are trying to follow to prove that Tom Raney, whom this man had never met and never talked to, had said that he wanted to get with him and prevent witnesses from coming here. It is the worst violation possible of the hearsay rule. They even admit they brought him here on the promise that they wouldn't ask him who told him.

page 759 } Mr. Robertson: That is right, but I have no  
right to bind you.

I say this, Your Honor: It is perfectly obvious that this

*Frank Dixon.*

message came to this man as the official of the union, and it was up to him to receive it and act upon it as an official of the union. He got it in the routine performance of his duties. When we get to where we want to go into particulars, they say, "Let's confine ourselves to generalities." When we try to stick to generalities, they say, "You must give us the particulars." They can get them if they want them.

Colonel Harris: May I say a word, Judge?

The Court: I will come back to you, Colonel.

Mr. Moore: I would like to bring to Your Honor's attention the language of the Virginia Courts concerning this situation in the case of *Troglon v. Commonwealth*, 31 Gratt. 862, where the Court cites from Judge Story as follows:

"The question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is the matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate and establish his intention. Indeed, in no other way would it be practicable in many cases to establish such intent or motive; for the single act taken by it-  
page 760 } self may not be decisive either way, but when  
taken in connection with others of the like character and motive, the intent and motive may be demonstrated almost with absolute certainty."

That is how we think it is relevant and admissible, because if they intimidate this man as far as testifying in the case goes, it certainly shows they went at least that far and probably farther in intimidating a large group of them to the extent of running them off the job.

The Court: All right, Colonel Harris.

Colonel Harris: If the Court please, counsel for the Plaintiff keep saying and trying to leave the impression on the Court that this is a rough case.

Mr. Robertson: What kind of case?

Colonel Harris: To me, it is a powder puff case. There is no evidence that any single human being lost even a tiny little bit of skin. Nobody had their toes stepped on. Nobody was pushed over. Nobody was hurt. From the beginning of this puffed-up lawsuit to the present time, nobody has been hurt.

Now they come in and try to create the impression on this Court that they are so anxious to save this man down in Kentucky. If he were sent by Tom Raney, don't you know Tom

*Frank Dixon.*

Raney knows who it was? It is absurd to come in here and go through all that rigmarole as if they were trying to protect the man's life. If he came from Tom Raney, Tom Raney knows who he is. They can't protect him. If Tom Raney sent him and Tom wants to disclose who he was so the people will know that his sympathy is not with the Mine Workers, Tom Raney can tell them.

Mr. Robertson: Tom Raney is a member of your International Executive Board, and you can bring him.

Mr. Mullen: I am talking about, not the facts; I am talking about the question of procedure and the question of law, whether they can prove what they are trying to prove. I am not arguing about whether they can or can't prove it. I am arguing the question of procedural law, that they can't prove it in the manner that they are trying to prove it. It is hearsay.

The Court: Just how far do you think, Mr. Allen, you could go?

Mr. Robertson: As far as we have gone, Your Honor. I don't think any farther.

Mr. Allen: You have reference to this particular incident right here about calling for the conversation between Mr. Dixon and this man, whoever he was, supposed to be sent by Tom Raney?

The Court: Yes.

Mr. Allen: I think Mr. Dixon ought to be allowed to say that he had received threats patterned after those on page 762 <sup>1</sup>/<sub>2</sub> before, even after this suit started, in connection with witnesses. If they want the names and the details, then they should ask for them.

Mr. Robertson: Let me finish here. Isn't this the answer to it? As far as the message from Tom Raney is concerned, I am now through with that. If they want to develop the name, they can develop it. If they want to say Dixon is lying and is unworthy of belief, they can bring Tom Raney here and he can deny it out of whole cloth, and there is the issue that the jury can take or leave.

Mr. Mullen: We are not through with it. We are asking the Judge to rule it out and tell them so. Dixon isn't claiming that he has been threatened.

Mr. Robertson: I haven't come to that yet. I am talking now about the message from Tom Raney. We are going to talk about the other thing in a minute. I thought you wanted to dispose of this first question first.

*Frank Dixon.*

Mr. Mullen: I do, but Mr. Allen brought up that Raney had threatened him.

Mr. Robertson: He didn't say that. You misunderstood him, Mr. Mullen. We said this, that Tom Raney sent him a message and said, "I want to get together and make an agreement with you that you call off your witnesses from Paintsville, and we won't worry you any more in Eastern Kentucky." That is not a threat. That is an over-  
page 763 } ture to buy off the witnesses.

What I am going to tell you about the threat to his life is an entirely different matter, and Tom Raney had nothing to do with that.

Colonel Harris: The fact that they say we can later try to shovel out the mass of irrelevant stuff that they are trying to get in doesn't require the violation of the rules of evidence. We still have rules of evidence to determine the admissibility of stuff, and every once in a while they argue that we will get our chance to do so and so. They can't put us to that chance. They have to meet the requirements of the rules of evidence as they go along.

The Court: Is there anything else you gentlemen want to say?

I will overrule the motion, and will allow the witness to answer.

You want to reserve an exception?

Mr. Mullen: We note an exception.

Mr. Robertson: Now, let us take up the other matter. This thing about the threat to his life is an entirely different matter, and Raney has nothing to do with that. I want to develop there the threat that was made to his life.

The Court: Can you foresee any question that is going to be raised when we go back in the courtroom so we can  
thresh that out now?

page 764 } Colonel Harris: We are going to object to any claim that this man, this eager beaver, gets on the stand and says that "somebody threatened my life," and thereby poses as a brave man. Of course we will object to it.

The Court: What question are you going to ask?

Mr. Robertson: I am going to ask him, since this case was instituted and since he has been connected with it, has any threat been made against his life; and if so, by whom and in what manner. That is the substance of it. I can't remember the exact wording of it.

Colonel Harris: Your Honor knows that the threat of an

*Frank Dixon.*

individual member of a union of 600,000 members wouldn't be action for which the union would be responsible.

Mr. Robertson: Judge, let me give you an illustration of it. Suppose the Court were to adjourn this afternoon and John L. Lewis would come to my home tonight and say, "I don't like your tactics in that case, now, and you just dry up and quit them or I will shoot you." Does the Court mean I wouldn't have a right to come back here and tell that to this jury tomorrow as showing the animus and attitude in this thing and the pattern of it from before this occurrence on down through to the present day?

Mr. Mullen: No, we wouldn't say that, but there you have direct connection. Here you have a go-between.

Mr. Robertson: That doesn't make any difference. Suppose he sent me that message by you; it would serve me just as bad and be just as effective, because I wouldn't want John L. to send me word he was going to kill me. I think he would do it.

Mr. Mullen: He might not be lying, you don't know.

Mr. Robertson: He might be, and the jury could decide on that.

Colonel Harris: If all his arguments are as weak as the statement that he is scared, I think Your Honor can just dismiss them from your mind hereafter.

The Court: Do you care to make any observation on that point, Mr. Allen?

Mr. Allen: No, sir.

The Court: Do you gentlemen care to discuss it further?

Mr. Mullen: No.

The Court: I will allow the question to be asked.

You want to except to it in here?

Colonel Harris: Yes.

page 766 } (The following proceedings were had in open court:)

By Mr. Robertson:

Q. Mr. Dixon—

The Court: Mr. Robertson, it has been indicated to the Court that some questions may be asked that may be embarrassing to some people, and it is entirely up to you whether you want to stay in the Court or not. All right, you may proceed.

*Frank Dixon.*

By Mr. Robertson:

Q. Mr. Dixon, since you have been connected with this case have any threats been made against your life and if so, by whom and in what manner?

A. I will have again to say in a round-about way the word has been sent on to me by various people that I had better keep my ass out of the eastern part of the state.

Mr. Harris: We move to exclude the answer on account of the fact that the witness again makes use of the device "round-about way."

The Court: What do you mean by round-about way, Mr. Dixon?

The Witness: I am trying to refrain from bringing somebody else into this case because bodily harm might come to them by using their name.

The Court: Did somebody tell you or what?

The Witness: It goes back to the conversation page 767 } that happened at Ashland, Kentucky and the same thing was brought to me there from the same party, that Mr. Raney had offered to meet with me to make a deal with me, and if we did allow these men in Paintsville to testify I had better keep my ass out of the eastern part of the state.

Colonel Harris: We object.

Mr. Roberson: Let him finish, please.

Colonel Harris: I thought he was through. I beg your pardon.

The Witness: I have finished if that is a satisfactory answer.

Colonel Harris: You want to find out from him if that is satisfactory?

The Witness: I beg your pardon. I didn't say it was satisfactory to him. I was waiting to see if he was going to ask me anything further pertaining to it.

The Court: Had you completed your statement?

The Witness: Yes, I finished the statement.

Colonel Harris: We ask the Court to exclude from the jury this evident attempt to create the impression that he is protecting somebody, because if a man came to him who was sent by Tom Raney, Tom Raney knows that man's name. It isn't a secret known only to this man that he is protecting. If anybody connected with the union sent that man there, the man connected with it knows his name and it isn't any page 768 } secret from him.

Mr. Robertson: If Your Honor please, and

*Frank Dixon.*

also Tom Raney is a member of the International Executive Board of the United Mine Workers of America, living at Pikeville, Kentucky, and they can bring him here if they want him. All that he is saying here now is precisely what your Honor has already ruled on in Chambers and he is just repeating it here in the presence of the jury. The Court has already ruled that these questions may be asked.

Colonel Harris: Since Your Honor made a ruling, this witness has been trying to make satisfactory answers for Mr. Robertson.

The Court: That will be a question for the jury to appraise the testimony. I overrule the objection.

Mr. Mullen: We reserve an exception.

By Mr. Robertson:

Q. In connection with that threat did they make any reference to you about Big Sandy River and Tug River?

Colonel Harris: May we have an objection to all questions along that line and an exception without taking up time delaying the case?

The Court: Yes.

The Witness: The threat was sent to me again that if I testified and permitted these men in Paintsville, the carpenters in Paintsville to testify, that all the damned  
page 769 } water and gravel in the Big Sandy River wasn't  
going to fill me up if they ever caught me in the  
eastern part of the State again.

By Mr. Robertson:

Q. Does what happened in Breathitt County conform or differ from the pattern of behavior of the United Construction Workers in other parts of eastern Kentucky?

Colonel Harris: We will have to add that that calls for an unauthorized conclusion of the witness and we don't know with what he is comparing.

Mr. Robertson: I am comparing it with other instances where they have been run off the job. There have been some of them already mentioned here, Wheelwright, Kentucky. Somebody else called them. There are four or five of them. I can't remember them all. As I understand the law we are entitled to show a general pattern of conduct a reasonable length of time before the Breathitt County occurrences and a reasonable length of time after the Breathitt County occurrences to show whether this Breathitt stuff was part and par-

*Frank Dixon.*

cel of a general pattern used by these defendants to enforce their will.

The Court: I overrule the objection.

Colonel Harris: We reserve an exception and may we add, Judge, to that exception that they don't specify the date, they don't specify the time, *the* don't specify the place, page 770 } and they don't specify the industry or business that was involved.

The Court: Are you going to follow this question with one specifically showing those things?

Mr. Robertson: I hadn't intended to but I do now intend to.

By Mr. Robertson:

Q. Mr. Dixon, does what was done in Breathitt County, Kentucky conform to or differ from the general course of conduct as you have known it in similar instances in Kentucky?

A. It did, and it does.

Q. Did it conform or differ?

A. There has been a number of jobs that our people have been run off of: Wheelwright, Kentucky, Prestonburg, Kentucky—

The Court: Give the time.

The Witness: If Your Honor please, I don't really—I will say within the past year. I can do it that way. I would have to go back to my records and reports to the International office to get those dates.

The Court: Give the approximate times.

The Witness: It was in the summer at Prestonburg Kentucky, where we had a contract with a contractor. I don't just remember the name. That was a job where we built a dam on the Big Sandy River. There was a graveyard above the dam where they would have to be moved. Our page 771 } contract called for removing those bodies and making caskets. The graveyard would be removed to higher ground. The members of the Prestonsburg local union had a contract with this company—I just can't say the name of the company—and the United Construction Workers run our carpenters off that job. We had another contract at Wheelwright, Kentucky to do the carpenter work and wheelwright, and they were ran off that job. We had another job that was being built in Barberville, Kentucky, an armory for the State of Kentucky, and our people were run off that job.

*Frank Dixon.*

We had a job at Lynch, Kentucky, building a washer and coal tippie, and the men were run off that job.

Those are the jobs that I specifically know something about because the local unions had called me in to their districts, and my assignments from the international office took me in there to investigate and find out what the trouble was, and those are the conditions that I found when I got into the territory.

Mr. Robertson: The witness is with you.

### CROSS EXAMINATION.

By Mr. Harris:

Q. You say it conformed to these instances where other people were run off. In those other instances were the cases in which no single member of your union got as much as a scratch?

A. I would answer that in this way, that their page 772 } lives were threatened.

Q. No. I asked you the question, was it the case in these others that you mentioned where no single member of your union got as much as a scratch?

A. I might answer that by saying we didn't give them a chance to because we left the job without anybody being injured.

Q. Every time—

A. In other words, we left the job before we would allow any of our people to be injured over the job.

Q. All United Construction Workers have to do is to come in and say we want you to git, and you git, is that the idea?

A. No, sir. When there is at least 50 or 75 men or 100 men come to a job and go to a small building and just crowd up into the door and tell you that by God you are going to belong to our organization or you ain't going to work here, and we probably have only 10 or 15 or 20 men on that job, they certainly haven't got any room to protect themselves.

Q. You know you had more than any 10 or 15 or 20 men on the job of Laburnum Construction Corporation, don't you?

A. We had quite a few men on that job. I don't just remember how many. But those men were scattered from the top of the mountain to the bottom of the mountain.

Q. Don't you know you had 64 men on this work?

A. Even so there would be 64 of our men on the page 773 } job, those men were scattered over a large area, and I don't suppose there were more than, we will

*Frank Dixon.*

say the largest number of them that could be together would be around 15 of them.

Mr. Robertson: Let him finish, please, Mr. Harris.

Colonel Harris: I thought he had answered my question. He might have been making a speech that I wasn't listening to.

The Witness: You certainly were asking the question.

The Court: Did you finish answering the question?

The Witness: Yes.

The Court: I understood you had. Go ahead, Mr. Harris.

By Colonel Harris:

Q. Do you claim to this jury that the carpenter helpers and common laborers on the Laburnum job were members of the carpenters union?

A. They were not, the laborers and carpenters helpers, members of our organization, but they had made applications to join our organization.

Q. That was after the United Construction Workers came in to try to organize them, wasn't it?

A. I beg your pardon.

Q. When did they make application?

A. I gave personally to one of the men—I can't recall his name—in the Paintsville Local Union a large number of application blanks, I would say roughly it would have been around the early part or around the middle part of July, around about the early part of July.

Q. What do you mean by the early part of July?

A. I would say roughly—I am not specifically stating any dates because I didn't have no occasion to have to remember the date of that meeting. I was attending a meeting of their local union, and the question was brought up that the laborers and the carpenter helpers wanted to organize on the Laburnum Construction Company job. I said, if that is the case your general constitution says you handle your own materials of members of your organization. Sign these men up and put them into your organization as carpter helpers.

Q. Do you remember the question I asked you?

A. That is the question you asked me.

Q. Didn't I ask you what you mean by the early part of July? Wasn't that what I asked you?

A. I believe I answered your question.

Q. I didn't hear any dates given.

A. I didn't give you any dates.

*Frank Dixon.*

Q. Give us one.

A. Exact date?

Q. Give us one, please.

A. I am unable to give you the exact date of that meeting.

Q. By the early part of July do you mean before the 10th of July.

A. I would say, yes, around the 10th, somewhere around in there.

Q. All right. Do you mean applied for the membership?

A. Yes, sir.

Q. In the carpenters union on the 10th of July or by the 10th of July?

A. I know that some of the applications were signed around about the 21st.

Q. Oh, they were all signed and dated on the 21st, weren't they?

A. I did not write the applications myself, so there I couldn't say what date they were signed.

Q. Have you seen a single application that bears a date that was not dated the 21st of July?

A. I really haven't saw any of the applications.

Q. You haven't?

A. No, sir.

Q. Now, then, you are an organizer, aren't you?

A. That is right.

Q. Didn't you carry blanks around with you when you were around organizing?

A. Yes, sir. I always do.

Q. You didn't have any blanks when they asked for some out there on the job, did you?

A. Yes, sir.

Q. Didn't you have to send off and get the blanks?

A. No, sir.

Q. Do you mean the first time anybody asked out there for an application blank with the A. F. of L. carpenters union you were able to hand it right out?

A. Yes, sir. If you will let me give you a clear answer of my answer.

Q. No, you answer the question.

The Court: One minute, Mr. Robertson.

Colonel Harris: I asked him to answer my question. I am not willing for him to make speeches. Mr. Robertson will no doubt make them.

Mr. Robertson: Your Honor, I am not calling for any

*Frank Dixon.*

speeches. We have plenty of oratorical talent. The witness said that he answered the *questio*, yes, and said "I would like to make an explanation." I think the witness has a right to do that before he goes to something else.

The Court: Do you want to qualify that statement?

The Witness: Yes, sir, I would like to in as much as the attorney has asked me a question in such a way that I can't answer the question any more than say yes.

The Court: You may proceed to qualify your statement.

The Witness: I swore to tell the truth and that page 777 } is what I want to say. In this instance where he asked me that question, I certainly answered him yes that I always carry these application blanks with me, and when my membership asked me for those cards we were in a meeting. I can't run around here with a whole pocket full of literature sticking in my pockets as if I was a pack horse or something. I went down to my automobile and got the cards and gave them to him. That is the question I wanted to answer you on. That is the reason I couldn't answer your question the way you asked it because you asked the question, didn't I have the applications cards with me.

By Mr. Harris:

Q. You stated to this jury a while ago that you didn't regard that those three signs informing the public that there was a strike there—didn't regard that as a picket line.

A. Certainly not, sir.

Q. You also would tell this jury, would you not, that if there had been a picket line you wouldn't have paid any attention to it?

A. Right.

Colonel Harris: That is all.

Mr. Robertson: I have no other questions.

The Court: Stand aside.

(Witness excused.)

Mr. Robertson: Mr. Weaver P. Freeman.

page 778 } The Court: Do you want this witness to go outside? Are you going to put him back on?

Mr. Robertson: Not as far as I know, Your Honor.

The Court: If he stays in, there will be a question about his testifying again.

Mr. Robertson: He had better go out, then. I can't look into a crystal ball.

The Court: The previous witness will leave the room, then.

Whereupon,

WEAVER P. FREEMAN,  
called as a witness on behalf of Plaintiff, having been first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Freeman, is your name Weaver P. Freeman?

A. That is right.

Q. Where do you live?

A. Louisville, Kentucky.

Q. How old are you?

A. Fifty-three.

Q. Where were you born and raised?

A. Harrisburg, Kentucky.

Q. How far is that from Breathitt County?

A. Probably 100 miles, roughly.

page 779 } Q. Are you connected with the American Fed-  
eration of Labor?

A. I am.

Q. What is your position with that union?

A. I am an International Representative of the Carpenters.

Q. What are the duties of your position?

A. It covers a multitude of things, good will ambassador,  
troubleshooter, and various things that might have to be  
settled in our organization.

Q. How long have you occupied your present position with  
the union?

A. About six years the last time.

Q. On the 28th of July, 1949, that calendar shows was  
Thursday. Were you in Salyersville, Kentucky, on that date  
in connection with the trouble that the Laburnum Construction  
Company was having in Breathitt County?

A. I don't know whether it was actually in that connection.  
I think I had been over to Paintsville and stopped in Salyers-  
ville, if this is the time you are having reference to, the time I  
was talking to Mr. Delinger.

Q. On that occasion, did you phone Mr. Bryan in Hunt-  
ington while you were in Salyersville?

A. I did.

Q. What was the occasion for your seeing Mr.  
page 780 } Delinger at that time?

A. I came into town and I parked my automo-  
bile, and Mr. Delinger was standing on the sidewalk. We went

*Weaver P. Freeman.*

up to his hotel room, and he told me of the difficulties that he was having over on the job. I had already heard about it through various people. I wouldn't be able to name them, probably, right now, but you know how it gets around.

He asked me if I would talk to Mr. Bryan—

Colonel Harris: We object to any hearsay conversation, if the Court please.

Mr. Robertson: I can bring this right to the point. It is the same thing the Court has ruled on before.

By Mr. Robertson:

Q. Did Mr. Delinger tell you, or not, that his life had been threatened?

A. He told me that they had sent him word to get the hell over there and get what few rags he had and get the hell out and stay out.

Q. Did you convey that message to Mr. Bryan in your telephone conversation?

A. I certainly did.

Colonel Harris: May we have an objection to all the questions along that line, and an exception, Judge?

The Court: The record will show your objection and exception to this line of examination.

page 781 } By Mr. Robertson:

Q. Did you attend an A. F. of L. union meeting in Salyersville, Kentucky, on the 2nd day of August, 1949?

A. I did.

Q. What was the purpose of that meeting?

A. It was a group of building trades representatives, myself as an International Representative of the Carpenters. We had a meeting with Mr. Bryan, and as the International Representative of the Carpenters, he insisted that I would send my members back in there on that job. He told me that he had a contract with us; for us to furnish them with carpenters. And I told him that didn't make any difference what kind of contract he had; that under no condition would I send my membership back in there where I wouldn't go myself.

. . . . .

Q. What was the conversation between you and Mr. Bryan about whether you would or whether you wouldn't? Just

*Weaver P. Freeman.*

give us the whole conversation. Don't pull any punches on what was said.

page 782 } A. My local unions work under local autonomous charter, and by that they make their own rules and regulations and their own by-laws, and decide as to who they will work for and who they won't work for, and the conditions they will work under. By that, I wouldn't even advise them to go back, knowing the conditions that existed.

Q. Did you and Mr. Bryan have any words over that?

A. Why, yes, I guess it was a pretty heated argument.

Q. What did you tell him and what did he tell you? Don't mind the ladies; just go ahead. We told them to go out if they didn't want to hear it.

The Court: Go ahead and answer the question.

The Witness: Well, I—they told us, they told my membership if they went back there they were going to shoot their ass off, if that is what you are asking for.

By Mr. Robertson:

Q. That is what I am asking for. Did you have any talk with Mr. Bryan about the difference in the situation in Kentucky and in Richmond?

A. Yes. I told him—he told me about the contract and everything, and I said, "Yes, that contract is in Richmond, but this is down in Breathitt County, Kentucky, and there is a hell of a lot of difference between Breathitt and Richmond." I think it was something like them words that I used.

Q. When he kept on telling you what he knew about it, what did you tell him to do about it?

page 783 } A. I told him from past experience and what I had read in the newspapers, they would do just exactly what they said they would do.

Q. Did you tell him anything about he didn't know—

A. Yes, I told him as far as going back there and putting on a pair of overalls and leading a bunch of men back there, he didn't know his ass from a hole in the ground.

Mr. Robertson: The witness is with you.

### CROSS EXAMINATION.

By Colonel Harris:

Q. Do you live out in Kentucky now?

A. I live in Louisville.

*Weaver P. Freeman.*

Q. Louisville, Kentucky?

A. Yes, sir.

Q. How much did they agree to pay you to come here today?

A. How much did who agree to pay me to come here today?

Q. The Plaintiff that you are testifying for?

A. Nothing. The International Brotherhood of Carpenters pays me for my traveling, sir.

Q. And you are not looking to the Laburnum Construction Company or Mr. A. Hamilton Bryan for any compensation?

A. Absolutely not. I am on my own, brother.

page 784 } Q. Your visit here today is just a part of a broad fight between your union and the United Construction Workers?

A. I would assume so, for I am here on assignment from my International Office.

Q. Yes. How long have you been fighting the United Construction Workers?

A. Well, we have had a little trouble with them right along, ever since I have been on this job. The first trouble I ran into with them was at Barbourville, Kentucky, when the J. D. Jennings Company out of Louisville—

Q. I didn't ask about that. I asked him how long.

Mr. Robertson: If Your Honor please, I am going to ask him to read the question. He is answering the question that was asked.

The Court: Read the question back.

(The pending question was read by the reporter.)

The Court: Answer that question.

The Witness: About two or three years, roughly.

By Colonel Harris:

Q. You say you have been an organizer this time about six years?

A. Did I say "organizer"?

Q. I beg your pardon. You didn't. You said you had been with the union six years this last time. How long were you with it the first time?

page 785 } A. About 14 or 15 months, and I was lent to the American Federation of Labor for the three war years, and then went back with the Carpenters.

Q. How long have you been a member of the Carpenters Union?

*Weaver P. Freeman.*

A. Since 1921.

Q. Have you maintained your membership constantly all that time?

A. If I hadn't, I wouldn't be an International Representative.

Q. In your talking with Mr. Delinger, did you name anybody there on the job that had been shot?

A. No, I didn't know—

Q. Did you tell him anybody on the job that had been hit?

A. No.

Q. Did you tell him anybody on the job that had had their foot stepped on?

A. No.

Q. As a matter of fact, there wasn't a single living person that received any physical injury whatsoever out there, was there?

A. They used good judgment.

Q. Will you answer my question, please, sir?

The Court: Answer the question.  
page 786 } The Witness: No.

By Colonel Harris:

Q. This terrible reputation that Breathitt County has—the people in Breathitt County had that reputation long before July, 1949, didn't they?

A. Yes, it dates back as far as 1900. We have a statue of a Governor standing in front of the Capitol now, from some of their outlaw activities up in that section of the country.

Q. That wasn't a United Construction Workers fight?

A. It goes to prove that they are not law abiding citizens.

Q. The people, not the United Construction Workers alone, but everybody out there?

A. That is right.

Q. Do you mean to say that all the people on the other side are brave and all the people on your side are cowards?

Mr. Robertson: I object to that, Your Honor.

Colonel Harris: I think that is a fair question.

Mr. Robertson: I say that is a perfectly unfair question to the witness, and is intended to be an unfair question, and I object to it.

The Court: I overrule the objection.

*Weaver P. Freeman.*

Mr. Robertson: Exception.  
page 787 } Colonel Harris: Read the question to him.  
please, Mr. Dudley.

(The pending question was read by the reporter.)

The Witness: No, there are no cowards in my family, to answer the question in that respect, but I think our people just aim to use good judgment, as I said before, if that answers the question.

By Colonel Harris:

Q. As a matter of fact, those people out in Breathitt County, in fact, all over Kentucky, have a reputation for being brave men and fighters, don't they?

A. That is right.

Colonel Harris: That is all.

Mr. Robertson: I have no other questions.

The Court: Stand aside, Mr. Freeman. That is all.

(Witness excused.)

Mr. Robertson: If Your Honor please, our next testimony is the deposition of a man named Henry Starr which was taken out in Kentucky. He could not come here, and I am going to ask that I be permitted to take the stand and read the answers to the questions, and Mr. Allen read the questions.

Mr. Mullen: If Your Honor please, objections to a large number of the questions have already been filed with Your Honor.

page 788 } Mr. Robertson: You may object to them as they come along.

The Court: I am wondering if we wouldn't save some time if we conferred in chambers.

Mr. Robertson: I don't think you would. I don't think there are many objections to them. I won't read the answers if they object.

Mr. Mullen: I think we would save a great deal of time. The objections are written out. We could go over them right quick.

The Court: How long do you think it would take, Mr. Mullen?

Mr. Mullen: I don't know, Judge, because I don't know how

*Henry Starr.*

much argument there is going to be on the objection after it is made.

Mr. Robertson: I suggest we go along and see how far we can get, and then if we come to an objection, if there is any difficulty on ruling on it, then we can adjourn to chambers.

The Court: Let's go on to the first objection, and then I can see.

page 789 } (At this point the deposition of Henry Starr was read to the jury, Mr. Allen reading the questions and Mr. Robertson reading the answers, as follows:)

"The witness,

HENRY STARR,

being first duly sworn by Alice Lyon, a Notary Public for the County of Johnson, in the State of Kentucky, testified as follows, to-wit:

"The signature and seal of said notary waived by agreement of parties hereto.

"DIRECT EXAMINATION.

"By Mr. Robertson:

"Question 1. Mr. Starr, what is your full name?

"Answer. Henry Starr.

"Question 2. How old are you, Mr. Starr?

"Answer. I am fifty-four years old.

"Question 3. Where do you live?

"Answer. Here in the City of Paintsville.

"Question 4. Were you born and raised in this general neighborhood, Mr. Starr?

"Answer. No, sir. I was born and raised in West Virginia.

"Question 5. What is your address here in Paintsville?

"Answer. Depot Street.

"Question 6. What is your occupation?

"Answer. Carpenter.

"Question 7. Are you a member of any union?

"Answer. Yes, sir.

"Question 8. What is that union?

page 790 } "Answer. Carpenter's union, Local 646, affiliated with A. F. of L.

"Question 9. Is that a local here in Paintsville?

"Answer. Yes, sir.

*Henry Starr.*

"Question 10. Are you an officer in that union at the present time?

"Answer. Yes, sir.

"Question 11. What is your office?

"Answer. Business Agent and Treasurer.

"Question 12. For how long?

"Answer. I have held the position of Treasurer for three years. This is the third year, beginning July 1st.

"Question 13. And you were Treasurer of your Local in July 1949?

"Answer. Yes, sir.

"Question 14. Did you hold any other office then?

"Answer. No, sir, not then.

"Question 15. How long have you been a member of said union?

"Answer. Since 1940, August 17th.

"Question 16. Mr. Starr, did you ever do any work for Laburnum Construction Corporation at Evanston, Kentucky?

"Answer. Yes, sir.

"Question 17. What kind of work did you do there?

"Answer. Carpenter foreman.

"Question 18. What County is Evanston in?  
page 791 }

"Answer. Breathitt County.

"Question 19. Is that County sometimes called  
"Bloody Breathitt"?"

"Answer. That is what they call it, yes, sir.

"Question 20. How did it get that name, if you know?"

"Answer. Because there was so much willful murder done there. If someone got mad at someone they would go out and have a feud.

"Question 21. How far is Breathitt County, Kentucky, from Harlan County, Kentucky, if you know?"

Mr. Robertson: There is an objection to that.

Mr. Mullen: We will waive that objection.

(The reading of the deposition continued as follows:)

"Answer. I wouldn't know just exactly.

"Question 22. What kind of work was Laburnum Construction Corporation doing at Evanston in the month of July, 1949?

"Answer. We were building a coal *tripple* and preparation plant and houses, and also a school house, we had under construction at that time.

*Henry Starr.*

"Question 23. I believe Laburnum Construction Corporation had another company of the same ownership that was doing some of the work there at the school house?

"Answer. Laburnum Construction Corporation was doing it all.  
page 792 }

"Question 24. About how many members of your local were doing that carpenter work there at Evanston; approximately?

"Answer. I think we had thirty-four or thirty-five carpenters on the job there out of this local.

"Question 25. Would that include the school house and also the tipple and coal preparation plant?

"Answer. That would include all the carpenters on the job for Laburnum Construction Corporation.

"Question 26. I will ask you to describe the construction of the tipple there and what was at the tipple and what was at the head house and how those two units were connected?

"Answer. The main tipple built at the bottom of the hill was to receive all the coal, and we had a lot of construction work going on at the top of the hill so the coal could be sent down the hill on the button line.

"Question 27. Was that operation known as Pond Creek Pocahontas Company's Mine No. 1?

"Answer. Yes, sir.

"Question 28. Was that a shaft mine, or a strip mine?

"Answer. Strip mine.

"Question 29. You mentioned doing some work on the school house, approximately how far was the school house from the tipple?

"Answer. Approximately a mile and a quarter.

page 793 } "Question 30. How far would you say Evans-  
ton is from Paintsville by road?

"Answer. I think the car registered fifty-one miles.

"Question 31. And how far was that operation from Salyersville, Kentucky, in Magoffin County?

"Answer. It is eighteen miles from here to Salyersville.

"Question 32. What kind of country is it up there where that operation is?

"Answer. It is mighty rough country.

"Question 33. Was it wooded right down to the operation?

"Answer. Yes, sir, until we cleared it out.

"Question 34. How close would you say the brush and woods came down to the tipple and school building there?

*Henry Starr.*

"Answer. I would say we cleared off, or the Company cleared off the right-of-way, and I would say they cleared off a hundred foot lane for the button line up the hill, and on the hill they cleared off a place for the water tank.

"Question 35. Is the tipple in a little pocket there?

"Answer. It comes off of a point.

"Question 36. And how far was the woodlands away from the school house?

"Answer. It is approximately a hundred feet up to the woods in some places and in some places not so much.

"Question 37. Do you know where the United Mine Workers of America operate in that vicinity?

"Answer. Yes, sir, they are working around page 794 } there in the mines and it is a fact they would be organized in there.

"Question 38. Do you know whether the United Mine Workers of America were organized in there at that time?

"Answer. They were not as I know of at that time.

"Question 39. How long had your Local 646 been operating there before July 25, 1949?

"Answer. We went there in November, 1948, when we signed a contract and went to work over there.

"Question 40. So that would be approximately eight months?

"Answer. Yes, sir."

Mr. Robertson: There is not an objection at this point, but there is something here. Do you want me to read it? If you don't object, I will read it.

Mr. Mullen: I have no objection.

The Court: Let us read only what is necessary.

(The reading of the deposition continued as follows:)

"Question 41: Mr. Starr, did you, as a member and officer of your union, receive reports that United Construction Workers of District 50, Region 28, affiliated with United Mine Workers of America, were going to try to run the Laburnum Construction Corporation's employees off the job there at Evanston?"

Mr. Mullen: If Your Honor please, we have an objection on that. We object to the question on the ground that the purport and nature of any reports received would be hearsay.

*Henry Starr.*

Mr. Robertson: Your Honor, we say it was  
page 795 { information he received in the regular course of  
his employment as a union official, and it is ad-  
missible.

The Court: I will overrule the objection.

Mr. Mullen: Please note an exception.

(The reading of the deposition continued as follows:)

"Answer. Yes, sir, I did.

"Question 42. Did those reports that came to you come in  
increasing frequency or decreasing frequency?

"Answer. Every day or two we would hear a rumor and  
they were careful whose name they would attach to it, but it  
was official enough that they were aware of it."

Mr. Mullen: If Your Honor please, we object to the ques-  
tion and answer because he says it is simply a rumor. He  
doesn't say any definite report came to him, that anybody  
brought the report, but it is simply a rumor.

Mr. Robertson: We think it is admissible, Your Honor, be-  
cause it is information that came to him as an official of the  
union, that these people were coming to run them off the job.

The Court: I will allow that.

Colonel Harris: We reserve an exception.

(The reading of the deposition continued as follows:)

"Question 43. You say it was reported to you in your ca-  
pacity as a member and officer of the union you represented?

"Answer. Yes, sir.

page 796 { "Question 44. As a result of those reports  
which came to you on or about Sunday, July 24,  
1949, did you take any action about it?

"Answer. On the Saturday night preceding the Sunday  
we had a meeting and we requested our business agent, Mr.  
Preston, to be over there on Monday morning.

"Question 45. Was that Mr. Burt Preston?

"Answer. Yes, sir.

"Question 46. Why did you request him to be there on  
Monday morning?

"Answer. He was our legal representative in a case like  
that and we wanted him there to take care of the affairs and  
to keep down any trouble that might arise. We had received

*Henry Starr.*

reports that the United Construction Workers were moving over there.

"Question 47. Did the carpenters from your Local 646 go to work over there on July 25, 1949?

"Answer. Yes, sir.

"Question 48. Was one Burt Preston there on that day?

"Answer. Yes, sir.

"Question 49. Did the United Construction Workers show up there that day, as you had expected, or not?

"Answer. No, sir.

"Question 50. As an officer of the union you represented, did you get any word during that day that any-  
page 797 } thing further would be done by the United Construction Workers?

"Answer. No, sir, not that day.

"Question 51. Did you and your men work all that day?

"Answer. Yes, sir, on Monday, the 25th of July, 1949.

"Question 52. Before you left work on the 25th, did you, as an officer of your union, Local 646, get word that anything would happen there on Tuesday the 26th?

"Answer. No, sir, not that day.

"Question 53. Did you and your men go back to work there on Tuesday the 26th of July, 1949?

"Answer. Yes, sir.

"Question 54. How many men were there that day?

"Answer. I think I had sixteen on the payroll that were working on the tipple and some men borrowed from another job that were working on top of the hill.

"Question 55. Do you know how many carpenters were working on the school house?

"Answer. No, sir, I don't know.

"Question 56. How far was the school house from the tipple?

"Answer. About a mile and a quarter.

"Question 57. What was the regular time for starting to work on the job in the morning?

"Answer. Seven o'clock.

"Question 58. Did you start to work as usual  
page 798 } with your men that morning?

"Answer. Yes, sir.

"Question 59. How long did you work?

"Answer. Until the noon hour; twelve o'clock.

"Question 60. And then what happened there at the noon hour?

*Henry Starr.*

"Answer. We were eating our lunch and some of them were through and I think some were not and I looked out the office window in front and the first thing I knew fifty or seventy-five men came up over the hill all at once, was the first time I knew anyone was there.

"Question 61. Were they walking or in automobiles?

"Answer. They were walking when I seen them.

"Question 62. Did they appear to have anyone leading them?

"Answer. Yes, sir.

"Question 63. Who was that?

"Answer. Mr. Hart.

"Question 64. What are his initials, if you know?

"Answer. W. O., I believe.

"Question 65. Do you know what connection he had, if any, with the United Construction Workers?

"Answer. He said he was an international organizer.

"Question 66. You said you were in the office. What office was that?

"Answer. In the superintendent's office.

"Question 67. Was that at the tipple, or away page 799 } from the tipple?

"Answer. About fifty feet away from where the end of the tipple went up.

"Question 68. You say you saw, in this group of men; how many did you say you saw?

"Answer: Between fifty and seventy-five, when I first looked out.

"Question 69. How many men working for the company were there at the tipple at that time?

"Answer. About eighteen.

"Question 70. So they had you outnumbered four or five to one?

"Answer. Yes, sir.

"Question 71. When you saw them coming, what did you do?

"Answer: I closed up my lunch kit and walked out into the yard and began looking things over.

"Question 72. Where did they come to?

"Answer. They came up in the yard around the tool house, blacksmith shop, and office, all around there, just milling around.

"Question 73. Did any of them get up into any part of the tipple?

*Henry Starr.*

"Answer. I wouldn't say they did, because the Coal Company asked them not to on account of someone getting hurt and the Company being responsible for the accident.  
page 800 }

"Question 74. What would you say about the ages in that group; how old or young or middle aged?

"Answer. Some were middle aged and some were young, sixteen or eighteen years old, and some older, forty or fifty.

"Question 75. Had any of them been drinking?

"Answer: Yes, sir.

"Question 76. How do you know that?

"Answer. I smelled it on them and from the way they acted; they acted intoxicated, in an intoxicated way.

"Question 77. I believe this was Tuesday, July 26, 1949, in the summertime. How were these men in this fifty or seventy-five group dressed?

"Answer. In different ways; some had on overalls and some had on overall pants and some had on jackets and some had on sport shirts.

"Question 78. Did you see whether or not any of them were carrying any guns?

"Answer. Yes, sir.

"Question 79. What did you see along that line?

"Answer. I saw two of them with their shirts come up and guns sticking under their belts.

"Question 80. Did you see any of the others where you could see signs of their guns?

"Answer. Yes, sir, several of them you could see prints of guns under their belts.  
page 801 }

"Question 81. Did any of them carry knives? know.

"Answer. I never seen any knives out in the open, I don't know.

"Question 82. Was it an orderly group or disorderly group?

"Answer. Disorderly.

"Question 83. Was there any cursing going on?

"Answer. Yes, sir.

"Question 84. Was that gentle or rash?

"Answer. It was pretty rash.

"Question 85. Would they go through the whole string of cursing you are familiar with?

"Answer. Yes, sir.

"Question 86. Did you hear the words "son-of-a-bitch" used there in that group?

"Answer. Yes, sir.

*Henry Starr.*

"Question 87. Was that addressed to any particular person, or just general?

"Answer. They said they would run that bunch of sons-of-bitches out of there.

"Question 88. Did you hear the word "bastard" used there?

"Answer. I couldn't say.

"Question 89. How old a man would you say page 802 } Mr. Hart, the leader of the group, was?

"Answer. He looked to be about thirty years

"Question 90. Was he a big man?

"Answer. No, sir, not such a large man.

"Question 91. Did he have anything to say while his group were milling around the tippie there?

"Answer. Yes, sir. I went out and talked with him.

"Question 92. You went out and talked to him as an official of your union?

"Answer. Yes, sir, and as foreman of the carpenters of the company, I felt it my duty to go out and ask him what they meant.

"Question 93. I will ask you to say what he said to you and what you said to him.

"Answer. I went out and asked him what it meant and he said, 'It means we are taking the job over and if you fellows want to sign on the dotted line, you can work and we will go along with you.'

"Question 94. He meant for you to sign on the dotted line for what?

"Answer. To join up with the United Construction Workers, and he said, 'We are going to take it,' and I said, 'That is pretty strong language,' and he said, 'Don't you think I can back it up.'

"Question 95. Did any episode occur that day page 803 } in the tool house at the tippie?

"Answer. I wasn't in the tool house.

"Question 96. How long would you say that Hart and his crowd stayed there?

"Answer. Something like an hour.

"Question 97. Did they say anything else to you that you heard—I am talking about Hart—did he say what would happen if you came back to the job and worked?"

Mr. Robertson: There is an objection there.

Mr. Mullen: Objection was taken to that, Your Honor, on the ground that it is leading.

*Henry Starr.*

Mr. Robertson: I don't think that amounts to anything. You don't press that, do you?

Mr. Mullen: No, I am not particularly concerned with that. I didn't take this deposition, Your Honor. I am reading what other people did. Neither I nor Colonel Harris took them.

(The reading of the deposition continued as follows:)

"Answer. He said he didn't intend for us to work there.

"Question 98. Did he say what would or what would not happen to you if you went on and worked in spite of what he said?

"Answer. He said he would make it plain that he didn't aim for us to work there; that was their work and they were going to take it.

"Question 99. How long did you say he stayed there?

page 804 } "Answer. About an hour.

"Question 100. And then did this group leave all together or did they just drift away?

"Answer. They drifted away, I think. We left some of them there when we left, standing around.

"Question 101. Did your union's men go back to work after the lunch hour that day?

"Answer. No, sir.

"Question 102. Why?

"Answer. Because we were afraid to.

"Question 103. Why were you afraid?

"Answer. They told us not to, and if we did, they would fish us out of the pond out there.

"Question 104. Did they make that threat to you?

"Answer. They said we were not going to work, and if we went back to work, they would fish us out of the pond.

"Question 105. Was Mr. Bryan there at that time?

"Answer. No, sir.

"Question 106. You didn't see him there at all while you were there that Tuesday?

"Answer. No, sir, I didn't.

"Question 107. After the lunch hour, did your men just leave as they generally did when the day's work was over?

page 805 } "Answer. No, sir, we didn't. After they told us not to work, I asked about gathering up the tools and we would go and gather up the tools and bring them down and not work any more.

"Question 108. And then what did you do?

*Henry Starr.*

"Answer. I gave orders for all the men to gather up the tools and put them in the tool house and then we loaded up the trucks and cars and jeeps, whatever we were riding in, and came out of there and came home.

"Question 109. Did you order your men not to work that afternoon after the lunch hour?

"Answer. I didn't have to; they were afraid to go back. It was dangerous and I wouldn't have gone back myself.

"Question 110. Was anything said or done about a picket line when Mr. Hart was there Tuesday?

"Answer. Yes, sir. He went out there to put up one and Bill Maynard, of the Coal Company, asked him not to put it up.

"Question 111. And what did Hart do?

"Answer. He took it down. He had it printed on a sign stuck up beside the track there.

"Question 112. Did he leave it stuck up beside the track?

"Answer. No, sir, he took it down and he went over to the road, five or six hundred feet over to the highway, and stuck one up over there against some rocks. He pulled up some rocks and set it up over there at the road.

"Question 113. Did he leave it there?

"Answer. Yes, sir.

page 806 } "Question 114. Did he say anything about any-one crossing that picket line?

"Answer. I didn't hear him say anything about that.

"Question 115. Now, after the men quit work there on Tuesday, July 26, 1949, and went on home, was there any meeting of your Local 646 in Paintsville here as a consequence of what had happened that day?

"Answer. Yes, sir.

"Question 116. When was that meeting?

"Answer. On the night of July 26, 1949, we met down at the City Hall."

. . . . .

"Question 117. How many men attended that meeting?

"Answer. About fifty.

"Question 118. What was the purpose of that meeting?

"Answer. To discuss and try to get something done about what had happened over there and what was the best thing to do.

"Question 119. Was that the main place for carpenters to get work around here?

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*Henry Starr.*

page 807 { "Answer. Yes, sir.

"Question 120. If you got run off of that job, where would you work?

"Answer. Just anywhere where they could find a day's work or a job; Ohio, Michigan, or anywhere they could find work.

"Question 121. Were there any outsiders present at that meeting?

"Answer. Yes, sir.

"Question 122. Do you know Mr. A. Hamilton Bryan sitting over there?

"Answer. Yes, sir.

"Question 123. What is Mr. Bryan's connection with Laburnum Construction Corporation?

"Answer. He is General Manager of Laburnum Construction Corporation.

"Question 124. Was he the top man on the job?

"Answer. Yes, sir.

"Question 125. Did he have anything to say about the men in your Local 646 going back to work the next day?

"Answer. Yes, sir.

"Question 126. What was the substance of what he had to say?

"Answer. He asked us to go back to work and he said he would put on a pair of overalls and go first and we told him we would follow him."

Mr. Mullen: One minute, please, What number page 808 { are you on?

Mr. Allen: No. 127. I am going to read No. 127 now.

Mr. Mullen: I have an objection to 125 and 126. You have gone over them. Go ahead.

(The reading of the deposition continued as follows:)

"Question 127. Did he have anything to say as to whether or not he thought anyone would get hurt there?"

Mr. Mullen: If Your Honor please, I object to the question on the ground that any statement made by Mr. Bryan was not in the presence of the defendants and is hearsay.

Mr. Robertson: We claim it is admissible, and the Court already has been letting it in. It shows a state of fear or lack of it, and whether or not the utterance was made.

*Henry Starr.*

The Court: The objection is overruled.

Mr. Mullen: To save time, if these gentlemen don't mind, I will make the same objection to 128, 129, and 130, and we can dispose of it now. I will just take an exception.

The Court: Let me take a look at these other questions, and then I will pass on them.

(Court examining deposition.)

The Court: I will overrule the objection, and you note an exception.

Mr. Robertson: Read 127 again please, Mr. Allen.

(The reading of the deposition continued as follows:)

"Question 127. Did he have anything to say as page 809 } to whether or not he thought anyone would get hurt there?

"Answer. He didn't seem to think it, but we knew better.

"Question 128. Did anyone make any statement to him along that line?

"Answer. Yes, sir.

"Question 129. Who made a statement to him?

"Answer. Mr. Burt Preston. He told Mr. Bryan he didn't know the situation; that he didn't know it was as dangerous as it was and he wouldn't order anyone to go back to work there and get them killed and have to haul them out of there.

"Question 130. Did he say anything about things being different in Richmond, Virginia, and out here at Evanston in Breathitt County, Kentucky?

"Answer. Yes, sir. He told him if he had trouble at Richmond, Virginia, he could get the police, and over there he couldn't even get the highway patrol to come in.

"Question 131. After Mr. Bryan said he would put on a pair of overalls and lead the men back to work, did the men decide they would go back to work on Wednesday?"

Mr. Mullen: If your Honor please, the objection heretofore filed with the Court on that is on the ground that it is based upon the hearsay statement of Mr. Bryan and the answer states a conclusion of the witness as to what was decided.

Mr. Robertson: If Your Honor please, we page 810 } claim that is the same proposition as before. It all tends to show whether or not the men were afraid to go back to work.

*Henry Starr.*

The Court: The objection is overruled.

Mr. Mullen: Exception noted.

(The reading of the deposition continued as follows:)

"Answer. They decided they would go back over there and see how conditions were before they went to work. That was Mr. Preston's orders.

"Question 132. Were you to go in a group?

"Answer. We were to meet at Salyersville at a filling station on the corner and we were to proceed from there close together for protection if something happened.

"Question 133. How far is it from Salyersville to the mine, approximately?

"Answer. About thirty miles.

"Question 134. How big a town in Salyersville, would you say?

"Answer. Between 1,300 and 1,500 population.

"Question 135. Are there any other towns of any consequence between Salyersville and where you were working?

"Answer. Just Royaltown with a population of 400 or 500 between Salyersville and the mine.

"Question 136. When you got over to the job on Wednesday morning what was the situation you found there?

"Answer. We met at the time office. We all page 811 } gathered up there.

"Question 137. How far is the time office from the tippie?

"Answer. I would say five hundred or six hundred feet.

"Question 138. Was it in sight of the tippie?

"Answer. Yes, sir.

"Question 139. Now, tell us what happened there on that Wednesday morning of July 27, 1949?

"Answer. We didn't see anyone over at the tippie and the sign was sticking up there at the side of the road, the picket sign, and Mr. Bryan went down and got it and took it in the office and we went over to the tippie and some of the boys went to work.

"Question 140. What did Mr. Bryan do with the picket sign?

"Answer. He took it into the office.

"Question 141. Do you remember what was written on that sign?

"Answer. "ON STRIKE—UNITED MINE WORKERS," and I have forgotten the number of the Local that was on it.

*Henry Starr.*

"Question 142. When you got there and before you went over to the tippie, did Mr. Bryan have anything to say?"

Mr. Mullen: One minute, please. I object to that question on the ground that it calls for hearsay, as it does not appear that it was made in the presence of any of the defendants.

The Court: That is the same objection, and it is overruled.

Mr. Mullen: I have three or four more on hearsay.

Mr. Robertson: I am perfectly willing to admit that there is a continuing objection to that entire line of testimony.

Mr. Mullen: To be consistent with what has gone before, we have to make these objections, and if we can agree it is a continuing line, it will save time.

The Court: Very well.

Mr. Allen: I will read the question over.

(The reading of the deposition continued as follows:)

"Question 142. When you got there and before you went over to the tippie, did Mr. Bryan have anything to say?"

"Answer. He tried to get us to go on over there and go to work; that the job was in jeopardy; that if he couldn't get the job done, he would lose the job.

"Question 143. What took place then?"

"Answer. After he took the sign down, we went over to the tippie and some of the boys went on the tippie and went to work and Mr. Trimble wouldn't go to work, said it looked too dangerous, and there was a group of fellows sitting on a wooden crate and we went out and sat down by them.

"Question 144. How far from the tippie?"

"Answer. About twenty feet.

"Question 145. Did you have any talk there?"

page 813 } "Answer. Yes, sir, we talked some with them.

"Question 146. Did they make themselves known?"

"Answer. They said they were there to see if we went to work or not. They said, 'If you go to work, in an hour there will be a hundred men here and they will fish you out of that pond out there, and that damned squirt there with that straw hat on will be the first one to get in.'

"Question 147. Did they say they would pull anyone else out of the pond?"

*Henry Starr.*

"Answer. They said we all would get in that pond if we worked. They said in an hour there would be enough men there to take care of us.

"Question 148. Did they say what those men would do if they had to come there and stop you from working?

"Answers. They said they would throw us in that pond; pretty stern words for men out in the mountains like that. He said within an hour they could have a sufficient number of men there to take care of us.

"Question 149. Did he say where those men would come from?

"Answer. No, sir, he didn't say.

"Question 150. That was about what time in the morning?

"Answer. Around eight o'clock.

"Question 151. And what did you do in consequence of what those fellows said and did?

page 714 } "Answer. Well, according to our constitution, the only way we can call a man off the job is for safety measures and Jack Patrick said that was one time he was going to exercise his authority, for it wasn't safe for no man to go to work.

"Question 152. And what did he do?

"Answer. He told the men not to go to work until conditions were made safe to go back there and go to work.

"Question 153. Did the men quit after he told them that?

"Answer. We all bunched our tools up and the men came down off the tippie and said they were going to quit work for they were afraid they would get shot in the back.

"Question 154. What time did you leave there?

"Answer. About nine-thirty or ten o'clock in the morning.

"Question 155. Have you ever been back there to work since?

"Answer. No, sir.

"Question 156. Why?

"Answer. I was afraid to go back.

"Question 157. Why?

"Answer. I was afraid I would get killed.

"Question 158. Now after that, on August 2nd, I believe, which would be the following Tuesday, do you know whether there was a meeting held between your local and the local at Salyersville to see whether or not there could be something worked out between the two unions?

page 815 } "Answer. There was, but I wasn't present.

"Question 159. Going back to the situation that existed there on Monday, Tuesday, and Wednesday, July 25,

*Henry Starr.*

26, and 27, 1949, in addition to the carpenters you mentioned, were there some laborers there?

"Answer. Yes, sir.

"Question 160. About how many laborers were working on the job, if you know?

"Answer. I don't know. I wasn't keeping their time. I think there were six or eight.

"Question 161. Do you know whether or not they were organized in any union?

"Answer. They had signed up with the American Federation of Labor, because I had seen the cards where they had signed up.

"Question 162. On Tuesday, when Hart and this fifty or more men came there, did Hart and his crowd have anything to do with trying to make those men sign up there with the United Construction Workers?

"Answer. Yes, sir.

"Question 163. Tell us what happened about that.

"Answer. They went out there and got those laborers and I don't know how many signed willingly, but I did see them take one of them, a man on each side of him holding him by the arm and one in the back, behind him, and they

page 816 } took him out there and forced him to sign a card.  
I was watching that particularly, because he told us he would not sign.

"Question 164. Were they mistreating him in any other way?

"Answer. They just told him he had to sign.

"Question 165. Did you see them actually physically force anyone else to sign?

"Answer. I saw them gang around them and take them out there where the man had the cards and saw them signing them.

"Question 166. What sort of system did they use? Suppose I would be here and I didn't want to sign, what would they do to me?

"Answer. Three or four would gather around you and open up a lane and tell you to walk.

"Question 167. Suppose I wouldn't walk?

"Answer. I would be afraid to say, I don't know.

"Question 168. Do you know how many they forced to sign up there that day?

"Answer. I saw them force two to sign and I couldn't say about the rest of them, but I know there were two they actually forced to sign up there that day.

*Henry Starr.*

"Question 169. Did you hear any reference made there, either on Tuesday or Wednesday, about a territory known as Beaver Creek?

"Answer. Yes, sir.

"Question 170. What was that?

page 817 } "Answer. They said if they had to, if we went to work any more, they would go to Beaver Creek and get two hundred tough men and come there and kick every one of us out of there.

"Question 171. Did Hart make that statement?

"Answer. Yes, sir.

"Question 172. Did you hear him make that statement?

"Answer. Yes, sir.

"Question 173. Do you know why he said, 'Beaver Creek'?

"Answer. It has the name of being a tough territory.

"Question 174. What I am trying to do here is for you to tell what occurred from Sunday, July 24, 1949, when you asked Mr. Burt Preston to go over there, until they ran the men off the job. Do you recall anything else that happened there that I haven't asked you about?

"Answer. Mr. Preston told him, "I don't believe you can get two hundred men out of Beaver Creek to do that. I have as many friends on Beaver Creek as you have. I used to live there for a number of years and all those fellows are my friends."

"Question 175. And what did Mr. Hart say to that?

"Answer. I don't remember what he said, but that is what Mr. Preston said to him.

"Question 176. Did that make you feel all right so you were willing to go back to work?

"Answer. No, sir.

page 818 } Mr. Robertson: The next is on pages 62 and 63.

Mr. Mullen: Let me ask, do you want the stenographer to take this down. We all have copies of it. It makes a useless amount of record to pile up.

Mr. Robertson: I don't think so. I think it makes the record easier to follow if we have to use it hereafter. I think we had better put it in the record.

Mr. Mullen: I have no objection.

The Court: You are jumping to page 62?

Mr. Robertson: We called him back.

Mr. Allen: There is a continuation of Mr. Starr's testimony on page 62.

*Henry Starr.*

Mr. Robertson: Other witnesses testified and then he was called back to the stand.

(The reading of the deposition continued as follows:)

"Question 1. Mr. Starr, you testified this morning regarding various things which happened on Monday, Tuesday, and Wednesday, July 25th, 26th, and 27th, 1949. Since that time have you received any threats against your personal safety?"

"Answer. I have received three (3) telephone calls.

"Question 2. State what they were?"

"Answer. Two of them were on Friday evening after July 26th, and the other was on Saturday evening, and said if I wanted to live, not to go back over there."

Mr. Mullen: If Your Honor please, we object page 819 } to all that testimony upon being recalled on the ground that the witness had been excluded and he had been allowed to remain in after testifying on the statement that he would not further testify.

Mr. Robertson: Where is that in the record, Mr. Mullen?

Mr. Mullen: Page 31, isn't it?

Mr. Robertson: I think Mr. Pollard waived it, too.

Mr. Mullen: I am reading Mr. Pollard's objections.

Mr. Allen: May it please Your Honor, that witness wasn't called back to be examined about anything that he had testified to before or about any incidents connected with the affair at all. It was about something that took place after he testified.

Mr. Mullen: Let me look at it a minute.

Mr. Allen: What was the objection?

Mr. Mullen: The objection was that he was permitted to remain in the room upon the completion of his previous testimony without objection and upon the condition that he would not further testify.

Mr. Robertson: I don't remember that. If you show it to me in the record and if I am wrong, that is different.

Mr. Mullen: Let me look at it a minute, please. page 820 } Mr. Robertson: All right. I think you are mistaken. If you will look on page 9 I think it refers to two of your witnesses.

Mr. Mullen: On page 9 it was agreed that all of the witnesses should be excluded. At that time Mr. Starr was on the stand.

Mr. Allen: In any event it is within Your Honor's discretion as to *whether* he can be recalled.

Mr. Robertson: I don't concede that that was done. I

*Henry Starr.*

don't remember it. I want my memory refreshed. I don't remember that that was or was not done, I mean that he was in the room or not in the room.

Colonel Harris: Page 31 is where it is supposed to be.

Mr. Allen: There is nothing in the stipulation on page 9, and I don't see anything following that which shows it.

Mr. Mullen: We will waive it, Your Honor.

Mr. Robertson: Here it is. Let's clear that up. At the bottom of page 31—

The Court: There is no need to clear it up because they have withdrawn the objection.

Mr. Robertson: They said there they didn't mind his staying in. It is at the bottom of page 31.

Mr. Mullen: It was on the assumption that he page 821  $\frac{1}{2}$  is through testifying. We will waive it, however.

Mr. Allen: I guess I will have to read the No. 1 question again.

(The reading of the deposition continued as follows:)

"Question 1. Mr. Starr, you testified this morning regarding various things which happened on Monday, Tuesday, and Wednesday, July 25th, 26th, and 27th, 1949. Since that time have you received any threats against your personal safety?"

"Answer. I have received three (3) telephone calls.

"Question 2. State what they were?"

"Answer. Two of them were on Friday evening after July 26th, and the other was on Saturday evening, and said if I wanted to live, not to go back over there.

"Question 3. Could you tell who it was?"

"Answer. No, sir. I tried to trace the calls and they were made from a pay station and there wasn't any chance to trace the calls.

"Question 4. Have you had any since those three you have mentioned?"

"Answer. No, sir.

"Question 5. Did you ever get any before that time?"

"Answer. No, sir."

Mr. Robertson: The next is on page 150 to 153. Wait one minute. Let me glance at that. When we come to page 822  $\frac{1}{2}$  the objections we will stop.

(The reading of the deposition continued as follows:)

*Henry Starr.*

"Question 1. Mr. Starr, there was a question I failed to ask you on yesterday, but you are still under oath.

"Answer. Yes, sir.

"Question 2. Since the occurrence at the Pond Creek Pocahontas Company's #1 Mine at Evanston, in Breathitt County, Kentucky, on July 25th, 26th, and 27th, 1949, has Mr. Hunter approached you—"

Mr. Mullen: That we object to, Your Honor. It *relates* to matters subsequent to the occurrences there, and it is not shown to be relevant.

Mr. Robertson: If Your Honor please, the relevancy of it is that after this occurrence David Hunter got him and tried to get him—I think the Court had better just read it. If the Court would take it up on page 150 over to page 153.

The Court: The Court will read it.

(Court Examining the portion of the deposition referred to.)

The Court: Do you gentlemen want to say anything further?

Mr. Robertson: Yes, sir. If Your Honor please, we think from Question No. 3 at the bottom of page 151 on through page 153 is relevant because it was in effect an attempt page 823 } by David Hunter to buy Starr off.

The Court: Do you want to say anything further, Mr. Mullen?

Mr. Mullen: No, I don't want to make any further objection.

The Court: I will overrule the motion and allow the questions.

Mr. Mullen: Note an exception, please.

(The reading of the deposition continued as follows:)

"Question 3. Now, Mr. Starr, I asked you if, since the occurrence at the Pond Creek Pocahontas Company's #1 Mine at Evanston, in Breathitt County, Kentucky, on July 25th, 26th, and 27th, 1949, Mr. Hart has approached you regarding his giving you a job?

"Answer. Yes, sir.

"Question 4. Do you know about when that was?

"Answer. That was in November 1949, this last year.

"Question 5. At that time did you have regular work?

"Answer. Yes, sir.

*Bert Preston, Senior.*

"Question 6. What was the conversation that Mr. Hart had with you?

"Answer. We were working on a bridge, me and Mr. P. L. Trimble, on Jenny's Creek, about four miles up here, and he approached us along about 2:00 or 3:00 o'clock in the afternoon and asked us if we would meet with him that page 824 } day, and we said not until after work hours; that we were obligated to the man we were working for until 5:00 o'clock, and he asked if we would meet him at the courthouse, and I said, no, we would meet him at the Lodge Hall and went up there and lit the fire and he came in and *hd* some man with him. I don't know him. He said he was an attorney for United Mine Workers or United Construction Workers, I don't remember which he said, and he asked us if *he* would give him a statement, and he told me he had a job for all of us, providing that things went the way they should go, and I said, "I can give you a statement just the way it happened, but I don't think you will want it."

"Question 7. Did you give him any statement?

"Answer. No, sir. He didn't ask me any more for any statement.

"Question 8. Did he give a job?

"Answer. No, sir."

Mr. Robertson: If Your Honor please, our next witness is Mr. Bert Preston.

Whereupon,

BERT PRESTON, SENIOR,  
called as a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Preston, I am going to ask you to page 825 } speak loud enough for all these gentlemen to hear you, please.

A. All right, sir.

Q. Your name is Bert Preston?

A. Senior.

Q. How old are you, Mr. Preston?

A. 62.

*Bert Preston, Senior.*

Q. Where do you live?

A. I live in Johnson County, Kentucky, near Paintsville.

Q. How far out of Paintsville?

A. About four miles.

Q. What is the name of the place where you live?

A. West Vanelaer.

The Court: Mr. Preston, will you attempt to talk a little louder?

The Witness: Yes, sir.

By Mr. Robertson:

Q. Mr. Preston, what kind of work do you do?

A. Carpenter work.

Q. Are you a member of any union?

A. Yes, sir.

Q. What union is that?

A. Paintsville 646.

Q. Is that the Carpenters Union of the A. F. of L.?

A. That is.

Q. How long have you been a member of that union?

A. About nine years.

page 826 } Q. In July, 1949, were you an officer of the union?

A. Yes, sir.

Q. What office did you hold?

A. Business agent.

Q. What were your duties as business agent?

A. Looking after the interests of the local.

Q. Are you an officer of the union at this time?

A. No, sir.

Q. But you are still a member?

A. Yes, sir.

Q. Have you ever done carpentry work for Laburnum Construction Corporation?

A. No, sir.

Q. Mr. Preston, were you requested to go to the Laburnum Construction Corporation job site in Breathitt County, Kentucky, and be there on Monday, July 25, 1949?

A. Yes, sir.

Q. Who gave you that request?

A. Otto Preston.

Q. Is he related to you?

A. First cousin.

*Bert Preston, Senior.*

Q. Is he an A. F. of L. carpenter?

A. Yes, sir. He was at that time.

Q. With what local?

page 827 } A. The same local, 646 Paintsville, Kentucky.

Q. What request did he make of you about going to the job site in Breathitt County?

A. They asked me to come over there, and he was the messenger for them, to come over there, that they were going to have trouble with the United Construction.

Q. Did you go?

A. I did.

Q. Did you get over there Monday morning?

A. I got over there at work time.

Q. That would be about when?

A. About eight o'clock, 7:30 or 8, something like that.

Q. Did you go pretty generally over the work that day?

A. Yes, sir.

Q. Did you go up on top of the mountain?

A. I did.

Q. And around the tippie?

A. Yes, sir.

Q. The schoolhouse?

A. Yes, sir.

Q. And the 25 houses that were being built?

A. They weren't working on the houses at that time.

Q. Did anything happen that day that was unusual?

A. No, sir.

Q. Did you stay there overnight or go home that night?

A. I went home.

page 828 } Q. Did you return Tuesday morning, July 26?

A. Yes, sir.

Q. How did you happen to go back that day?

A. I had a report that they weren't coming in until Tuesday, that they delayed their trip in there until Tuesday.

Q. What time did you get back there Tuesday morning?

A. Work time.

Q. Will you state what happened there from the time you got there, say, first, up to noon?

A. I walked over around the tippie there and I went up to the schoolhouse again on Tuesday morning before noon, but I wasn't up on top of the hill.

Q. Did anything happen before noon, before the noon hour?

A. No, sir.

*Bert Preston, Senior.*

Q. What was the first thing that happened out of the ordinary that day as far as you yourself know about?

A. I was standing at the tippie. I had eaten lunch and had finished my lunch and I was standing at the tippie. There was quite a bunch of fellows came along and passed by me and went over to the toolhouse, carpenters toolhouse. I followed them over.

Q. How many men would you say were in that group?

A. I would estimate something like 40, near 40, page 829 } something like that.

Q. Was anybody in charge of the group?

A. Yes, sir.

Q. Who was that?

A. A fellow by the name of Hart.

Q. All right, then what happened?

A. He went on in the toolhouse and he was talking to some of the carpenters when I went in there. They filled up the whole front of the house. I had to elbow my way to get in. He went almost in the middle of the little room. He was talking to some of them. I walked up and asked him what he wanted, and he turned around to me and said, "Who are you?" I told him I was acting agent for the carpenters of the Paints Local.

Q. Then what happened?

A. He told me then that he wanted us all to sign up with the United Construction, and I told him the boys all had cards with the A. F. of L. He said we would sign up or get out, get off the job. I said, "Well, if we don't sign up or get off the job, what will you do then?"

He said, "I will go to Beaver and bring 300 men from Beaver and then you will find out what will happen."

Then I asked him the question, I said, "Well, what will happen?"

He said, "We will kick your damned asses off the job."

Q. Did anything else happen in the toolhouse? page 830 }

A. Then I told him that I was going to take it up with the International, and I said to him, "You know how well Willim Hutcheson loves John L. Lewis."

He said, "Well, let them thrash that out in Washington."

Q. Did Hart make any statements to the men there in the toolhouse about what he could get for them if they joined up with the United Construction Workers?

A. I never heard it.

Q. Did you hear argument between Hart and a man named Arnett?

## Supreme Court of Appeals of Virginia.

*Bert Preston, Senior.*

A. It was after that talk. Arnett *accused* him of promising the men more than he could do, and he said that he hadn't promised them any more. John Arnett said, "You are a God damned liar." All this crowd came shuffling down and were in their shirts and everything else. I don't know what they were going for. I tapped John on the shoulder and said, "John, let me do the talking." John hushed up.

Q. Then what happened?

A. Then I told him—he said that he had all the laborers signed up over there. I asked him if he had ever given them their obligation. He said "We don't give them an obligation."

Q. What did you say to that?

A. I didn't say anything, but I knew better.

page 831 } Q. Were you scared in there?

A. That was the tightest place I was ever in in my life, and I have been in tight ones.

Q. Were you scared?

A. I was scared.

Q. What were you scared of?

A. I was scared of all those people around there. They looked like they were going to try to kill everybody in there, and I guess they would if I hadn't stopped John Arnett.

Q. Then what happened after you got out of the toolhouse?

A. He went out and he said he was putting up a picket. I said, "I will not recognize your picket." He told one of the big tall fellows, I don't know who it was, and said go out and stand at the foot of the stairs that goes up to the tippie. I said we won't recognize any picket line. Then he got a card and wrote a card. This fellow was carrying it. And the tippie worked on. I walked up to Mr. Hart and I asked him, "Don't your picket stop the tippie?"

He said "Tom Raney told me not to stop the tippie for a day or two unless I had to."

Q. Then what happened next?

A. After I came back with him I started over to the office, the construction office over there to call the inter-  
page 832 } national, and on my way out they run across. There was one fellow walked up to a laborer. The laborer had quit, had his lunch kit under his arm and started walking off. This tall fellow walked up to him and he said, "Sign this." He just stood and looked at him, I don't know, it seemed like a half a minute. A couple more fellows walked up, one on each side of him. This fellow had a book, and this fellow said "By God, sign it." And this fellow put his lunch

*Bert Preston, Senior.*

kit at his feet and signed whatever it was he had in his hand.

Q. Did anything happen after that that day?

A. Not that I know of.

Q. How long would you say Hart and his men were there?

A. Well, I would say something like 45 minutes.

Q. Did the men who had been working there, the carpenters and laborers, did they leave in a group or just drift away?

A. They drifted away.

Q. What did you do?

A. I went over to the office and put a call in at international and didn't get them, but we did get a call in to Frank Dixon at Louisville.

Q. What was the purpose of that call?

A. We wanted him to get in touch with International and let International know what had happened over there.

Q. Did you go on back to Paintsville from the job site?

A. Yes, sir. I guess it was 3:30 or 4:00 when I page 833 } left there.

Q. Did your local hold a meeting at Paintsville that night?

A. Yes, sir.

Q. Did you attend it?

A. Yes, sir.

Q. How many men would say were there?

A. Thirty-five.

Q. What was the purpose of the meeting?

A. We wanted to discuss it, and Mr. Ham Bryan was going to attend the meeting. The meeting was called especially I think for him.

Q. Was he asked to make a talk to the meeting?

A. Yes, sir.

Q. Did you hear the talk he made?

A. I did.

Q. What was the substance of it?

A. He wanted us to go back to work regardless. We said that somebody was apt to go over there and get killed or hurt. He called it hurt, but people down in that country don't hurt you. They kill you.

Q. What did you have to say about it?

A. I told him he didn't know a damned thing he was talking about, that he was from the city, a town, that he page 834 } didn't know a damned thing about them people down there.

Q. You know them pretty well?

*Bert Preston, Senior.*

A. Yes, sir.

Q. Did you ever live over on Beaver Creek?

A. I have been on Beaver Creek, sir.

Q. How do you like it over there?

A. Well, they are rough there too. I guess there are more murder cases in Floyd County than any place on Sandy River.

Q. When Mr. Bryan wanted them to go over there and you told him he didn't know a damned thing he was talking about, what happened next?

A. He kept arguing that they would have to go or lose their jobs. I told him the jobs didn't amount to nothing when a man was dead. He argued around I guess for an hour, and I told him, I said, "If you will put on a pair of carpenter overhauls and furnish each of these men two, and not less than a '38 revolver, I will have no objection to their going."

Q. What did he say to that?

A. He said he would do it.

Q. Did he say he would give them the guns?

A. No. He talked the boys out of that before he left the hall.

Q. What was the final decision about the guns?

A. To leave them off.

page 835 } Q. Whose advice was that?

A. Mr. Bryan's.

Q. What did he say about that?

A. Mr. Bryan?

Q. Yes.

A. He said leave them off.

Q. Did the men take a vote on what they would do?

A. Yes, sir.

Q. What did they vote to do?

A. They voted to go back over there.

Q. Were they going to meet at any particular place or meet at the job site?

A. I don't know. I wasn't interested in it after they decided to go back.

Q. Did you go back over there the next day?

A. No.

Q. Why didn't you go?

A. I didn't have any business over there.

Q. Have you been back since?

A. No, sir.

Q. Why?

A. I have no business over there.

*Bert Preston, Senior.*

Q. Are you scared to go over there?

A. I am. I have good friends over there, and  
page 836 } they have all advised me not to come over there  
any more.

Q. Do you know about the meeting that was held at Salyersville on August 2?

A. Yes, sir.

Q. Were you at that meeting?

A. I was.

Q. What happened at that meeting?

A. He still argued for them to go back to work, that he was going to lose his job over there if they didn't go back. He asked me right in the meeting if I was willing for the men to go back, and I said no, that I wasn't. Then he asked the Salyersville business agent, Robert Poe, if he was willing to go back, and Robert Poe said no, that he wasn't willing to go back over there to work.

Q. What did Mr. Bryan have to say to that?

A. He was at the end of his row it looked like. Then he asked me a while after that if it would be all right for some of the boys over there to help crate up his tools and move away from there, and I told him if they wanted to go and help him it would be all right with me.

Q. Did Bryan have any words there at the Salyersville meeting with Weaver Freeman about whether the men would go or not?

A. Yes, sir.

Q. What was that?

page 837 } A. They talked quite a little about it, and Freeman backed me up 100 per cent. He said he was afraid to go back, that he knewed that he wouldn't go to Breathitt County, that he had no business over there and he wouldn't advise the men to go, that he had no way of forcing them to go and he would not force them to go.

Q. Did he express himself on what Bryan knew about it or not?

A. Well, yes. He told Bryan he didn't know anything about it. He told him about the same thing I did.

Mr. Robertson: The witness is with you.

page 838 } Colonel Harris: I want to ask him one question and then postpone my cross until tomorrow.

The Court: All right.

*Bert Preston, Senior.*

CROSS EXAMINATION.

By Colonel Harris:

Q. Is your name Bert E. Preston, Sr.?

A. That is right.

Q. Is that your signature?

(Witness examining document.)

Mr. Robertson: I would like you to show me what you are asking the witness about. That is in accordance with Virginia practice.

Colonel Harris: I will show it to you before I ask any question other than that.

Don't talk about it. Just answer that question. I want to show it to the lawyer.

The Witness: That is my signature, but I never—

The Court: One minute.

(Plaintiff's counsel examining document.)

Mr. Robertson: We don't object to that. That is just part of what he said, my dear friend.

Colonel Harris: I understood we weren't going to take it up until tomorrow morning, Judge.

The Court: All right. Gentlemen, it is five o'clock, and Court will be adjourned until ten o'clock tomorrow morning.

page 839 } (Whereupon, at 5:00 o'clock p. m. the Court  
recessed until 10:00 a. m., Tuesday, January 30,  
1951.)

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Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 30, 1951.

Appearances: Archibald G. Robertson, George E. Allen,

*Bert Preston, Sr.*

T. Justin Moore, Jr., Francis V. Lowden, Jr., William A. Johnson, Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

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PROCEEDINGS.

(Roll call of the Jury.)

The Court: I believe Mr. Preston was on the stand when we adjourned yesterday.

Whereupon,

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the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

. . . . .

CROSS EXAMINATION (continued).

By Colonel Harris:

Q. Mr. Preston, when we adjourned last night, I had just asked you to look at your signature and asked you whether or not it was your signature, and you said that it was.

A. Yes, sir.

Q. This paper that you signed was signed in your own home, wasn't it?

A. That is right.

Q. And two men came there to talk to you?

A. That is right.

Q. After they had talked to you, you signed?

A. With objections, yes, sir.

Q. You objected to one sentence, and they scratched that sentence out, and you initialed the lines marking  
page 842 } it out, didn't you?

A. Yes, sir.

Q. You were sworn at that time, weren't you?

A. No, sir.

Q. You read what was in that paper above your name, didn't you?

*Bert Preston, Sr.*

A. Yes, sir.

Q. Do you recall that it starts off: "State of Kentucky, County of Johnson: The affiant, Bert Preston, having been duly sworn, deposes and says"?

A. I wasn't sworn.

Q. You read that, didn't you?

A. I read it, yes, sir.

Q. You didn't ask them to strike that out, did you?

A. No, sir.

Q. On that occasion, the paper that you signed, and which I have in my hand, in that you made the statement that it was true that William O. Hart, a representative of the United Construction Workers—you told Hart that if they, the United Construction Workers, established a legal picket line, that the local union would honor it?

A. Yes, sir.

Q. Then you told him that Hart asked you what you would do if the picket line wasn't there the next day, and you answered that they would sure as hell work?

page 843 } A. That is what I said.

Q. Then you also told these gentlemen that you told Hart at that time that if they continued their legal picket line, they would honor it?

A. I don't remember telling him that.

Q. Will you look right here, this last sentence?

A. (Examining document.) That is my signature, but I didn't sign that statement at all.

Q. You admitted yesterday evening that you signed this, didn't you?

A. That wasn't what you showed me yesterday evening. What you showed me yesterday evening was just on the front here, just down a little ways, and I signed up here, and down there it is signed two places. I only signed one paper.

Q. You saw me hand the paper to Mr. Robertson, the lawyer in the case, didn't you?

A. I never made a statement like that. The only statement I made was that I would honor a picket line. I told him when he brought it there if he added a word to it or took one away from it, I wouldn't sign it. Then he marked out that they had went on strike. I said, "I won't sign it." After he marked it out, I did not sign it. The rest of the statement, I never made.

Q. You saw me hand this statement to Mr. Robertson yesterday, didn't you?

page 844 } A. Yes, sir.

*Bert Preston, Sr.*

Colonel Harris: If the Court please, we offer in evidence as Defendants' Exhibit—you may look at it and see if it is the same thing I showed you yesterday, Mr. Robertson.

(Paper handed to Mr. Robertson.)

Colonel Harris: —as Defendants' Exhibit No. 1 for identification.

(The document referred to was marked for identification Defendants' Exhibit No. 1.)

page 845 } By Colonel Harris:

Q. You tell this jury now that you never at any time told Mr. Hart that if they established a legal picket line, you would honor it?

A. I told him—

Mr. Robertson: He didn't say that at all. He is misquoting the witness either intentionally or unintentionally.

Colonel Harris: I asked him do you tell this jury now that you never at any time told Mr. Hart if they established a legal picket line, you would honor it.

The Witness: I told him that.

By Colonel Harris:

Q. You did tell him that?

A. Yes, sir.

Q. You took a prominent part in the proceedings out there, didn't you?

A. Yes, sir.

Q. When they were in the toolhouse, about 40 men, I believe you said, were in the toolhouse?

A. I said there were 40 men in the bunch, but they didn't add get in the toolhouse. It wasn't big enough. They crowded in, all they could get in.

Q. How many in your best judgment were in the toolhouse?

A. About half of them about 20.

Q. About 20. At that time you had to elbow your way into the toolhouse, didn't you?

A. Yes, sir.

Q. When you elbowed your way into the toolhouse did you see any drunken men?

A. I never seen a drunk man there. I wouldn't swear that I seen anybody drunk.

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Q. Did you see any weapons?

A. No, I never seen any weapons.

Q. Did you hear Mr. Arnett tell Mr. Hart "You're a God damned liar"?

A. Yes, sir.

Q. When a member of your union used that sort of fighting language to Mr. Hart was the member of your union struck or hit by anybody?

A. No, sir.

Q. At that time you touched Arnett on the shoulder and told Arnett to let you do the talking, didn't you?

A. Yes, sir.

Q. And when you did that you then told Mr. Hart that if they would establish a legal picket line, you would honor it?

A. Yes, sir.

Q. How long was it after you gave directions to Mr. Hart as to the proper way to proceed was it before he made the sign?

page 847 } Mr. Robertson: If Your Honor please, I object to that. I am not going to keep interrupting, but I do want to put counsel on notice here that he must quote the witness fairly. This witness has not said that he gave Hart any directions to do anything. It is perfectly unfair to the witness.

The Court: The witness is on cross examination.

Mr. Robertson: I know, but he is predicating his questions on a false assumption. The witness never said he instructed Hart to do anything.

The Court: I didn't understand counsel to say that he did that.

Mr. Robertson: I am not going to interrupt any more, but I call to the attention of the Court and the jury that the lawyer is not being fair to the witness. Read the question, please.

Colonel Harris: I state, Your Honor, that it is my purpose to be very fair to the witness. In no particular do I want to take advantage of any witness. All I want is to get the truth before this jury.

Mr. Robertson: Read the last question, please.

(The pending question was read by the reporter.)

By Colonel Harris:

Q. When you told Mr. Hart that he would have to put up a

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page 848 } picket, he then and there told one of the men to  
walk out there and stand, and when he did that you  
told him you wouldn't recognize that kind of  
picket, isn't that correct?

A. That is right.

Q. Then you added that he would have to put up a card to  
show what he was picketing for?

A. Yes, sir.

Q. Do you know a man named Henry Starr?

A. Yes, sir.

Q. After Mr. Hart put up the sign as indicated by you, did  
you give instructions to Henry Starr?

A. I don't remember giving Henry Starr any instructions.

Q. To refresh your recollection, didn't you, after he put  
up the sign, advise your men to quit work?

A. Yes, sir.

Q. And then after advising your men to quit work didn't  
you tell Mr. Starr they had put up a picket and we would  
recognize it?

A. I don't remember that.

Q. Your name is Mr. Bert Preston, isn't it?

A. That is right.

Q. I will ask you if on the 18th and 19th of August, 1950,  
in the offices of Meade & Johnson in the city of Paintsville,  
Johnson County, Kentucky—

Mr. Robertson: What page, please?

Colonel Harris: I will get to the page in a minute.

page 849 } By Colonel Harris:

Q. —if you didn't—

Mr. Robertson: What page, please.

Colonel Harris: I will follow my own ideas. I told you  
I would give it to you in a minute.

Mr. Robertson: When he refers to the record of deposi-  
tions I ask the Court to instruct Counsel to tell me the page  
to which he is referring.

Colonel Harris: Page 1. It is the first page.

The Court: Page 1.

Colonel Harris: Showing the date.

By Colonel Harris:

Q. —if you didn't give testimony on that occasion. They  
took your deposition.

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A. They did.

Colonel Harris: Now refer, Mr. Robertson, to page 42, which contains a part of this witness' deposition, and you will find this question No. 69: "Question: Did you advise your men to quit work?" "Answer: Yes, sir."

By Mr. Harris:

Q. That is true, isn't it?

A. That is right.

Q. You swore that out there then, didn't you?

A. Yes, sir.

Q. All right, question 70: "Who did you give page 850 } your instructions to?" And you answered: "Henry Starr." Do you remember that?

A. No, I don't.

Q. There was a person there taking down, a Mrs. Mabel Louise Porter. You know her, don't you?

A. I do.

Q. She was sitting there in the room in your hearing taking down the testimony, the questions and answers, wasn't she?

A. She did.

Q. To refresh your recollection further, I will ask you if this question, No. 71, was not asked you, just after you answered "Henry Starr."

"Question: What did you tell him?" And you answered under oath on that occasion, didn't you, "I told him they put up a picket and we would recognize it."

Do you recall that now after reading what the lady has down here?

A. I don't remember it.

Q. Do you say you didn't say it?

A. I didn't say that. I said I didn't remember it.

Q. I ask you now another question: Do you say you didn't say that?

A. I still say I don't remember it.

page 851 } Colonel Harris: Will Your Honor instruct the witness to answer my question?

The Court: Can you answer yes or no, Mr. Preston?

Mr. Allen: Isn't the witness entitled to have his memory refreshed by having shown him the statement and let him tell all that he said in this immediate connection?

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Mr. Robertson: I am going to offer the whole deposition into evidence as soon as they get through and try to ask the Court to let me read his entire deposition to the jury so they can tell whether he is lying or telling the truth.

Colonel Harris: Counsel is just anticipating what we were going to do. Naturally when I ask him questions about the deposition we are going to offer it and let the jury see it.

Mr. Allen: I understand, Your Honor, the rule to be that if you ask a witness about former testimony or a former statement he has a right to look at it before he answers the question, and let him refresh his memory.

The Court: Let him look at it, Colonel Harris.

Colonel Harris: Yes, sir. Questions 69, 70, and 71, right on that page. That is what I was asking about.

(Witness examining deposition.)

By Colonel Harris:

Q. No. 69 was the question, did you advise your page 852 } men to quit work and you said yes, sir, and you answered that that is true and correct.

A. That is true.

Q. No. 70, the question was who did you give your instructions to, and the answer was Henry Starr. Do you say whether that is true and correct or whether the lady added something that you didn't say?

A. I don't remember having—

The Court: What was your answer?

The Witness: I don't remember having talked to Henry Starr.

By Colonel Harris:

Q. I didn't ask the witness whether he talked to Henry Starr. I asked you if the question was asked you, who did you give your instructions to on that occasion, and if on that occasion you didn't answer under oath that Henry Starr was the one?

A. I didn't get that question.

Colonel Harris: Will you read the question to him, please?

(The pending question was read by the reporter.)

The Witness: I don't remember talking to Henry Starr in

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any way at all about honoring a picket line. The only talk we had was he asked Hart's permission for the men to go up on the tippie and get their tools, and Tart told page 853 } him to go and get them. The only conversation I remember—

By Colonel Harris:

Q. I am not asking you whether you had a conversation with Mr. Starr. I am asking you what you swore to. The question is—I will repeat it—did you on that occasion before Mrs. Mabel Louise Porter have this question asked you. Question No. 70: "Who did you give your instructions to?" And if you did not make answer, "Henry Starr"?

A. Henry Starr never had any conversation with me at all there. When I came out from the toolhouse I passed him alongside the building.

The Court: Do you deny or affirm making the statement?

The Witness: I still deny that I ever talked to Henry Starr about the strike. If I did, I don't remember it.

Colonel Harris: We ask the Court to instruct the witness to answer our question, if the Court please.

The Court: The Court understands from the witness that he doesn't remember making such a statement, and by that the Court further understands that he doesn't deny or affirm it. That is the best I can make out of his testimony. Is that correct or not?

The Witness: That is right.

By Colonel Harris:

Q. On that occasion when they were taking your page 854 } deposition do you recall this question being next asked you: "What did you tell him"? And that you made answer, "I told him they had put up a picket and we would recognize it."

A. I don't remember now telling Henry Starr that or talking to him that way. Henry Starr when he sees a picket or any union man sees a picket, you don't have to tell him.

Q. It is just ingrained with a union man to honor a picket line, isn't it?

A. It is.

Q. How long have you been a union man?

A. Al most nine years.

Q. How long have you been familiar with the reputation of Breathitt County, Kentucky, for violence?

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Q. And it has had a reputation of feuding and fighting and killing one another for 20 years, hasn't it?

A. Oh, 20 years, I imagine, or longer.

A. That is right.

Q. The County adjoining Breathitt is Floyd County, isn't it?

A. McGoffin County, that we have to go through.

Q. You have to go through Magoffin. You go through Magoffin and you get to Floyd. How long have you been familiar with the reputation of Floyd County?

A. Forty years or longer.

page 855 } Q. What has been the reputation of Floyd County during that 40 years for feuding and fighting and violence?

A. About as bad as Breathitt County and Magoffin County.

page 856 } Q. You would say, would you not, that those Kentuckians out there in Breathitt County and in Floyd County, don't care any more for killing a man than they do for sitting down at the table and eating?

A. They will kill you if you cross their path, and don't think they won't.

Q. Do you mean that that is just confined to the few people who are members of the United Construction Workers?

A. The people as a whole.

Q. The people as a whole: all right.

When you were giving your deposition that I have asked you about this morning, didn't you describe it this way—and to refresh your recollection I will read you the preceding question:

“Question. Were you afraid to go back to work there as a result of what Hart and his crowd had said and done?”

“Answer. I wasn't working there, but I was afraid for the men to go back to work.

“Question 73. Why?”

And you answered:

“Answer. I knew the condition over there. They don't care any more for killing you than sitting down at the table and eating.”

Do you recall saying that?

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page 857 } A. I do.  
Q. That is true, isn't it?  
A. Very true.

Q. Do you recall the meeting on August 2, which was Tuesday, at Salyersville, at which Mr. A. Hamilton Bryan was present?

A. Yes, sir. We call it "Salyersville" over there, though.  
Q. Thank you.

Mr. Bryan at that meeting made a speech, didn't he?

A. I never heard it.

Q. In giving your deposition, I will ask you to look at Question No. 83, right up there (indicating).

A. (Examining deposition.) I still say Mr. Bryan never made a speech. He made a talk with everybody. He would ask one a question and another one a question. But as far as a speech, Mr. Bryan never made it.

Q. I will ask you if, when you were giving your deposition, Question No. 83 was not asked you in these words.

"Did Mr. Bryan have anything to say at that meeting?" and if you did not make answer on that occasion:

"Yes, sir. Mr. Bryan was very interested in it, and I told Mr. Bryan it was election time and it was impossible to get an injunction in Magoffin or Breathitt Counties."

Does that refresh your recollection?

A. If I remember right, I told Mr. Bryan he had page 858 } better get his injunction in Federal Court, because it was election time and he couldn't get any in Magoffin or Breathitt County.

Q. Was that answer correctly written down by the young lady out there?

A. I wouldn't think so. It wasn't the way I answered it.

Q. I will ask you to look at Question 84, and the answer right there where my thumb is.

A. (Examining deposition.) Yes, sir. I will swear to that.

Mr. Robertson: I will ask counsel to read that question and answer.

Colonel Harris: If the Court pleases, I don't need any

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directions as to what I am going to read. I think I show very clearly that I have been coming up to this point in order to read it to the Court.

Mr. Robertson: I didn't give him any direction. I made the request.

By Colonel Harris:

Q. "Question 84. Did he"—and the context shows it was referring to Mr. Bryan—"Did he want the men to get back to work?"

"Answer. Yes, sir. He wanted the men to go back to work and get a man hurt so he could get an injunction, and we told him we would rather lose the job than get a man hurt."

You say that is correct?

page 859 } A. That is correct.

Q. Do you recall going over to see Mr. Hart on Wednesday, or did he come to Paintsville and send for you?

A. Give me the date.

Q. Wednesday would be the 27th.

A. Mr. Hart sent for me.

Q. Did you go?

A. I did.

Q. I will ask you to look at Question No. 104, right up there, and your answer to it (indicating).

A. (Examining deposition.) I did.

Q. The question reads:

"Question 104. Did anything happen anywhere else in this particular connection?"

"Answer. Mr. Hart did come to Paintsville, and sent for me on Wednesday, and wanted to apologize for running us out over there. I asked him if he still had a picket up, and he said he did, and I told him I didn't have any talk for him."

You say that is correct?

A. That is correct.

Colonel Harris: That is all.

#### RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Preston, you testified yesterday that after you elbowed your way into the tool house, and when Arnett called

*Bert Preston, Sr.*

Hart a god damned liar, that that was about as tight a situation as you were ever in, in your life.

A. Yes, sir.

Q. Then when Hart asked you would you honor a picket line, why did you tell him you would?

Colonel Harris: We object to that as an uncommunicated mental operation of the witness. He has said he told him that; and what went on in his mind, we submit is not proper legal evidence.

Mr. Robertson: It is just the same as everybody else.

The Court: I think he can give the reason.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Why did you tell him you would honor a picket line?

A. It was my only way out.

Q. As you understand picket line, was what he did out there a legal picket line?

A. No, sir.

Q. Why?

A. He didn't have anybody on the job.

page 861 } Q. Did you smell any whisky in the tool house?

A. I did not.

Q. Do you know a man named Noble Hobbs?

A. No, I don't.

Q. At the time you gave this signed statement which you said was given at your home, how many men came there?

A. Three.

Q. Was one of them that young man sitting right over there with his arm up on that railing?

A. It was.

Q. Do you know his name?

A. I do not.

Q. When you signed that statement, was anything written on it below your signature?

A. No, sir.

Q. I am going to read the statement, everything above your signature, to you, and then ask you whether it is true or false, and if there is anything about it not right, what is wrong.

"The affiant, Bert Preston, having been duly sworn, deposes and says:

"That he is a Business Agent for the Carpenters Local Union No. 646, American Federation of Labor.

BLEED THROUGH

BLURRED COPY

*Bert Preston, Senior.*

“The affiant says that on or about July 26, 1949, he was at the construction job of the Laburnum Construction Corporation in Breathitt County, Kentucky.”

page 862 } Then this sentence is inked out: “At that time the United Construction Workers were going on strike.” That is marked out, and it is initialed “B. E. P.”

“The affiant says that he told William O. Hart, a representative of the United Construction Workers, that if they, the United Construction Workers, established a legal picket line, that his local union would honor it. The affiant says that Hart asked him what he would do if the picket line wasn’t there the next day, and that he answered that they would sure as hell work. He told Hart at that time that if they continued their legal picket line they would honor it.

“BERT E. PRESTON, SR.”

Mr. Preston, is that all you told them there at your house that night when they came to your home?

A. Yes, sir.

Q. Did you insist that they scratch out that sentence which is scratched out?

A. Yes, sir.

Q. Then under your signature:

“Subscribed and sworn to this, the 8th day of December, 1949, before me, a Notary Public, who hereby certify under my official seal that I am duly authorized by the laws of the

State of Kentucky to administer oaths in the  
page 863 } State of Kentucky.

“NOBLE HOBBS, Notary Public.

“My Commission expires 3-3-52.” And the Notary’s seal is on it.

Do you know whether Noble Hobbs is an official or representative of either the United Mine Workers or District 50 or the United Construction Workers?

A. No, sir, I don’t know.

Q. Based on what occurred and what you saw, what you heard, what you did at the job site there on the 26th day of July, did the men quit on account of the picket line, or quit because they were scared to go back to work?

*Bert Preston, Senior.*

Colonel Harris: We object to that question, if the Court pleases. That is the issue for this jury to decide in this case.

Mr. Robertson: The Court has ruled on it over and again, the reason why they quit.

Colonel Harris: If Your Honor has ruled on it over and over again, we object on the ground that it is a needless repetition.

Mr. Robertson: I think it is a proper question, Your Honor.

The Court: I will allow the question for what it is worth.

Colonel Harris: We reserve an exception.

page 864 } By Mr. Robertson:

Q. Based on what you heard, what you saw, and what you did, and what you know, there at the job site on the 26th day of July, 1949, did the A. F. of L. men quit on account of the picket line, or because they were scared to work?

Colonel Harris: We interpose the same objection just stated to the same question.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Answer the question, please.

A. It was through fear that we quit, instead of the picket line.

Q. When Hart sent for you there and you asked did he still have his picket line up, and he said yes, and you said you didn't have any further talk for him, what did you mean by that statement?

Colonel Harris: We object to the witness now, at this late date, interpreting plain and simple every-day language that needs no interpretation; and on the further ground that it invades the province of the jury.

Mr. Robertson: If Your Honor please, it is perfectly obvious that what the witness is using there is a colloquial, Kentucky mountain expression. I don't think anybody in this room, except my friend there, considers it plain  
page 865 } English. I am trying to clear it up.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. What did you mean when you told Mr. Hart you didn't have any more talk for him?

*Bert Preston, Sr.*

Colonel Harris: We interpose the same objection just made to substantially the same question, and reserve an exception.

The Court: Go ahead and answer the question.

The Witness: I meant that I didn't have any more talk with him about the job in a new way.

By Mr. Robertson:

Q. That you just didn't want to talk with him?

A. That is right.

Colonel Harris: We object to him leading the witness, if the Court please. Will Your Honor exclude that answer?

The Court: The objection is sustained.

By Mr. Robertson:

Q. Either on that occasion on the 27th of July, or on any other occasion, did Hart ever offer you any sort of apology for running you off the job?

A. That was the day, the 27th, when he wanted to apologize for running us off.

Q. What did you say along that line?

page 866 } A. I told him we didn't have any talk for him.

Q. Did he say anything about having run you off the job?

A. Yes, sir.

Q. What did he say?

A. We went from there, from the street—we were on the street, Court Street, when I did the talking with him or he was talking to me. There were four or five others with him, our carpenters from Paintsville. They said they were going out to Odd Fellows Hall where they could get chairs and sit and talk. They asked me to go along, and I said no, I didn't believe I would go, but they insisted that I go.

After we got out there, he was still talking about the job, and I asked him why he brought this gang in with him. He said he wanted to show the Laburnum Construction Company their strength.

Q. Did you ever ask him in that conversation if you could go back to work?

A. No, sir.

. . . . .

page 867 } If Your Honor please, I understand counsel for the other side agrees to it, and I am going to ask

*Bert Preston, Sr.*

that we be permitted at this time to introduce in evidence the deposition of this witness at Paintsville, Kentucky, and let me take the stand and let Mr. Allen ask the questions and me read the answers, just as we did in the case of Henry Starr.

That is all I have with this witness.

Colonel Harris: I want to ask him another question.

The Court: I will give you an opportunity to do that.

Colonel Harris: It just saves me the trouble of reading it. We were going to read it.

Mr. Robertson: I don't object to that.

The Court: I understand, gentlemen, there is no objection.

Mr. Mullen: We can't object, Your Honor. It is their deposition, and they can put it in any time they get ready, I think.

The Court: Colonel Harris, do you want to ask the witness some more questions?

Colonel Harris: Yes, Your Honor.

The Court: You may proceed.

#### RE-CROSS EXAMINATION.

By Colonel Harris:

Q. The apology that Mr. Hart offered was that page 868 } he apologized if there was any misunderstanding on who he represented, wasn't it?

A. He didn't refer to who he represented. He said he just wanted to apologize because he had run us out of there.

Q. And there was no mention whatsoever of who he represented?

A. No, sir.

(Defendants' counsel conferring.)

Colonel Harris: That is all on re-cross examination of this witness.

The Court: All right. You may stand aside.

(Witness excused.)

page 869 } (At this point the deposition of Bert Preston was read to the jury, Mr. Allen reading the questions and Mr. Robertson reading the answers, as follows:)

"The Witness,

BERT PRESTON,

being first duly sworn, testified as follows, to-wit:

"DIRECT EXAMINATION.

"Question 1. Mr. Preston, your name is Bert Preston?

"Answer. Yes, sir.

"Question 2. How old are you, Mr. Preston?

"Answer. I am 62 years old.

"Question 3. Where do you live?

"Answer. I live in West Van Lear.

"Question 4. How far from Paintsville?

"Answer. About four miles.

"Question 5. How long have you been living in this general territory?

"Answer. All my life.

"Question 6. What is your occupation?

page 870 } "Answer I am a carpenter.

"Question 7. Do you belong to any union?

"Answer. Yes, sir.

"Question 8. What union?

"Answer. American Federation of Labor, Carpenters Union.

"Question 9. What local?

"Answer. Paintsville local.

"Question 10. What number?

"Answer. 646.

"Question 11. Are you any officer of your local union, Mr. Preston?

"Answer. I am not now, no, sir.

"Question 12. In July, 1949, were you an officer of the Local 646?

"Answer. Yes, sir.

"Question 13. What office did you hold?

"Answer. Business agent.

"Question 14. As such business agent what were your duties generally?

"Answer. It was the business of looking after our carpenters, to get them jobs and their wages and see that the conditions were all right.

"Question 15. And the headquarters of your Local 646 was where?

page 871 } "Answer. Paintsville, Kentucky.

"Question 16. Now the week starting on July 25, 1949, was a Monday, the beginning of a week. Prior to

*Bert Preston.*

that time as an officer of your local 646 had you learned or had reports come to you that the carpenters of your Local 646 who had been working out at the Pond Creek Pocahontas Company No. 1 Mine at Evanston in Breathitt County, Kentucky, been run off the job out there?

"Answer. Yes, sir.

"Question 17. Over what period of time were those reports coming to you?

"Answer. I was notified on a Sunday, July 24, 1949.

"Question 18. Who notified you?

"Answer. Otto Preston.

"Question 19. Did you hear it from any other source? Did you hear any such reports from Mr. Henry Starr?

"Answer. No, sir. I got my reports from Otto Preston.

"Question 20. Were you requested to do anything?

"Answer. I was requested to go over there on Monday, July 25, 1949.

"Question 21. Did you go?

"Answer. Yes, sir.

"Question 22. What was the report that you got on July 25, 1949?

"Answer. Otto notified me of the reports that page 872 } the United Construction Workers were coming in on Monday to run the carpenters off there and asked me to come over and the night before I received an order from Henry Starr asking me to go over, but Otto was telling me himself.

"Question 23. Did you go over there on Monday?

"Answer. Yes, sir.

"Question 24. What situation did you find over there on Monday?

"Answer. On Monday when I went over there Otto came to me and told me they had decided not to come in until Tuesday the 26th.

"Question 25. Did you stay out there until Tuesday the 26th?

"Answer. No, sir. I came home and went back on Tuesday the 26th.

"Question 26. Did you go out there by yourself or with other people?

"Answer. I went by myself.

"Question 27. What time did you get out there?

"Answer. About eight o'clock.

"Question 28. Mr. Preston, tell what you saw when you got there, what the situation was and what you did?

*Bert Preston.*

"Answer. Well, when I went out there they told me they were ganging up.

"Question 29. Who told you that?

page 873 } Mr. Mullen: I object to that answer on the ground it is not responsive to the question and also it is hearsay, No. 28.

Mr. Robertson: I think it is proper, Your Honor. It is information given to him as the business agent of the union, generally, from inquiry around on the job.

The Court: The next question is, who told you that?

Mr. Robertson: Yes.

The Court: I will overrule the objection, Mr. Mullen.

Mr. Mullen: We will note an exception, if Your Honor please.

(The reading of the deposition continued as follows:)

"Question 29. Who told you that?

"Answer. Mr. Haslam, Superintendent of the Pond Creek Pocahontas Company No. 1 mine at Evanston told me they were ganging up at the store.

"Question 30. Who did they say they were?

"Answer. He said they were miners from Tiptop in the edge of Magoffin County.

"Question 31. What did you do then?

"Answer. I walked up to the store house and school house and to see the gang that was working up there.

"Question 32. How many carpenters were page 874 } working at the school house?

"Answer. Two laborers and 8 carpenters.

"Question 33. Were they at work when you got there?

"Answer. Yes, sir.

"Question 34. Tell what happened.

"Answer. I told them if they came up there first to come on down to the tipple and not have any trouble with them, come on down to the tipple and we would thrash it out down there.

"Question 35. Did you caution your men about having any trouble?

"Answer. Yes, sir. I told them not to have any trouble, to come on down to the tipple and we would thrash it out down there.

"Question 36. Did any of the United Construction Workers come to the schoolhouse before you left?

*Bert Preston.*

"Answer. No, sir.

"Question 37. From the schoolhouse where did you go?

"Answer. I went on down to the tippie.

"Question 38. How far was it from the schoolhouse to the tippie?

"Answer. About a mile and a half or a mile and a quarter.

"Question 39. When you got down to the tippie what was the situation down there?

"Answer. They were all sitting around the page 875 } store there, quite a bunch of them.

"Question 40. United Construction Workers?

"Answer. United Construction Workers.

"Question 41. How many would you say there were?

"Answer. I don't know, something like 40 or 50, I guess.

"Question 42. Did they have any leader or spokesman?

"Answer. I never stopped to hear any of their conversation.

"Question 43. What did you do?

"Answer. I went on down to the tippie from there.

"Question 44. I thought you said that group was at the tippie.

"Answer. No, sir. They were at the store.

"Question 45. How far from the tippie?

"Answer. Something like half a mile.

"Question 46. When you got past the store and went on to the tippie what was the situation down there?

"Answer. The carpenters were working. No one was interfering with them at that time. That was about 10 o'clock in the morning.

"Question 47. What happened then?

"Answer. There wasn't anything happened until when the boys laid off at noon and were eating their dinner, and I was walking around the tippie and this bunch came page 876 } and got out of their cars and went into the carpenters shed there and I followed them in.

"Question 48. Could all of them get in the toolshed?

"Answer. No, sir.

"Question 49. About how many were in there?

"Answer. I don't know how many, but I had to elbow to get in.

"Question 50. Did they have any spokesman for the United Construction Workers?

"Answer. Yes, sir.

"Question 51. What was his name?

"Answer. Hart.

*Bert Preston.*

"Question 52. What happened there?

"Answer. He commenced asking the boys to join up with the United Construction Workers, and they all told him they had cards with the American Federation of Labor and some of them showed him their cards, and he told them they would have to join the United Construction Workers if they worked, and I walked in and asked him what he wanted, and he turned around and asked me who I was, and I told him I was business agent for the Carpenters Union, Local 646, and he said he would talk to me, and he said we would have to join up with the United Construction Workers if we worked, and I told him we had a contract with Laburnum Construction Corporation to finish the tippie and schoolhouse, and he said if we wouldn't join up he would go to Beaver Creek  
page 877 } and get two or three hundred men and come back, and he said, 'you see what that will mean.' And I said, 'No, I don't know what that means.' And he said, 'It means we will kick your ass out of here, if the lady will excuse me.'

"Question 53. What did you reply to that?

"Answer. I told him I had worked on Beaver Creek and knew a number of people on Beaver, and he said that he sure was going to see that we didn't work there on that job.

"Question 54. Did you see Mr. Bryan there that morning or that day?

"Answer. No, sir.

"Question 55. What was the outcome of your conversation in the toolhouse, what did it all lead up to?

"Answer. I told Mr. Hart I was going to take it up with the International organization and go to Mr. Hutcheson, the President of the Carpenters Local.

"Question 56. When you were in the toolhouse there were any of the fellows with Hart drinking?

"Answer. I don't know. I never seen them drinking any.

"Question 57. Did you smell any liquor?

"Answer. No, sir, I didn't.

"Question 58. Did you notice them drinking on the outside, any of the crowd with Hart there?

"Answer. No, sir.

page 878 } "Question 59. Did you notice any guns on any of that gang that was with Hart there?

"Answer. No, sir.

"Question 60. Did you see any marks of guns through their clothing?

"Answer. No, sir. I saw motions but no marks.

*Bert Preston.*

"Question 61. What kind of motions?

"Answer. When John Arnett told Hart he couldn't give his men what they were getting, he said, 'You are a damned liar,' and they made all kinds of motions, running their hands in their shirts. I told John Arnett to be quiet, that I would do the talking. It looks pretty suspicious to me that something could start awfully quick there, is what I thought.

"Question 62. What did John Arnett say?

"Answer. Hart was promising the men that came in there with him our jobs there.

"Question 63. How did the thing end up there in the tool-house and outside there during the lunch hour? What was the end of it?

"Answer. The end of it was that he was going to picket, and he told one of the fellows to walk out there and stand, and I told him we wouldn't recognize that kind of picket, that he would have to put up a card to show what he was picketing for.

page 879 } "Question 64. Did he do that?

"Answer. Yes, sir.

"Question 65. What kind of card did he put up?

"Answer. He got a pasteboard card and wrote on it, but I didn't see what he wrote on it.

"Question 66. Did he put it up?

"Answer. I don't know. I walked on over to the office.

"Question 67. Did anything else happen there?

"Answer. As I was walking along one of the laborers was walking along with his lunch kit in his hand and a fellow walked up and held out a card and said, 'Sign this.' And he said he wasn't going to sign it, and two or three fellows walked up and said, 'By God, sign this.' And he set his lunch kit down by his side and signed it.

"Question 68. Did Hart say anything about signing to you?

"Answer. He said we had to sign.

"Question 69. Did you advise your men to quit work?

"Answer. Yes, sir.

"Question 70. Who did you give your instruction to?

"Answer. Henry Starr.

"Question 71. What did you tell him?

"Answer. I told him they had put up a picket sign and we would recognize it.

page 880 } "Question 72. Were you afraid to go back to work there as a result of what Hart and his crowd had said and done?

*Bert Preston.*

"Answer. I wasn't working there, but I was afraid for the men to go back to work.

"Question 73. Why?

"Answer. I knew the condition over there. They don't care any more for killing you than sitting down at the table and eating.

"Question 74. What was the meaning of Hart's reference there to going to Beaver Creek and getting men?

"Answer. They have a reputation on Beaver Creek of being very bad, and they had taken a job on Beaver Creek from a Prestonsburg local.

"Question 75. You or Mr. Starr mentioned something about some men from Tiptop.

"Answer. They got these men from Tiptop.

"Question 76. What sort of reputation does Tiptop have?

"Answer. Tiptop is very, very bad.

"Question 77. What sort of set-up is it there at the tippie with reference to the hills and woods?

"Answer. A man working on the tippie was just a taget to men who know how to shoot like Breathitt County men do.

Mr. Mullen: If Your Honor please, we object to that answer as not responsive. It is not material and it states the opinion of the witness.

Mr. Robertson: I think it shows the occasion page 881 } for fear, Your Honor, and is material and relevant for that reason.

The Court: The Court sustains the objection. Disregard the question and the answer, gentlemen of the jury.

(Reading of the deposition continued as follows:)

"Question 78. Do the hills come right down close?

"Answer. Yes, sir.

"Question 79. And does that same situation exist there at the schoolhouse?

"Answer. Yes, sir; only worse. They can get on each side there at the schoolhouse.

"Question 80. Did you attend the meeting on August 2 which I think was the following Tuesday at Salyersville between your local and the local over there?

"Answer. Yes, sir, on Tuesday, August 2, 1949.

"Question 81. Who generally was at that meeting?

"Answer. Mr. Bryan was there, and we had two inter-

*Bert Preston.*

national men there, and the laborers had a man from Lexington.

"Question 82. What was the purpose of that meeting?

"Answer. We were trying to figure out a way of getting back to work.

"Question 83. Did Mr. Bryan have anything to say at that meeting?

"Answer. Yes, sir. Mr. Bryan was very interested in it and I told Mr. Bryan it was election time and it page 882 } was impossible to get an injunction in Magoffin or Breathitt County.

"Question 84. Did he want the men to get back to work?

"Answer. Yes, sir. He wanted the men to go back to work and to get a man hurt, so he could get an injunction, and we told him we would rather lose the job than get a man hurt.

"Question 85. Did Mr. Bryan ask a point-blank question if the men out of your local would go back to work?

"Answer. Yes, sir.

"Question 86. And then did he ask the men out of the local over at Salyersville if they would go back to work?

"Answer. Yes, sir.

"Question 87. And what did they tell him?

"Answer. They told him they wouldn't.

"Question 88. What did you tell Mr. Bryan?

"Answer. I told him it was very dangerous for the men to try to work.

"Question 89. And was it Robert Poe that spoke up for the Salyersville local?

"Answer. Yes, sir.

"Question 90. When I was questioning you about July 25, and 26, 1949, I failed to ask you if there was a meeting held here in Paintsville by your local on the night of July 26, 1949, which would have been Tuesday night.

"Answer. Yes, sir.

page 883 } "Question 91. Were you at that meeting?

"Answer. Yes, sir.

"Question 92. About how many men would you say were there?

"Answer. I imagine there were 30.

"Question 93. Was Mr. Bryan there?

"Answer. Yes, sir.

"Question 94. Tell us what happened at that meeting?

"Answer. Mr. Bryan still wanted us to go back to work, and I told him the conditions there, that he was from Richmond, Virginia and he never was in Breathitt County before,

*Bert Preston.*

and he insisted and I told him if he would put carpenter's clothes on and go with the men and stay with them, I would be willing for them to go back on Wednesday.

"Question 95. What did he say to that?

"Answer. He said he would.

"Question 96. And in consequence of that what did the men say they would do?

"Answer. They went back, several of them.

"Question 97. Was Mr. Bryan there on the morning of July 27?

"Answer. I wasn't there. I don't know.

"Question 98. So you don't know whether he did what he said he would do or not?

"Answer. No, sir.

page 884 } "Question 99. I believe you said you never worked over there.

"Answer. No, sir.

"Question 100. But you are a carpenter?

"Answer. That is right.

"Question 101. If you had been working over there and Hart had told you what went on there would you have been willing to go back to work?

"Answer. No, sir."

Mr. Mullen: Your Honor, I object to that. It is hypothetical and calls for a conclusion of the witness.

Mr. Robertson: If Your Honor please, you have ruled on it over and over again. It is relevant to show whether or not they had fear. The next two or three questions show that.

The Court: The objection is overruled, Mr. Mullen.

Colonel Harris: Reserve an exception.

(Reading of the deposition continued as follows:)

"Question 101. If you had been working over there and Hart had told you what went on there, would you have been willing to go back to work?

"Answer. No, sir.

"Question 102. Why?"

Mr. Mullen: Same objection.

The Court: Same ruling.

page 885 } (Reading of the deposition continued as follows:)

*Bert Preston.*

“Question 102. Why?”

“Answer. I wouldn’t want to get hurt.”

“Question 103. Mr. Preston, what I have been trying to do here is to get you to tell, as far as you know it yourself, what happened there on this job from the time you received a request on Sunday to go over there the following day, and on through. Did anything occur there other than I have asked you about, that would throw further light on this?”

“Answer. I don’t remember anything else that happened over there.”

“Question 104. Did anything happen anywhere else in this particular connection?”

“Answer. Mr. Hart did come to Paintsville and sent for me on Wednesday and wanted to apologize for running us out over there. I asked him if he still had a picket up and he said he did, and I told him I didn’t have any talk for him.”

\* \* \* \* \*

page 886 } Mr. Robertson: If Your Honor please, Mr. Preston concluded his testimony in deposition form, and he testified again at Paintsville on November 18, 1950, and I am going to ask permission to read that. It is very short. It covers matters about which he has been questioned by Mr. Harris. I don’t have my copy from the office up here. I didn’t know I was going to need it today. I can read the questions and answers. It is very short, three pages, I think.

(At this point the deposition of Bert Preston was read to the jury, Mr. Robertson reading the questions and the answers, as follows:)

“The witness,

BERT PRESTON,

having been first duly sworn, testified as follows, to-wit:

“DIRECT EXAMINATION.

“By Mr. Robertson:”

This is at Paintsville, Kentucky, on November 18, 1950.

“Question 1. Mr. Preston, your name is Mr. Bert Preston?”

*Bert Preston.*

"Answer. It is.

"Question 2. You are the same Mr. Bert Preston who testified in the depositions which were given in this action in August, 1950?

"Answer. Yes, sir.

"Question 3. Mr. Preston, when you had the conversation with William O. Hart on July 26th, 1949, did you ask him why he did not shut down the tipple at the No. 1 Pocahontas Mine?

"Answer. Yes, sir.

page 887 } "Question 4. Will you state what it was you asked him and what his reply was?

"Answer. I asked him what was the reason he didn't shut the tipple down as well as us, and he said he had orders from Tom Raney not to shut it down that day.

"Question 5. Did he say anything about shutting it down at any later time?

"Answer. He said, 'not unless he had to; not to shut it down for a day or two unless he had to.'

"Question 6. When he made that remark to you, did you say anything about communicating with a man by the name of: William Hutchinson?"

Mr. Mullen: There is an objection there, Your Honor, on the ground of hearsay and immateriality.

Mr. Robinson: If Your Honor please, my recollection is that they have already cross-examined Bert Preston regarding his reference to William Hutchinson, and the purpose of this is to show who William Hutchinson is. I think it is relevant for that purpose, and tends to connect the local situation out there with the national office in Washington.

The Court: I will overrule the objection.

Colonel Harris: We reserve an objection.

Mr. Robertson: I will re-read the question:

page 888 } (The reading of the deposition continued as follows):

"Question 6. When he made that remark to you, did you say anything about communicating with a man by the name of: William Hutchinson?

"Answer. It was before that, that I told him I would take it up with William Hutchinson. It was when I was in the carpenter's shop.

*Bert Preston.*

“Question 7. Who is William Hutchinson?”

“Answer. He is president of the Carpenter’s Local, or Carpenter’s Union of the United States.

“Question 8. What was it you said to Hart about taking it up with William Hutchinson?”

Mr. Mullen: Same objection, Your Honor.

The Court: Same ruling.

Colonel Harris: Exception.

Mr. Robertson: There was no answer to that question.

(The reading of the deposition continued as follows:)

“Question 9. Now, Mr. Preston, what was your conversation with Mr. Hart regarding William Hutchinson?”

Mr. Mullen: Same objection.

The Court: Same ruling.

Colonel Harris: Exception.

(The reading of the deposition continued as follows:)

“Answer. I told him I would take it up with the page 889 } international officer, William Hutchinson, for him coming over there and running us out.

“Question 10. What did he say to that?”

“Answer. He said to let them thrash it out in Washington; for William Hutchinson and John L. Lewis to thrash it out in Washington.

“Question 11. On the 26th day of July, 1949, and also just after that, do you know whether or not a man by the name of Robert Poe was a business agent for the Salyersville Local, #697 A. F. of L.?”

“Answer. Yes, sir, he was.”

Mr. Robertson: I ask that Willard P. Owens come forward and be sworn.

Mr. Mullen: If Your Honor please, Mr. Owens is a member of the Legal Department of the United Mine Workers, has been working with us in this case, and everything he knows, he knows in his confidential relation as an attorney. He was not out there, nor a participant in anything that happened. He never went out there until we sent him out to get information for us. He is not a proper witness, under the circumstances.

*Bert Preston.*

Mr. Robertson: If Your Honor please, you remember that Mr. Owens has been constantly attending these pre-trial conferences.

The Court: Gentlemen, let us retire to chambers.

Mr. Robertson: I will ask Mr. Owens to stay  
page 890 } out of this conference so I can tell the Court what  
I have in mind.

The Court: The same ruling will apply in this instance with Mr. Owens as did with Mr. Bryan.

page 891 } (The following proceedings were had in cham-  
bers:)

Mr. Robertson: May I ask you when you were employed in this case, Mr. Mullen?

Mr. Mullen: I don't know. My firm was employed a way back in the very beginning.

Mr. Robertson: Do you remember the approximate date?

Mr. Mullen: I could find out. It was certainly right after the suit was brought.

Mr. Robertson: Let's get the papers and see when this suit was brought. Get the Notice of Motion.

(Mr. Moore left the room to get the paper referred to.)

The Court: Colonel Harris, in regard to your motion for mistrial, it may be well for you to present me with an order filing same, and I will enter it as of the date you made your motion.

Colonel Harris: If we present it in the morning, will that be time enough?

The Court: That will be perfectly all right. I wanted to remind you of it.

Mr. Mullen: The suit was instituted on November 17, as I recall, 1949.

Mr. Robertson: That is right.

page 892 } If Your Honor please, I wish to call attention  
to this: that at the first pretrial conference at  
which Mr. Willard Owens appeared, which I think  
might have been around October 12, you remember I asked  
who he was, and he didn't want to disclose his identity. He  
finally told who he was, and said that he was here as a specta-  
tor and was not counsel in the case, and did not expect to  
testify for any of the defendants in the case, and therefore  
he thought he should be permitted to stay in the pretrial con-

ferences. The Court ruled in those circumstances that he might do so, and he appeared for them constantly, appeared with them constantly thereafter, in these pretrial conferences.

Now it develops that he, on the 8th day of December, 1949, long before he ever came in here but within 30 days after the suit was instituted, if you believe Bert Preston, was at Bert Preston's home taking a statement from him.

I propose to call him to the stand and ask him who he is, what his father's name is, and what position his father occupies with the United Mine Workers of America. I think there is nothing privileged about that. I think it is relevant and material, and that I have a right to ask it as tending to establish agency here between the United Mine Workers and what occurred out at the job site.

The Court: That is as far as you propose to go?

Mr. Robertson: Yes

page 893 } Colonel Harris: And we submit, if the Court pleases, that where a young man is employed as a lawyer and his employer is sued, the use of that young man in preparation of the defense is no ratification of anything that happened prior to the time the suit was brought. A union of the size of any one of these three necessarily has to have legal counsel; and for them to have legal counsel to defend lawsuits, it would be absurd to hold that having counsel to defend suits that are brought against them makes them responsible for the suit that is brought. That is what he is arguing.

Mr. Mullen: If Your Honor please, I can't see that they have any right to put him on the stand to ask him even those questions. They purposely say it will show agency. Any information that he has, he has as a lawyer. He was sent out there at our request, as was said, about 30 days afterward, to get some statements. All he said here was that he was not going to enter of record for the trial of the case, but he was an attorney being used in the case.

I have been called as a witness on three different occasions. I was not counsel in the case. It involved clients of mine. I always claimed immunity, and that was immediately allowed.

Mr. Robertson: We summoned this boy as a witness the first day he was here.

page 894 } Mr. Mullen: I know you did. You slipped out and summoned him the first day we were here. You had no right to do that, I believe.

Mr. Allen, There is no rule of law against calling an attorney as a witness. You may even call one that is at the bar, to the witness stand. I have done it. Of course, you

can't violate the rule of privilege. We don't propose to ask this witness anything that is privileged.

Mr. Robertson: Let me interrupt you there, and then I won't say anything more. I had this up with the Power Company over and over again. If you have a whole lot of other people present, it is not privileged. They had this fellow Noble Hobbs there. I have worked that out in Power Company cases. If you give something out to your stenographer, it is not privileged.

Mr. Mullen: You have already examined Hart, and we did not claim any privilege for him.

Mr. Allen: I called a lawyer in a case in the Federal Court in Washington, I called one of counsel at the bar trying the case, around to the witness stand, and asked him non-privileged questions. The Judge required him to answer them. I got some valuable information which helped me in the case.

We have a right to call any member of counsel trying the case, provided we don't ask improper questions.  
page 895 } The Court of Appeals of Virginia said in the Robertson case, you don't have even to summon the witness. If he is present in court, you may call him to the stand. That is exactly what they said.

Mr. Robertson: That is what they did to me in that case, and made me open up my file.

The Court: I don't think there is any question about calling a witness if he is present in the courtroom, but do you have a case on calling an attorney?

Mr. Allen: If Your Honor please—

Mr. Robertson: I can tell you this, that Ed Preston has had cases in Law and Equity Court, Part 2, and I think he put Mr. Allen on the stand.

Mr. Allen: He did.

Mr. Robertson: If I am wrong, you can correct me.

Mr. Allen: That is correct.

Mr. Robertson: Mr. Allen intimated there was some rascality going forward, because Ed Preston interviewed his witnesses before the trial. Ed Preston thereupon called Mr. Allen to the stand and made him admit that he always did it and considered it his duty to do it.

Do you remember that, Mr. Allen?

Mr. Allen: That is exactly correct, and I took no exception to it because I thought he had a right. There has been no case in Virginia, so far as I know, passing upon page 896 } the right to call counsel, but I have never known of any case anywhere where it was held by any court that the opposing parties didn't have a right to call counsel to the witness stand.

Of course, if you ask questions that are privileged, then counsel claims the privilege for his client. It is the privilege of the client, however, and not counsel.

Mr. Mullen: It is the privilege of the client, yes, but the client can ask—

Mr. Robertson: I can give you cases on this, because I think I have tried about three for the Power Company.

For instance, here is a typical case of it: You catch a bus driver stealing. We have had them who admitted stealing \$40 or \$50 a week above their pay. He is some nice young boy who has come in from the country, and you feel sorry for him. You call him in and have a nice fatherly talk with him and try to get him straightened out.

We had it there with June Penick. June Penick's assistant was there, and June Penick's stenographer was there. I have forgotten whether anybody else was there or not. The lawyers were not there. Then the boy immediately goes out and sues you for defamation of character, and all that. I have fought, bled and died that those conversations were privileged, and have been overruled time and again that they were not.

page 897 } The Court: I understand you want to ask him his name and who he is, what his father's name is, and what the father does, and stop?

Mr. Robertson: Then if they want to cross-examine him about circumstances—

The Court: The Court will allow you to go that far and no further. I don't think that is privileged. I don't think those questions are privileged.

Colonel Harris: May we have our objection and exception in here, instead of having to repeat them in the presence of the jury?

The Court: Certainly.

Mr. Allen: That is all right.

Mr. Mullen: I don't think it is privileged to put him on the stand and ask him who he is, and he can testify he is a lawyer.

The Court: Those two questions, I understand, are all he is going to ask. He certainly didn't learn, by virtue of his relationship of attorney and client, that his father is Secretary and Treasurer of the United Mine Workers of America.

Colonel Harris: May we state our objection?

The Court: Certainly.

Colonel Harris: Our specific objection is on the ground of irrelevancy and immateriality, and in view of  
page 898 } their statement that they want to prove who his father is to show ratification of participation by

*Willard P. Owens.*

the unions with which his father is connected, we object on the ground that by no process of reason does the identity of a lawyer used by defendant after he is sued operate to make the defendant a participant or one who ratifies a wrong claimed to have happened some months before.

Mr. Robertson: Just to keep the record straight, of course we have never said one word about ratification here. We have said we intended it to show the agency relationship. On the relevancy of what happened out there, the Court has already ruled, I think.

Colonel Harris: We reserve an exception to each ruling.  
page 899 } (The following proceedings were had in open  
court:)

The Court: Mr. Owens, will you take the stand?

Mr. Robertson: I don't think he has been sworn.

Mr. Owens: I was sworn the first day, Your Honor.

Whereupon,

**WILLARD P. OWENS**

called as a witness on behalf of the Plaintiff, having been previously duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Robertson:

Q. What is your name?

A. Willard P. Owens.

Q. What is your father's name?

A. John Owens.

Q. What is your father's connection with the United Mine Workers of America?

A. He is Secretary-Treasurer of the United Mine Workers.

Mr. Robertson: Stand aside.

The Court: All right, stand aside.

. . . . .

page 900 }

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## JOHN HACKWORTH, JR.

called as a witness for Plaintiff, having been first duly sworn,  
was examined and testified as follows:

## DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Hackworth, what is your full name?

A. John Hackworth, Jr.

Q. Where do you live?

A. Riceville, Kentucky.

The Court: Mr. Hackworth, speak as loud as I am talking  
so these gentlemen in the jury can hear you.

By Mr. Robertson:

Q. How far is the place where you live from Paintsville,  
Kentucky?

A. About 17 miles.

Q. In what county is your home?

A. Johnson County.

Q. How old are you?

A. 25.

Q. What kind of work do you do?

A. Carpenter work.

Q. Where are you working now?

A. I am working at the water plant at Paintsville, Ken-  
tucky.

page 901 } Q. In town?

A. Yes, sir.

Q. Mr. Hackworth, are you a member of any union?

A. Yes, sir.

Q. Of what union is that?

A. I belong to the A. F. of L.

Q. What local?

A. 664.

Q. Whereabouts?

A. Paintsville, Kentucky.

Q. Were you working for Laburnum Construction Corpo-  
ration on its Breathitt County work in July, 1949?

A. Yes, sir.

Q. I am calling your attention now to the week which be-  
gan on Monday, July 25. What kind of work were you doing?

A. I was doing carpenter work on the schoolhouse build-  
ing.

*John Hackworth, Jr.*

Q. Before that Monday morning had you as a member of the union been told that there would be any difficulty there that week?

A. Yes, sir.

Colonel Harris: We object to that on the ground that it is hearsay, if the Court pleases.

Mr. Robertson: It is the same ruling that the Court has made.  
page 902 }

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Before that Monday morning had you gotten any knowledge that anything unusual would happen there that week?

Colonel Harris: Same objection and exception.

The Court: Same ruling.

The Witness: Yes, sir.

By Mr. Robertson:

Q. What was that knowledge?

Colonel Harris: Same objection and exception.

The Court: Same ruling.

By Mr. Robertson:

Q. What had you heard?

Colonel Harris: Same objection and exception.

The Court: Same ruling.

The Witness: Mr. Hart had come up there, him and one more fellow to the job, the schoolhouse where we were working. So he came around where I was at, me and another carpenter. He said, I am Mr. Hart, representing the United Construction Company." He says, "We want you fellows to join up." He said "You will get more wages and," he says, "we have plenty of work here for you." He said "This is our job and we are going to have it. This is our work."

page 903 }

By Mr. Robertson:

Q. What day was it he came there that first time?

A. That is the first time.

Q. What day was it, if you remember?

A. The best I remember it was the 22nd day of July.

*John Hackworth, Jr.*

Q. Go ahead and tell the full conversation with Hart that day.

A. So I told him I belonged to the A. F. of L. and I didn't feel like I should change over. He said, "You can consider this and suit yourself." He said, "You will either change over or you will get out of this damned hollow."

I said, "I will not change."

Q. What was the next time you saw Hart?

A. That was on the 26th day of July.

Q. Were you working at the schoolhouse there on that Tuesday morning?

A. Yes, sir.

Q. How many men were working there, if you remember?

A. Roughly I would say there were around eight or nine men, carpenters.

Q. How close do the woods come down to that schoolhouse?

A. In places within 50 yards, I would say.

Q. When you saw Hart on Tuesday, about what time was it that you saw him?

page 904 } A. About 11:30.

Q. Did he come to the schoolhouse?

A. Yes, sir.

Q. Now state the circumstance under which he came there.

A. The starting of it was we knew that they were coming, they had said they would. I heard around three to four shots fired when they started up the hollow, that is from the company's store up to the schoolhouse. So in about I would say 15 minutes they came up the hollow where we were.

Q. How many men would you say came up there?

A. Roughly I would say from 35 to 50.

Q. Were any of them drunk?

A. They had all the appearance of being drunk. Three or four of them looked like they had all they could go with, and I could smell whiskey on them.

Q. Did you see any of them with guns?

A. No, sir; I didn't.

Q. Did you see any prints of guns?

A. The only thing I saw, the only thing that imitated his gun was they rubbed against me and it felt like a gun on them, one fellow did.

Q. Suppose you would be him and I would be you, show how he rubbed against you.

page 905 } A. He walked up to me like this, three or four of them. He rubbed up and said, "You will join now, won't you, by God?"

*John Hackworth, Jr.*

Q. What did you say?

A. I said "No, I will not join."

Q. Go ahead and tell what happened there at the school house.

A. They just kept gathering right on around us until they were all up there, you see, all of them. They were cussing and talking around. Some of them had their knives out whittling. Our carpenter foreman said, "Boys, we might as well quit." He said, "We might as well quit and have lunch."

We asked them, "Can we have lunch now?" And they said "Yes, go ahead and eat, but be damned sure you don't go back to work."

So we had lunch and after that Howard, our foreman, said "Boys, there is no use our sticking our necks out. We ain't got a chance." He said "We will just take our tools and go down to the tippie."

Q. Did they have you outnumbered?

A. Yes.

Q. How much?

A. I would say—there were 35 to 50. You could consider it 8 or 9 men.

page 906 } Q. Were your brothers working there with you that day?

A. Yes, sir; two of them were.

Q. So after lunch was Hart with the men at the school-house?

A. Yes, sir; he was until we started eating dinner.

Q. Then what happened to him?

A. He says "Enough of you men stay here that you make damned sure they don't go back to work and we will go on down to the tippie."

Q. After you finished lunch did any of the men there at the schoolhouse go back to work?

A. No, sir.

Q. Did you go back to work?

A. No, sir; I didn't.

Q. Why?

A. I was afraid to.

Q. Why were you afraid?

A. I was outnumbered, and it didn't make sense for me to stick my neck out.

Q. Then after you had finished lunch did you go on down to the tippie?

A. Yes, sir; I did.

Q. Do you remember who you went with?

*John Hackworth, Jr.*

A. I went with—the best I can recollect now was Howard Williams, the foreman.

page 907 } Q. Did you go directly to the tippie or did you go by the store and then to the tippie?

A. No, sir. We had to go close to the store, but we went straight to the tippie, though.

Q. What was the situation at the tippie when you got there?

A. First when we got there, there was a bridge crossing the branch before we got to the tippie. There were I would say eight or ten men standing there at the bridge. They said, "You fellows are not going across this bridge." I said, "Well, I don't want to work. I am going across the bridge to get some of my tools."

He said, "Go ahead, but be damned sure you don't go to work."

Q. Then you went from there on to the tippie?

A. Yes, sir.

Q. When you got down to the tippie what was the situation?

A. When I got down there all the boys had quit work and were standing around. There were several men on the ground. I would say by that time there were around 100 men there from their side.

Q. Were they men you knew, who had been working on the job, or strangers?

A. They were most of them strangers.

page 908 } Q. Was Hart there?

A. Yes, sir.

Q. Who was giving orders to the men or directing them?

A. Mr. Hart was.

Q. Did you go in to the toolhouse there while Hart was there?

A. No, sir; I didn't.

Q. Did you hear Hart make any statements down there at the tippie?

A. No, sir; I didn't hear Hart, but I heard some of his men.

Q. What statements did you hear from Hart's men?

A. They were walking around to the laborers telling them they had to join if they worked in that holler. They were just ganging around them like they thought they might run and get away or something.

Q. Did you see them make any laborers sign up any cards?

Colonel Harris: We object to his leading the witness.

The Court: The objection is sustained.

*John Hackworth, Jr.*

By Mr. Robertson:

Q. State whether or not you saw them make any laborers sign any cards.

A. I didn't see anybody sign any papers, but page 909 } I seen them go with one fellow—there were three of them. They had him by each arm. I did not see him sign any papers, though.

Q. Did you see anybody handling any bullets down there, either at the schoolhouse or at the tippie?

A. No, sir; I didn't.

Q. About how long did Hart and his crowd stay at the tippie?

A. They were there until about four or five o'clock that afternoon, the best I can remember now.

Q. I think you said you did not go to work at all that day.

A. No, sir.

Q. About what time did you leave there?

A. It was around 4:30, I guess.

Q. Did you attend a meeting of your local union in Paintsville that night?

A. Yes, sir; I did.

Q. About how many men do you think were at that meeting?

A. Roughly I would say 35 or 40 men.

Q. What was the purpose of the meeting?

A. The purpose of the meeting was to see if we could get things settled so we could go back to work.

Q. Was Mr. Bryan at that meeting?

A. Yes, sir.

page 910 } Q. Did he make a talk?

A. Yes, sir; he did.

Q. What did he say and what was said to him?

A. He said, "I think you boys are crazy for not going back to work." So we told him he didn't realize the circumstance of that place, that he was out of town and didn't know what trouble was. He said he wouldn't be a damned bit afraid to go. So our business agent said to him, "You put on a pair of carpenter overalls and lead this gang." He said, "Yes, sir; I will."

Q. Was there anything said about the men going over there carrying guns?

A. Yes, sir. The business agent said "If you men go, don't take less than two '38's."

Q. What did Mr. Bryan say to that?

*John Hackworth, Jr.*

A. He said to be sure we didn't take any guns or any weapons at all.

Q. Was any arrangement made as to where you would meet the next morning?

A. Yes, sir. We were supposed to meet at Salyersville at a filling station.

Q. Did you meet there the next morning?

A. No, sir. I was about 30 minutes late.

Q. Did you go over to the job site that morning?  
page 911 } A. Yes, sir.

Q. About what time did you get over there?

A. I would say around 7:30 is when I got there.

Q. What happened when you got over there as far as you know it and took part in it.

A. I stopped at the timekeeper's office and Mr. Bryan came in there and said, "You fellows go to work and you won't lose any time for being late." So a couple of the boys—there were only three or four of us there at that time—a couple of them wouldn't go. Me and another fellow started. We went over to the tippie.

Q. When you got over to the tippie was anybody there?

A. Yes, there were.

Q. Who was there?

A. Practically all of our carpenters were there, and I would say around 75 to 100 men of theirs, of their organization.

Q. What were they doing?

A. They were doing the same thing they did before. They were running around walking around looking at one another, trying to get them to sign.

Q. Did you go to work that Wednesday?

A. No, sir.

Q. Why?

A. It didn't make sense. I had a wife and baby,  
page 912 } and I didn't feel like I wanted to die because I  
have had three or four chances at it myself.

Q. What time did you leave there that day?

A. The best I remember it was about 3:30 when I left.

Q. Have you ever worked over there since?

A. Yes, sir.

Q. When was that?

A. About two months later.

Q. After Laburnum left?

A. Yes, sir.

Q. Who were you working for when you went back after Laburnum left?

*John Hackworth, Jr.*

A. Codell Construction Company.

Q. Do you know whether or not they are working United Construction Workers?

A. Yes, sir; they are.

Q. Did you have to join up with the United Construction Workers to go to work with them?

A. I worked two weeks, and on the day before I quit one of their men came around with a piece of paper and said we had to sign it if we worked. So I signed the piece of paper, and the next day I quit.

Q. Were you in the armed services during World War II?

Colonel Harris: We object to that.

The Court: I will sustain that objection.

page 913 } Mr. Robertson: I don't want to press it, Your

Honor, but they said there wasn't anybody scared out there. I just wanted to show whether this man is susceptible to fear or whether he has been in danger in other circumstances.

The Court: I still sustain the objection.

Mr. Robertson: All right, sir.

The witness is with you.

### CROSS EXAMINATION.

By Mr. Mullen:

Q. Mr. Hackworth, what date was it you said you first talked to Mr. Hart?

A. On the 22nd of July.

Q. Where?

A. Up at the schoolhouse.

Q. At that time he said he wanted you to join the United Construction Workers?

A. Yes, sir.

Q. That was the Friday before they came over and, as you claim, ran you off the work?

A. That was before they came to run us off.

Q. Who was the president of the local to which you belonged, of the A. F. of L.?

A. Monroe Sublett, I believe, the best I can remember. We have had two or three since then.

Q. Was he the man that you asked Mr. Bryan  
page 914 } about putting on overalls and going with you?

A. No, sir.

*John Hackworth, Jr.*

Q. Who was that?

A. The business agent, Bert Preston.

Q. Didn't he ask Mr. Bryan, "Will you put on overalls, and lead us across the picket line"?

A. About that picket line I couldn't state how that came out.

Q. If any one else testified to that, you would not deny that is correct?

Mr. Robertson: That is why we separate the witnesses to keep them from ganging up. That is an improper question.

The Court: I think the separation of witnesses applies to both sides in this case, gentlemen. Repeat the question, please. Let me get the exact wording of the question.

(The pending question was read by the reporter.)

Mr. Mullen: I didn't state they had testified to that.

Mr. Allen: If Your Honor please, it is certainly an improper method in examining the witness to ask him if somebody else testified to so and so what would you say to that. That is not a proper way, I submit, to examine the witness.

Mr. Mullen: All right, Your Honor.

page 915 } The Court: Ask him if he affirms or denies.

By Mr. Mullen:

Q. Will you deny or affirm that that was said?

A. I will say that he said that he would put on a pair of carpenter overalls and lead the men to work. I don't recollect hearing him say about the picket line.

Q. I say that you saw three men around a man trying to make him sign?

A. Yes, sir. I didn't see them make him sign, but I saw they had him by each arm.

Q. Was that man a carpenter or laborer?

A. He was a laborer.

Q. You said also you saw them talking to the other laborers, didn't you?

A. The gang, yes.

Q. It was the laborers that they were asking to join when they were over there on the 26th, wasn't it?

A. They wanted all to join. He says, "You fellows will all join if you work."

Q. But you only saw him talking to laborers?

*John Hackworth, Jr.*

A. No, sir; they talked to me myself when I was down there.

Q. Did you see Mr. Hart on Monday, July 25th?

A. I don't remember that question.

page 916 } Q. You said you heard four or five shots. That was not at any of the places where the men were working, was it?

A. Well, they were working all around there, the whole job.

Q. But that was between the two points.

A. Yes, sir.

Q. It was around the bend of the road?

A. We had men working at the houses right next to where we heard the shots fired, and we had men working on up the holler and then down the road.

Q. Could you say where you saw the shots come from?

A. No, sir, I could not.

Q. You could say you just heard some shots?

A. That is right.

Q. You don't know who fired them?

A. No, sir.

Q. You didn't hear any men complain they had been shot at?

A. Not as I know of.

Q. Was anybody beaten up by any of these men who came there?

A. No, sir; not as I saw.

Q. Was anybody shot at?

A. Not as I seen.

Q. Was any property destroyed?

page 917 } A. No, sir; not that I know of.

Q. It was all talk?

A. It was all talk and action, yes.

Mr. Mullen: That is all.

Mr. Robertson: If Your Honor please, they used this witness' deposition in Paintsville as a guide in their cross-examination of him, and I ask that I be allowed to introduce it in evidence and read it to the jury just as we did in the case of the other witnesses.

Mr. Mullen: You are very much mistaken in my using it. I didn't refer to it a single time.

Mr. Robertson: I saw you looking at it.

Mr. Mullen: But I did not ask a question based on it.

Mr. Robertson: But you and Mr. Harris put your heads together and then looked at the thing to ask the question.

*John Hackworth, Jr.*

The Court: I don't think Mr. Mullen quoted anything from it.

Mr. Robertson: I don't think he quoted it directly, but I think I have a right now to introduce the deposition to the jury to show whether this witness is testifying the same today or differently in substance from what he did before, so they can determine his credibility.

Mr. Mullen: I think when the witness is page 918 { present and testifies, the deposition is not properly introduced.

Mr. Robertson: You let the other one in. Why do you object to this one?

The Court: As presently advised the Court sustains the objection.

We will now recess, gentlemen, for five minutes.

(Brief recess.)

page 919 { The Court: Who is your next witness, Mr. Robertson?

Mr. Robertson: Before the next witness, Your Honor, these witnesses from Kentucky are laboring men whose jobs are being held for them, and I would like for them to be excused so that they can go home after they testify, if that is agreeable.

The Court: Is there any objection on behalf of counsel for the Defendants?

Mr. Mullen: I don't think we object. There is no reason, after they have testified, for keeping them.

The Court: All right, that is satisfactory with the Court and satisfactory with all counsel.

Mr. Robertson: Norman Hackworth.

The Court: Does that agreement apply to all witnesses who have testified?

Mr. Mullen: That applies, so far as we are concerned to all witnesses.

The Court: All witnesses who have testified for the Plaintiff up to the present time, with the exception, of course, of Mr. Bryan.

Mr. Mullen: Any time we want to make an exception, we will ask the Court as they leave the stand.

The Court: All right.

Mr. Robertson: Come around and be sworn, Mr. Hackworth.

page 920 } Whereupon,

NORMAN HACKWORTH,  
called as a witness on behalf of Plaintiff, having been first duly  
sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Hackworth, your name is Norman Hackworth?

A. Yes, sir.

Q. Are you a brother of Mr. John H. Hackworth, who testified a few minutes ago?

A. Yes, sir.

Q. Have you another brother named Robert Hackworth?

A. Yes, sir.

Q. How old are you?

A. Thirty-five.

The Court: What is your first name?

The Witness: Norman.

By Mr. Robertson:

Q. Where do you live?

A. Riceville, Kentucky.

Q. How far is that from Paintsville?

A. About 10 miles.

Q. How far is it from the Laburnum job site in Breathitt County?

A. It is 45 miles, close to 45.

page 921 } Q. How big a town is Riceville?

A. Just a small village.

Q. How old are you?

A. Thirty-five.

Q. What kind of work do you do?

A. Carpenter work.

Q. Are you connected with any union?

A. A. F. of L.

Q. What is your Local?

A. 646, Paintsville, Kentucky.

Q. Where are you working now?

A. I am not working now.

Q. Were you working for Laburnum Construction Corporation in July, 1949?

A. Yes, sir.

Q. What kind of work were you doing?

*Norman Hackworth.*

A. I was doing carpenter work.

Q. Were you working at the schoolhouse or at the tippie or at the store?

A. I was working at the schoolhouse.

Q. Were your two brothers also working there?

A. Yes, sir.

Q. I call your attention now to the week which began on Monday, July 25, 1949. Before that morning, did you have any contact with a man named Hart about your work there?

A. No, sir.

page 922 } Q. What was the first time you had anything to do with Hart?

A. On July 26, 1949.

Q. Tell us what happened there at the schoolhouse that day?

A. About a quarter of 11, a quarter after 11, we were working at the schoolhouse, putting in the foundation. I heard some shots down the road, and in about two or three minutes I seen a big gang of men coming around the curve. The rumor had been around that they were coming to run us off the job, United Construction.

Q. How many men would you say were in that group that came around the bend in the road and up to the schoolhouse?

A. I don't know the exact number, but there must have been between 35 to 50 of them.

Q. Was anybody in charge of them?

A. Yes, sir.

Q. Who was that?

A. Mr. Hart.

Q. Were those men walking or riding?

A. They were walking.

Q. What sort of crowd of men were they?

A. It was a rough looking gang to me. Some of  
page 923 } them—I would say part of them were drunk, or at least they were drinking pretty heavy. You could smell whisky on their breath.

Mr. Hart comes up and makes himself known to us. He comes over to me with a—

The Court: Talk a little louder.

The Witness: He comes up to me with one of his application blanks and said, "Are you going to join United Construction?" And I said, "No." He said, "God damn you, if you work here, you are going to join the United Construction." I said, "I have been carrying my book too long with the

*Norman Hackworth.*

A. F. of L. to quit and join the United Construction, and I am not going to do it." He said, "You are not going to do it?" He said, "God damn you, we will kick you out of here."

I didn't have any other choice more than to go ahead and leave the job, because I knew the reputation of those people in that country. It was very bad. I didn't want to get killed, and I felt if I worked on there, I would get killed. So whenever they told us we had to quit, we stopped to eat lunch. Hart told part of his men to stay there at the schoolhouse to see that the gang that was working there with us didn't go back to work after lunch. He left 10 or 12, I would say, and they told him they would see that we damned sure didn't strike another tap on that schoolhouse, regardless of what it took to stop us.

page 924 } By Mr. Robertson:

Q. Did you go back to work there after lunch?

A. No, sir.

Q. Why?

A. Because I was afraid to.

Q. What did you do after lunch?

A. After lunch, I gathered up the company's tools and put them in my car and drove them down to the tool house and put them away.

Q. Was the tool house at the tippie?

A. No, sir. They had one tool house at the camps up above the tippie.

Q. Did you go to the tippie?

A. Yes, sir, I did go down there.

Q. What was the situation at the tippie when you got down there?

A. I didn't go to the tippie. I went across from the tippie in the road. The men all seemed to be mixed up over there. There wasn't any of them working. They just kept marching around. I didn't go over to the tippie. Some of the men who were riding with me come from the tippie over to my car at the road, and we come home.

Q. How close to the tippie did you get?

A. Oh, I would say 700 feet of the tippie.

Q. Why didn't you go on over there?

page 925 } Colonel Harris: We object to that as an uncommunicated mental operation of the witness.

Mr. Robertson: I think he has a right to show why he was scared to go or whether there was some other reason that he didn't go.

*Norman Hackworth.*

The Court: I overrule the objection.

By Mr. Robertson:

Q. Why didn't you go?

Mr. Harris: We reserve an exception.

The Court: Same ruling.

The Witness: The reason why I didn't go to the tippie was because I didn't want to go over there. They told me I wasn't going to work any more, and I didn't want to get around where they were at, because I felt maybe some of them would stick a knife in my back or shoot me.

By Mr. Robertson:

Q. Did you ever go back to work over there after that?

A. I went back, but I didn't go to work.

Q. When did you go back?

A. I went back the next morning, July 27.

Q. What happened over there then, that Wednesday morning?

A. I came to the company's office, and Mr. Bryan asked me if I was going to work. I told him, "No."

Colonel Harris: We object to the conversation page 926 } between him and Mr. Bryan as hearsay, if the Court please.

Mr. Robertson: It is relevant for the same reason, Your Honor, to show whether the man was scared to go work or not.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception; and may we have an objection and exception to that entire line of questions?

The Court: You may.

By Mr. Robertson:

Q. What was your conversation with Mr. Bryan?

A. He asked me to go to work, and I told him I wasn't going to work. He asked me why. I told him I thought a lot more of my life than I did of that job of work; that I feared I would be killed if I went back to work.

Q. How long did you stay there at the tippie?

A. I stayed there about an hour.

Q. I took it up a little out of order.

*Norman Hackworth.*

After you left the job site on Tuesday, July 26, did you attend a meeting of your Local in Paintsville that night?

A. Yes, sir.

Q. What was the purpose of that meeting?

A. The purpose of that meeting—

Colonel Harris: May we have an objection to page 927 } all questions on that line, on the ground of hearsay and immateriality?

The Court: Very well.

Colonel Harris: And an exception.

By Mr. Robertson:

Q. What was the purpose of that meeting?

A. The purpose of that meeting was Mr. Bryan was trying to urge us to go back to work, not let them run us out of there. So we told Mr. Bryan he didn't know the danger of those people in that country; that he didn't know their reputation; and there wasn't any law protection out there, and we didn't have any way to protect ourselves unless we wanted to go to the means of taking guns in there with us and doing our own fighting, and we didn't think that was the proper thing to do and get a bunch of our men killed and kill up somebody else.

Mr. Bryan still demanded that we go back to work. We told Mr. Bryan to put his overalls on and cross the picket line and go on down ahead of the men, and we would all go to work.

When we got over there the next morning —

Q. Did Mr. Bert Preston say anything about whether or not you should go armed?

A. Mr. Bert Preston said if we went over there, to go over there taking guns with us to protect ourselves. I page 928 } I remember he said to take at least two good guns.

Q. What did Mr. Bryan say to that?

A. Mr. Bryan objected to that. He said he didn't want any man taking a gun over there at no time.

Q. Did they agree that they would meet anywhere the next morning?

A. Yes, sir.

Q. Where was that?

A. They agreed to meet at Salyersville at a filling station, and the crew would all leave together.

Q. Did you meet there with them?

A. I got there—I didn't meet there with them. I got there

*Norman Hackworth.*

about five minutes after they had pulled out for Breathitt County.

Q. I think you have already stated what happened over there when you got over there. Did you go back there any more after that day?

A. No, sir.

Q. Have you ever worked there since, for Laburnum?

A. No, sir.

Q. Why?

A. Laburnum don't have any job over there any more, and the United Construction and United Mine Workers has got the work in that section. I don't belong to the United Mine Workers or United Construction, and for that page 929 } reason I don't work over there. I wouldn't work over there, anyway, after this all come about, if they offered me a job.

Q. Why?

A. Because I would be afraid to go back over there.

Q. Do they let you work over there if you don't join up with the United Construction Workers?

A. No, sir.

Q. At any time, have you helped Robert Poe to get membership applications for laborers that worked over there?

A. Yes, sir.

Q. When was that?

A. I wouldn't say just exactly the date it was, but it was a week or more before this all come about.

Q. How did you happen to help him get membership applications?

A. Mr. Frank Dixon gave me the applications, and told me to take them in there and help to organize the men, the laborers.

Q. Did any of the Laburnum people tell you that you had to join the A. F. of L., or you couldn't work?

A. No, sir.

Q. Did any of the Laburnum people tell you to turn the heat on them to make them sign up?

A. No, sir.

Q. Did you turn the heat on them to make them page 930 } sign up?

A. No, sir.

Colonel Harris: We object to that as calling for a conclusion of the witness.

Mr. Robertson: The witness is with you.

*Norman Hackworth.*

The Court: Do you wish to reply to the objection, Mr. Robertson?

Mr. Robertson: Sir?

The Court: Do you want to reply to the objection?

(The last question and answer were read by the reporter.)

Mr. Robertson: I assume, Your Honor, that they are going to claim that we put the heat on them to make them sign. Mr. Mullen has already said here that if the boss sends anybody out to sign up for the union, that is practically a threat in itself.

The Court: I will allow the question for what it is worth. Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. When that crowd came there to the schoolhouse on Tuesday, July 26, did you see anybody handling any bullets?

A. Yes, sir.

Q. What was that?

A. They would run their hand down in their pocket and pull out a handful, looked to me like, .38 pistol shells, page 931 } and would roll them from one hand to the other. The man was practically drunk. I would say he was drunk.

Q. Was there any rough talk there at the schoolhouse?

A. Yes, sir, there was.

Q. Just tell us what it was. Make it as rough as it was or just as smooth as it was.

A. I don't remember the words that were spoken, but one man they talked to was Henry Harland Houchell, and they talked very rough to him. I don't remember the words that were said, but it was more than I would want to talk about, and I would be afraid to tell you.

Q. What was it?

A. I don't remember what was said. The only thing I remember about it, I remember they talked very rough to him.

Q. Did you see anybody with any knives there?

A. Yes, sir.

Q. What kind of knives?

A. They were pocket knives, but they wasn't no penknives.

Q. What were they doing with them?

A. They were whittling around on sticks.

Q. How long were the blades of those knives?

*Norman Hackworth.*

A. I wouldn't say the exact measurement of the blades or anything of the kind, but they were big knives.

Q. Did anybody call you a son-of-a-bitch?

page 932 } A. No, sir, they didn't.

Q. Did you hear them call anybody else that?

A. Yes, sir.

Q. Did the fellow who was called that take it?

A. Yes, sir.

Q. Why?

Colonel Harris: We object to that.

The Court: I sustain the objection.

By Mr. Robertson:

Q. When you went to get people to sign up application blanks to join the A. F. of L., what did you say to them?

Colonel Harris: We object to that as hearsay and immaterial and irrelevant.

Mr. Robertson: The reason I am asking it, Your Honor, I reckon later on they will claim that the witness gave a conclusion. I am trying now to go into enough particulars that he will be stating facts and not conclusions.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. What would you say to them when you tried to sign them up?

Colonel Harris: Same objection, and exception.

The Court: Same ruling.

page 933 } The Witness: I only asked them if they wanted to sign up with the A. F. of L., and I told them that I thought it would be better for them; that they would get better wages, that we would all like to be organized and work together. I didn't tell anybody they had to join the A. F. of L. I didn't try to force anybody to join it. I only tried to help them out. I had talked to them along time before that, trying to get them organized.

By Mr. Robertson:

Q. Was Robert Poe with you on a number of those occasions, or were you pretty much by yourself?

A. Robert Poe was with me on some of them, and I was by myself on some of them.

Mr. Robertson: I have no other questions.

*Norman Hackworth.*

CROSS EXAMINATION.

By Mr. Mullen:

Q. Are you a member of the union now?

A. Yes, sir.

Q. What is it?

A. 646, A. F. of L., Paintsville, Kentucky.

Q. That is the same union that had men on the job for Laburnum?

A. Yes, sir.

Q. You were a member of it at that time?

A. Yes, sir.

Q. You state that you signed some of the men  
page 934 } up about a week before these happenings?

A. Yes, sir, something like that.

Q. You are very certain of that?

A. I wouldn't say for sure it was a week, that it was more than a week or less than a week, but it was pretty close to a week.

Q. It was pretty close to a week. It wasn't as early as the first part of July, was it?

A. No, sir, it wasn't.

Q. It wasn't as early as the 10th of July, was it?

A. No, sir.

Q. Did you see any guns?

A. No, sir, I didn't.

Q. You said some of the men had knives and were whittling. Whittling is a kind of common occupation among men when they are not working, isn't it?

A. It might be for some men, I don't know, but the way they were going around among us men at the time, with 8 or 10 or 12 men crowding up around us, each one of us there, with a knife in his hand and whiskey smelling on his breath, those knives didn't look too good. It didn't look to me as though they meant just to whittle a stick.

Q. Did anyone ever make a pass with one of the knives?

A. Nobody made a pass at me.

Q. You say you had talked to some of the labor-  
page 935 } ers before about joining. Had they refused, when you talked to them before?

A. No, sir, they hadn't. They seemed to want to get lined out to join it, but they never could make up their minds and all of them get together.

Q. What does it cost to join the Paintsville Local Union?

A. The Carpenter's Local?

*Norman Hackworth.*

Q. Yes.

A. It cost \$50.

Q. What are the dues?

A. \$1.50 a month.

Q. So these laborers would have had to pay \$50 to join?

A. I don't know what the laborers' initiation fee is, and I don't know what their dues would have been. I never looked it up. But I think it was \$10 that it cost them to join.

Q. Did you see any picket signs on the work? You were there on the 26th, you say?

A. There wasn't any picket signs at the schoolhouse.

Q. Were there any anywhere else?

A. I didn't see any on the 26th. I didn't go over to the tippie where they were working, where some of them had put up a picket sign, I understood.

Q. You understood they had put up a picket sign?

A. Yes, sir.

page 936 } Q. What did you do with the cards that you got signed up by the laborers?

A. I turned over what cards I got signed up to Bob Poe, Robert Poe.

Q. You don't know what he did with them, do you?

A. No, sir, I don't.

. . . . .

Q. Who filled in the cards that you got signed?

A. I filled them in.

Q. All you asked the man was to sign his name?

A. Yes, sir.

Q. Do you know how many you filled in?

A. I don't remember the number I filled in.

Q. You didn't fill them all in, did you?

A. No, sir.

Mr. Mullen: I have no more questions.

page 937 } Mr. Robertson: If Your Honor please, I offer this witness' testimony at Paintsville and ask that I be permitted to read it to the jury and introduce it in evidence in corroboration of the testimony the witness gives here today.

Mr. Mullen: I object to that, Your Honor.

The Court: I sustain the objection.

Mr. Robertson: That is all, Mr. Hackworth.

The Court: Stand aside, Mr. Hackworth.

(Witness excused.)

*Robert Hackworth.*

Mr. Robertson: Mr. Robert Hackworth.

Whereupon,

**ROBERT HACKWORTH**

called as a witness for Plaintiff, having been first duly sworn,  
was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Robertson:

Q. Mr. Hackworth, your name is Robert Hackworth?

A. Yes, sir.

Q. I will ask you to speak loud enough for all these gentlemen to hear you, please.

Where do you live?

A. Riceville, Kentucky.

The Court: Where?

The Witness: Riceville, Kentucky.

Mr. Robertson: R-i-c-e-v-i-l-l-e. I have been  
page 938 } out there.

The Court: Mr. Hackworth, talk as loud as I  
am talking so all these gentlemen can hear you.

By Mr. Robertson:

Q. How far is Riceville from Paintsville?

A. It is about 15 miles.

Q. How far is Riceville from the Laburnum site in Breathitt  
County?

A. I would say it is 25.

Q. How big a town is Riceville?

A. It is not much of a town at all, just a small village.

Q. How old are you, Mr. Hackworth?

A. 38.

Q. Are you a brother of Mr. Norman Hackworth and Mr.  
John Hackworth, who have both testified here this morning?

A. Yes, sir.

Q. What kind of work do you do?

A. Carpenter work.

Q. Where are you working now?

A. I am not working at carpenter work now.

Q. Are you a member of any union?

A. Yes, sir.

Q. What union?

*Robert Hackworth.*

A. 646, Paintsville, A. F. of L.

page 939 } Q. Were you working for the Laburnum Construction Corporation in July, 1949?

A. Yes, sir.

Q. I call your attention now to the week that began on Monday, the 25th of that July. Tell us where you were working then. Do you remember where you were working then?

A. Pardon me?

Q. I say on the week that commenced on Monday, July 25, 1949, were you working for Laburnum then?

A. Yes, sir.

Q. Where were you?

A. At the schoolhouse.

Q. Do you remember whether or not you had had any talk or heard any talk of William Hart before that Monday?

Mr. Harris: We object to that on the ground it is hearsay.

Mr. Robertson: It has the same purpose.

The Court: Do you have anything more you want to say?

Mr. Robertson: It is the same objection he has made time and again, Your Honor.

The Court: The objection is overruled.

Colonel Harris: Of course every time he asks the question we have to object.

The Court: That is true.

page 940 } By Mr. Robertson:

Q. Do you remember whether or not you either had any talk yourself with Robert Hart before that Monday morning or whether you heard any talk by him before that Monday morning?

A. No, sir, I did not.

Q. When you went to work that Monday morning, July 25, at the schoolhouse, did anything happen that day or did you work on through the day?

A. The 25th?

Q. Yes.

A. We worked through the day.

Q. On Tuesday, the 26th, what happened?

A. There wasn't anything happened that I knowed of on the 26th. You mean on the 26th of July?

Q. Yes.

A. Sure.

*Robert Hackworth.*

Q. There is a calendar there which you can watch to keep your mind straight.

\* \* \* \*

By Mr. Robertson:

Q. Were you there at the schoolhouse when Hart came there with a crowd of men?

A. Yes, sir.

page 941 } Q. Tell what happened.

A. You want me to tell when he came there the first time or the time with the crowd of men?

Q. I want you tell the first time he came first, and then the second time. Tell about the first time first.

A. It was on the 21st or 22nd of July, the best I remember, that he came there. He asked us to join the United Construction. He said "We are taking this job over." We told him, "No, we wouldn't join," that we already belonged to a local.

He said, "Well, you make up your minds. We are coming back." He said, "I am going to take this job over. If you work here you are going to have to join up with us." So he left. Then on the 26th, the following day, he came back with a bunch of men. He came up to the schoolhouse where we were working.

Q. How many men would you say were with him?

A. I would say there were—the best of my memory, 30 or 40, I guess. It could have been more.

Q. Tell the jury what happened when they came there to the schoolhouse.

A. They came up, and they just rushed right up on us and crowded right up and said, "All right, boys, we are here now. Are you going to join up with us or not," and we said "No, we are not." They said, "All right, if you are not you are going to have to quit work."

page 942 } I said to Mr. Hart, "Well, let's talk just a minute." "No," he said, "I have no damned talk for you." He said, "You fellows are just going to have to quit, that is all there are to it. We don't want to have to get rough with you."

We all just quit and went up to eat our lunch. It wasn't hardly the lunch hour, but we quit. I don't remember how many there were, but he told some of them to stay there and see that we didn't work any more. He said, "The rest of us will go down to the tipple."

*Robert Hackworth.*

We went up there and sat there and ate our dinner, our lunch. Then after we ate our lunch we gathered our tools all up and put them in our boxes and went down to the company's store there. Then those men came on down to the tippie.

Q. When Hart and his men came there to the schoolhouse, was it a bunch of men that you knew or were they strangers?

A. They were strangers, most of them were. There may have been—I never looked, you know, to notice them enough to see if there were any in the bunch. They were in a crowd. There may have been some of the boys that I worked with there before as laborers, but I don't—

Q. Were any of them drunk?

A. There were part of them that were acting  
page 943 } drunk, you know, like they had been pretty tight,  
I will say.

Q. Did you smell any liquor?

A. Yes, sir; I did.

Q. Did you see any guns?

A. No, sir.

Q. Was there any cussing there?

A. Yes, sir.

Q. What words did you hear used?

A. I said to Hart, "Let's talk a minute," and he said "I have got no God-damned talk for you."

\*     \*     \*     \*     \*

The Witness: Those men there were cursing around, you see, and every time Hart would say something, they maybe would curse, and you know, backing him up something like that.

By Mr. Robertson:

Q. Did anybody call you a son-of-a-bitch?

A. No, sir.

Q. Did they call you anything else?

A. No, sir.

Q. How many did they have you outnumbered?

A. I guess we were outnumbered, the best of my opinion we were outnumbered six to 1.

Q. After you gathered up your tools you say you went where?

page 944 } A. We went back down the road apiece there  
to a company store where we left our cars and

*Robert Hackworth.*

things and we loaded our tools in a car. Those men that guarded us there until we quit work, went on down to the tippie where the rest of the gang went.

Q. Did you go on down to the tippie?

A. No, sir; not that day.

Q. Why?

Mr. Harris: We object to that, if the Court please, as calling for an uncommunicated mental operation.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Why didn't you go down to the tippie?

Colonel Harris: Same ruling.

The Witness: They said they were going to stop everything, so I knew we had to stop up there. I just never drove on down to the tippie. I waited there until the rest of the gang came out.

By Mr. Robertson:

Q. Were you scared to go to the tippie?

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: An exception.

page 945 } By Mr. Robertson:

Q. Were you scared to go to the tippie?

Colonel Harris: Same objection.

The Court: Same ruling.

By Mr. Robertson:

Q. Will you answer the question?

A. Sure.

Q. Why?

Colonel Harris: Same objection and exception.

The Witness: I figured they would have trouble or something down there and I didn't want to get involved enough to maybe get hurt or be killed or something.

By Mr. Robertson:

Q. Did you attend the meeting of Paintsville local that night?

*Robert Hackworth.*

A. Yes, sir.

Q. Did you hear what went on there?

Colonel Harris: May we have an objection on the ground of hearsay to this line of questioning?

The Court: The objection is overruled.

The Witness: I heard a part of what went on there.

By Mr. Robertson:

Q. State what went on there so far as you heard it.

A. Well, it was late after the meeting started when I got in, and Mr. Bryan was there. He was talking  
page 946 } about wanting us to go back to work. Some of the boys said to him, "Will you put on a pair of carpenter overalls and lead us in there to our job?" He said "Yes, sir; I will."

Q. Was anything said about whether they would carry guns or not if they went back?

Colonel Harris: Your Honor gave us an exception to this line?

The Court: Very well.

The Witness: Some of them said "If you go back there you are liable to get killed if you are not protected some way."

Mr. Bryan said, "No, we don't want you to take any guns or anything."

By Mr. Robertson:

Q. Then did they make any arrangement as to how they would go the following day?

A. Yes, sir. They were supposed to meet at Salyersville, and all go in together.

Q. Did you go over there the next day?

A. No, sir. I went through there, but the gang had all gone in. I went in late.

Q. Did you go on over to the job site after the other men had gone ahead of you?

A. Yes, sir.

Q. About what time did you get over there?

A. I suppose it was 8:30, maybe nine o'clock.  
page 947 } I wouldn't say for sure.

Q. What was the situation when you got over there?

*Robert Hackworth.*

A. When I got over there I noticed the man over at the tipplem so I never went on over to the job myself. I stopped at the office. I noticed they were fixing to come out with their tools and things and I just never went on over.

Q. Did you sort of hang back a little and go back over there late on purpose?

A. You mean after they came out?

Q. No, I mean—

A. Sure.

Q. From Salyersville.

A. Yes, sir; I did.

Q. Why did you do that?

Colonel Harris: Same objection and exception.

The Court: Same ruling.

The Witness: I couldn't make up my mind to go back to work. I just dreaded to go in there and probably start work and maybe get killed or something. I didn't want to do that. I finally decided to go. I intended to work if they were working and had everything settled down. I wasn't sticking my neck out.

page 948 }

CROSS EXAMINATION.

By Mr. Mullen:

Q. You say you talked to Mr. Hart on the 21st or 22nd?

A. Yes, sir.

Q. Did you report that talk to anyone?

A. Yes, sir.

Q. To whom?

A. Some of the members who were working.

Q. Do you know whether it was reported to Mr. Delinger?

A. No, sir; I don't know whether it was reported to Mr. Delinger or not.

Q. Those who came with Mr. Hart, you say you knew some of them, that some of them had worked with you. Were those that you knew or among those you knew some of the laborers on the Laburnum job?

*Robert Hackworth.*

A. Those that came with him, the best I can remember, it seems that I had seen two or three of those laborers that I had been working with. I couldn't call their name because I never found out many of their names. I never fooled with them too much.

Q. You just recognized them as some of the laborers that you had been working with?

A. That is right.

page 949 } Q. At the meeting on the night of the 26th of  
of the Paintsville Union, Mr. Sublett was the man  
who asked Mr. Bryan the question was he not?

A. I don't remember.

Q. Whoever asked, you remember the question being asked as to whether he would put on overalls?

A. Well, no, I don't remember just exactly who asked him the question to do that, but I heard it mentioned and heard whoever it was as it, but I don't remember at this time who it was.

Q. You remember that the question was asked?

A. Yes, sir.

Q. Wasn't the question asked Mr. Bryan, "Will you put on overalls and lead us across that picket line?"

A. No, sir; not as I remember it.

Q. You don't remember that?

A. No, sir.

Q. Did you see the picket signs there?

A. No, sir.

Q. You didn't see any of them?

A. I did not.

Q. Did any of your fellow workers report to you that there were picket signs?

A. That there were picket signs?

Q. That there were picket signs there.

page 950 } A. I heard some of the boys say something  
about there being some signs there, but I don't  
know what they were. I never seen them.

Mr. Mullen: I have no further questions.

Mr. Robertson: I have nothing further. If Your Honor please, I offer in evidence the testimony of this witness at Paintsville and ask that I be allowed to read it to the jury.

Mr. Mullen: Same objection, Your Honor.

The Court: The objection is sustained.

Gentlemen, we will recess for lunch and come back at 2:15.

*Jack Patrick.*

(Whereupon, at 12:50 o'clock p. m. the Court was recessed until 2:15 o'clock p. m. the same day.)

page 951 }

AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: Jack Patrick, please.

This witness has not been sworn.

Whereupon,

**JACK PATRICK**

called as a witness for Plaintiff, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Robertson:

Q. Mr. Patrick, your name is Jack Patrick?

A. That is right.

Q. How old are you?

A. 42.

Q. Where do you live?

A. Paintsville, Kentucky.

Q. What kind of work do you do?

A. At the present time I am engaged in the mining business.

Q. What kind of work were you doing in July, 1949?

A. Carpenter work.

Q. Do you run your own mine property?

A. I do now, yes, sir.

Q. How many men do you work there?

A. From 12 to 18.

page 952 } Q. Do you just dig the coal out and load it in a truck and sell it yourself?

A. That is right.

Q. Are you affiliated with the A. F. of L. local union in Paintsville?

A. I am a member of it.

Q. Were you a member of it in July, 1949?

A. I was.

Q. Were you working for Laburnum Construction Company in Breathitt County, Kentucky in July, 1949?

*Jack Patrick.*

A. I was.

Q. I call your attention now to the week that began July 25, 1949, the Monday of that week. Were you working there that day?

A. I was.

Q. Before that time did you receive any report that the United Construction Workers were going to run you off the job?

A. I did.

Colonel Harris: Just a moment, please. We object to that on the ground that it is illegal, irrelevant, immaterial, incompetent, and hearsay.

The Court: The objection is overruled.

Colonel Harris: We ask an exception.

If the Court pleases, in order to save time and to speed up the trial, can we have objections to every question of that sort that deals with a rumor or report with reference to what they were to expect, and an exception?

Mr. Robertson: There is no objection.

Mr. Allen: No objection.

The Court: Very well.

By Mr. Robertson:

Q. What was the report you got as a member of the union that the United Construction Workers were going to run you off the job?

A. That they were coming in there and were going to take the job.

Q. On Monday, July 25, where were you working?

A. I was working at the bottom of the hill on the mine tipple.

Q. Did anything happen that Monday, did any trouble occur that day?

A. No, sir; I don't believe there did. I believe it was on the following Tuesday.

Q. Tell what happened there that Tuesday while you were there, what you saw and heard and did

A. Well, this fellow—it was noontime and we were all having lunch at this time.

The Court: Mr. Patrick, take your hand away from your face, please.

*Jack Patrick.*

The Witness: We were in the shed and were  
page 954 } all having lunch. This fellow Hart, as I later  
found him out to be, comes in the building first.  
We were sitting there not paying much attention to him. I  
was sitting there on a horse. He walks up and begins talk-  
ing to me. I don't remember the exact words that he used  
now. Anyway he said it was their job and they was taking  
the job over. He asked us if we would like to join up with  
them and work with them.

By Mr. Robertson:

Q. What was your answer to that?

A. I didn't answer it because I was nothing more than  
steward on the job at that time and our business agent by  
that time had walked into the building and he taken over. I  
didn't say anything else.

Q. Were you the steward on the job there then?

A. That is right.

Q. When this conversation occurred between Hart and Mr.  
Bert Preston, the business agent, about how many men do  
you think were there in the toolhouse?

A. It wasn't a very large building. There weren't but  
about 12 or 20 foot. It was full. I would say 25.

Q. What was the conversation between Hart and Preston  
and Arnett, if Arnett came into it?

A. When Hart said he was taking over the job, I don't  
know how it was, but anyway several—

The Court: Talk louder, Mr. Patrick.  
page 955 } The Witness: There were some pretty harsh  
words passed there, and there was a disturbance  
there, a racket about to start. That is when Bert Preston  
gets into it. Hart says he would take over. He could go and  
bring 600 men out of Beaver Creek and take the job over.

By Mr. Robertson:

Q. Was there any cussing going on?

A. There was.

Q. What words did you hear pass?

A. He said they could kick our damned ass off the job.

Q. Did Arnett take any exception to anything that Hart  
said?

A. Yes, sir; he did.

Q. What did Arnett have to say about it?

*Jack Patrick.*

A. I just can't quote exactly what the man said. I have forgotten.

Q. What is the upshot of it?

A. That is when everybody was getting loud and rough. Some fellows on the outside of the building, all rushed the building, crowded the door. Even the outside and all, they were jammed full in there.

Q. Were any of them crowded up around the windows and doors?

A. They was.

Q. Did any of the men go back to work after page 956 } lunch that day?

A. You mean the A. F. of L. men?

Q. Yes, sir.

A. No, sir.

Q. Did you go back?

A. I did not.

Q. Why?

A. Well,—

Colonel Harris: On each one of these "why" questions may we have an objection throughout the rest of the case to save time. It calls for an uncommunicated mental operation and invades the province of the jury.

The Court: You may save the point.

By Mr. Robertson:

Q. Why didn't you go back to work that afternoon?

A. The fact of the matter, they threw a picket line on it in the first place and in the second place if they hadn't, I wouldn't have gone back. They threw a picket on it and if they hadn't thrown a picket on it I wouldn't have gone back.

Q. Why?

A. There are too many fellows there talking too big for me.

Q. Were you scared to go back?

A. It didn't suit me to go back, no, sir, I didn't.

Q. Did you go to the union meeting in Paints-  
page 957 } ville that night?

A. I did.

Q. We have been over that pretty thoroughly. I don't think we need go into all that again.

Did you meet with others at Salyersville the next day, Wednesday, to go back out to the job?

A. I did.

*Jack Patrick.*

Q. Did you go together or go separately?

A. We all went pretty much together.

Q. Why?

A. Well, so if anything started we would all be together on it. We went more or less in a group so we would all be together.

Q. When you got out to the job site did you go down toward the tipple?

A. I did.

Q. Did you see anybody down there at that time?

A. I believe there was one fellow.

Q. Did you have any talk with him?

A. I did not.

Q. Then during the course of the morning on Wednesday did you as the steward have any talk with the men there in the foolhouse or in any of the buildings there at the job site?

A. I called a bunch of men off from work.

page 958 } Q. About what time was that?

A. I would say that was an hour, possibly an hour and a half after they started to work.

Q. Why did you pull them off the work?

A. Unsafe.

Q. Had any reports come to you that anything was going to happen in particular about running them off the job that day?

A. Nothing—one fellow who worked on the tipple all the time was a United Mine Workers, an electrician. I went up on the tipple and he came up to me and said, "Jack, what are you doing, putting these men back to work?" He said, "Don't you know we are with these boys, too?" Then I called them all off the tipple.

Q. What is the reputation of the United Mine Workers there in Kentucky for pulling rough stuff and running people off the jobs?

Colonel Harris: We object to that question, if the Court please. It is highly prejudicial and improper. It is no way to charge responsibility in a claim of this sort.

Mr. Robertson: It goes right to the heart of the case. They have intimidated they quit work because they wanted to honor the picket line.

page 958-A } The Court: Are you going to ask him about any particular event?

Mr. Robertson: Yes.

The Court: I will allow the question.

Colonel Harris: We reserve an exception.

*Jack Patrick.*

By Mr. Robertson:

Q. What is the reputation of the United Construction Workers about being rough or gentle in running people off jobs in eastern Kentucky?

Colonel Harris: Same objection and exception.

The Court: Same ruling.

The Witness: They just walk in on a job and demand it and take it over. They are bad that way.

By Mr. Robertson:

Q. Do you know of any instances where they have done that?

A. I do.

Colonel Harris: Same exception and objection.

By Mr. Robertson:

Q. Can you name some of them?

Colonel Harris: May I have an objection and exception to all the questions on this line to save repeating?

The Court: You may save your point.

By Mr. Robertson:

Q. Will you name as many as you can, any of them that you can, where you have known them to run men off page 958-B } the job in the same way that they ran A. F. of L. men off the Laburnum job?

A. There was a job going on at Beaver Creek, a tipple. They took it all over and put them off the job. They had a lot of trouble there. The same way in Prestonsburg, a construction job, non-union outfits. They put them off. They came along and taken our job from us. I believe that is all that I recall at the present time.

Q. Did you know about that when you called your men off the Laburnum job?

A. Part of it.

Q. Was that one of the reasons you called them off?

A. I knew what had been in the past, yes, sir.

Q. Did you notice any drinking among Hart's men there on Tuesday?

A. I didn't see anybody drinking, no, sir.

Q. Have you ever seen Hart since that Tuesday that he was there?

*Jack Patrick.*

A. I have.

Q. When and where?

A. In front of the Howard Hotel, the following day.

Q. Is that in Paintsville?

A. That is right.

Q. Did you have any conversation with him there?

A. I did.

Q. What was that conversation?

page 959 } A. He was sorry, that he didn't mean to take the job in that way and put us fellows all out of work. All he wanted was us to sign up with him and go to work for him, that they were in need of carpenters. He wanted us to go back to work.

Q. Did he say you could go back to work over there without signing up with him?

A. No, sir.

Q. Did he still say you would have to sign up?

A. That is right.

Q. What did he say you would do if you went to work without signing up?

A. It wasn't mentioned.

Mr. Robertson: The witness is with you.

### CROSS EXAMINATION.

By Colonel Harris:

Q. Do you know John Arnett?

A. I do.

Q. How long have you *known* him?

A. On this one job over there.

Q. The rough talk started in the toolhouse when John Arnett told Hart, "You are a damned liar," didn't it?

A. I couldn't answer that. I don't know. I don't remember that.

Q. You don't remember that?

page 960 } A. No, sir.

Q. You do know that your business agent, Bert Preston, touched John Arnett on the shoulder and said in substance, "You shut up. I will take charge." You remember that, don't you?

A. I don't remember that.

Q. Were you in the toolhouse?

A. I was in the toolhouse, yes, sir.

Q. And it is just 12 by 20 feet.

*Jack Patrick.*

A. I would say that, yes, sir.

Q. And you didn't hear anything that Bert Preston said?

A. Yes, I did.

Q. Said to John Arnett?

A. I don't remember it in that way. Bert Preston was over next to this door and John Arnett was over here, the way I remember it now.

Q. They weren't where he could touch John Arnett?

A. That is the way I recall it.

Q. Then did you hear in there Mr. Preston, your business agent for your local, tell Mr. Hart if they would set up a picket line your union would honor it?

A. He did.

Q. You heard that, didn't you?

A. He did.

page 961 } Q. Did you hear Bert Preston say, "A man standing out there isn't enough. You must put up a sign." You heard him say that, didn't you?

A. Hart said he would put up a sign out there. Preston said he wouldn't accept anything like that. That it had to be a legal picket. Hart said he would do it. Preston said, "If you do it that way we would have to honor your picket."

Q. He used the phrase, then, in that conversation, that it would have to be a legal picket?

A. He did.

Q. Are you positive about that?

A. I am swearing it.

Q. Have you talked to anybody about what happened in that toolhouse in the last six months?

A. Yes, sir.

Q. Who have you talked to about it?

A. Practically all of us have talked it. We talked it among us and discussed the whole thing.

Q. Practically all of you?

A. Yes, sir.

Q. How many times have you all discussed in a meeting of your local union what happened out there on that occasion?

A. I wouldn't state the exact number of times.

Q. In your best judgment. Does it come up  
page 962 } every meeting night?

A. It does not.

Q. How often does the union meet?

A. At that time we were having two meetings a month.

Q. You couldn't give us any idea of the number of occa-

*Jack Patrick.*

sions on which you all as members of 646 have discussed this case since it happened?

A. No, sir; I wouldn't.

Mr. Robertson: Wait a minute. Have you finished your answer?

The Witness: No, I didn't.

By Mr. Harris:

Q. Go ahead and finish.

A. Sometimes it would be talked two or three meetings straight.

The Court: How many? I didn't catch that.

The Witness: Maybe two or three meetings straight we discussed it to some extent. Maybe we would go another two or three meetings and it wouldn't be mentioned. For that reason I just wouldn't state the exact times it was discussed.

By Colonel Harris:

Q. Did the union, your local union, or your international union take any action on having you men of the A. F. of L. union come over here to be witnesses in this case?

page 963 } A. No, sir.

Q. The international union didn't have anything to do with it?

A. I never heard a word from the international union.

Q. And your local union?

A. No.

Q. Did you all agree in these discussions in the local union about this case that you would come over here and testify?

A. I never heard that.

Q. How long have you known that you were coming over here to testify in this case?

A. This past Thursday.

Q. Who gave you the word to come?

A. My father.

Q. Is he a member of the union?

A. That is right.

Q. Was your father out there that day?

A. Out where?

Q. At the job site of Laburnum Construction Company on July 26, 1949. Was he working there then?

A. He was working on the job. I don't know whether he was on the work that particular day or not. I just don't recall that.

*Jack Patrick.*

Q. Who was it that told Hart, "You pulled a page 964 } picket on us"? You used that phrase on your direct examination. You pulled a picket. Who was it who told Hart that?

A. That he pulled a picket?

Q. Yes. I understood you to use that expression on your direct examination.

A. Preston told him it had to be a legal picket before he would not cross it.

Q. You don't recall using the phrase "You pulled a picket," in the last half hour?

A. Preston told him if he put a legal picket up there he would have to honor it.

Q. You have told us that. My question was about the phrase "pulled a picket" that I understood you to use on your direct examination.

A. I don't know what you mean by pulled.

Q. All right, I didn't either. That is why I was asking.

In this conversation with Hart he said there had been a misunderstanding, that what he wanted to organize was laborers, didn't he?

A. I never heard that.

Q. When he was out there that day, did they ask you to join the United Construction Workers?

A. He did.

Q. Did he ask the other carpenters to join the page 965 } United Construction Workers?

A. I would say half the fellows on the work were in the toolshed having lunch when he walked in and told us we could join up with him. It was their job and they were going to take it.

Q. You didn't hear him ask any of the laborers to join, did you?

A. As a matter of fact, I don't think there were any laborers in this business at the particular time.

Q. During the time they were out there you didn't hear him ask any carpenters' helpers to join, did you?

A. There were no carpenters' helpers on the job.

Q. So all that you saw out there was them asking carpenters to join, is that right?

A. That is right.

page 966 }

C. H. PATRICK

a witness called for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Patrick, your name is C. H. Patrick?

A. That is right.

Q. Are you the father of Mr. Jack Patrick, who just testified?

A. I'm the father of Jack Patrick. I think I am following him. As far as I know I am.

Q. How old are you, Mr. Patrick.

A. I am 68.

Q. Where do you live?

A. Paintsville, Johnson County, Kentucky.

Q. Are you a member of any union?

A. American Federation of Labor.

Q. What is your local?

A. 646, Paintsville.

Q. What kind of work do you do?

A. Carpenter.

page 967 } Q. Were you working for Laburnum Construction Corporation in July, 1949?

A. I was.

Q. I call your attention now to the week beginning Monday, July 25. Before that time as a member of your union did you get a report that the United Construction Workers were coming to the Laburnum job in Breathitt County and run you all off?

A. Yes.

Q. What was the report that you got about that?

A. The report we got was that they were coming in and running us out. They claimed it was their work and they were going to have it.

Q. Where were you born and raised?

A. Johnson County, Kentucky.

Q. Is that the adjoining county to Breathitt?

A. No, sir. Magoffin County is the county in between the two.

Q. Do you know Floyd, Johnson, Magoffin, and Breathitt Counties?

A. Quite well.

Q. What is their reputation for law abiding or law breaking?

*C. H. Patrick.*

A. Well, our local newspapers get a nation-wide reputation as being bad. In some cases I think they erred; page 968 } in others maybe not, but at any rate the reputation is not good.

Q. Were you working out there at the Laburnum job site on Monday, July 25, 1949?

A. I was.

Q. Were you working up at the head house or down at the tippie?

A. I was up on top of the hill at the head house, I assume you call it.

Q. Were you expecting the United Construction Workers there that day?

A. Any minute.

Q. Did they come that Monday?

A. Not to where I was.

Q. Did you do a normal day's work on that Monday?

A. No, I did not.

Q. What were you doing?

A. Keeping my eyes open for something, these visitors we expected.

Q. What is that?

A. Keeping my eyes open for the visitors that we was expecting.

Q. Did you see any? Were you scared?

A. Well, no, I won't say I was scared but I didn't feel safe.

page 969 } Q. On Tuesday, July 26, were you working up on the hill or down at the tippie?

A. The dates now are a little indistinct in my mind. I wouldn't say positively about the date. The way I recall it, the next day we didn't anyone work.

Q. You recall the occasion when Hart and the group of men first came to the job site?

A. Yes, sir; very distinctly. I was notified over the telephone, from the bottom of the hill up to the top, what was taking place.

Q. Did you go down?

A. I did not.

Q. Why?

A. I had my own personal interests to look after.

Q. Did you go down there at any time during the progress of the trouble or did you stay up on top of the hill?

A. I stayed on top.

*C. H. Patrick.*

Q. When you left work did you go down to see what was going on?

A. I did not. There was a different route entirely to the highway that I made to go to the top of the hill from what the other fellows went to the tippie. I came around the top of the hill, to the intersection back here to come off, and I didn't go down to the tippie site at all.

Q. Did you take a different route home than the page 970 { one you generally take, or use the same way you generally go?

A. I took the same route home that I usually take, although it was a little different that evening, because this trouble came up and the fellow I was riding with went on, and left me stranded. So I waited there by the side of the road for a little while until someone picked me up.

Q. Did you go back to the job site the next day?

A. To the company office, only.

Q. What happened when you got back there the next day?

A. There were quite a few strangers to me, just milling around from one point to another. Nothing particular took place. Mr. Bryan there tried to get us to go back to work, and we absolutely refused. He walked down the slope toward the creek and also toward the tippie. Just below the road there was a little picket sign stuck up there on a little stick. He went down and plucked it out of the ground and threw it over the hill.

He came back up and said, "Come on; now you don't have to cross a picket line to go to work."

At that particular time, as well as all others, these carpenters were represented by a spokesman, which was our steward. He told Mr. Bryan that we absolutely refused to go over there to work.

page 971 { Q. Were you present when any conversation among the men occurred there in the tool house?

A. I was not.

Q. On that day?

A. I was not.

Q. Did you ever have any conversation with Hart after that?

A. I did.

Q. When was that?

A. Possibly the next day after all this happening in Breathitt County. This took place in Paintsville, Kentucky, in Johnson County.

*C. H. Patrick.*

Q. Where did you see Hart?

A. I saw him on the streets in Paintsville; also in our Local office.

Q. When you first saw him, what was the conversation between you and Hart, or any conversation you heard between Hart and anybody?

A. When I first saw him, I didn't get any part of the conversation. He was talking on the street to some of the other fellows. I didn't get any part of the conversation until we met him in our headquarters, local headquarters.

Q. Union Hall?

A. That is right.

Q. What happened there?

page 972 } A. He tried to apologize. He said that it wasn't his intention to take our job. Quite a little conversation took place.

We finally had him to admit that he was only wanting us to go back to work under his contract, sign up with him and go back to work.

. . . . .

Q. State whether or not Hart said anything would or would not happen to you if you tried to go back there and work without joining up with the United Construction Workers?

A. He said we could not go.

Q. What is the reputation of the United Construction Workers in Eastern Kentucky about running people off the work, A. F. of L. men?

page 973 } Colonel Harris: The same objection we assigned to the same question as to the United Mine Workers.

The Court: The same ruling.

Colonel Harris: We note an exception.

By Mr. Robertson:

Q. What is their reputation?

A. Not good.

Q. Do you know of your own knowledge of any other jobs that they have run people off of, like they did the Laburnum A. F. of L. men off the Laburnum job?

A. I do.

Q. Will you name some of them?

*C. H. Patrick.*

A. Oil Springs school job in Johnson County, Kentucky.

Q. Any others?

A. The name of the firms I can't state. Two or three on Beaver Creek, but I wouldn't say the firms.

Q. On Beaver Creek?

A. Yes, sir, Floyd County.

Q. Any others?

A. I don't know of any others.

Q. Did you know about their general reputation for running people off when you advised the men not to go back to work for Laburnum?

A. I beg pardon; I didn't get that.

Q. I don't think it was a proper question. Strike page 974 } it, please.

Did you know the general reputation of the United Construction Workers in Eastern Kentucky at the time this trouble occurred there on the Laburnum job?

Colonel Harris: Same objection, and exception.

The Court: Same ruling.

The Witness: I did.

Mr. Robertson: The witness is with you.

### CROSS EXAMINATION.

By Colonel Harris:

Q. Mr. Patrick, are you an active member of 646?

A. I am.

Q. Have you been attending the meetings fairly regularly for the past year and a half?

A. The past 8 years.

Q. The past 8 years?

A. Yes, sir.

Q. At one time you were an officer in the Local, weren't you?

A. Never; no, sir.

Q. You have never been an officer?

A. No, sir.

Q. Practically every time you all have a meeting, there is a discussion of what happened over there at the Laburnum job site, isn't there?

page 975 } A. Along at the time this was taking place, yes, sir.

*C. H. Patrick.*

Q. I mean since.

A. Since? No, sir.

Q. In these regular meetings that you have attended for the past 6 months, have you heard any discussion at the meeting of what happened over at the Laburnum job site?

A. I have not.

Q. You have not.

Now, Mr. Patrick, on this occasion, you were up at the head house, weren't you?

A. I was.

Q. Mr. Hart didn't come up to the head house, did he?

A. He did not, that I know of.

Q. You didn't see him at the head house, did you?

A. I did not.

Q. You didn't have any conversation with him up at the head house?

A. I did not.

Q. None of the men with him came up to the head house, did they?

A. If they did, I don't know it.

Q. You were wide awake. You weren't taking a nap that day at that time?

A. I wasn't taking a nap, but there were plenty of places they could come up there and me not see them.

page 976 } Q. You didn't hear any of them in any conversation with anybody on July 26, did you?

A. I won't answer that question, for the simple reason that I don't recall the dates very distinctly.

Q. I will try to help you out. I am talking about the day that it is alleged that Hart and some 35 or 40 or 50 or 75 men came up to the Laburnum job site, along in July.

A. No, sir, I didn't talk to him at all that day.

Q. You didn't talk to any of the other men that were with Hart?

A. No, none of Hart's representatives.

Q. And nobody in Hart's group made any threats to you on that occasion, did they?

A. They did not.

Q. Nobody in Hart's group injured you on that occasion?

A. They did not.

Q. Everything that you have been testifying about, that happened on that occasion, is just what you have heard other people say?

A. No.

*C. H. Patrick.*

Mr. Robertson: Let him finish. Wait a minute.

The Witness: What I have been testifying, in two or three instances I told you we had a conversation with Mr. Hart in the office—

page 977 } By Colonel Harris:

Q. I am not talking about a conversation in the office. I am talking about what happened out at the job site.

A. O. K. Then repeat your question, will you, please?

Colonel Harris: Read it to him, please, Mr. Dudley.

(The question was read by the reporter.)

The Witness: At that particular time, yes.

Colonel Harris: If the Court pleases, in view of the positive admission of the witness that all his testimony as to what happened on that occasion was hearsay, we move the Court to exclude that testimony and to direct the jury to disregard it.

Mr. Robertson: If Your Honor please, it is what came to this man as a union member, as reports of what was happening to other union members and what was going to happen to him if he didn't watch out. It is relevant for those reasons.

The Court: The motion is overruled.

Colonel Harris: We reserve an exception.

By Colonel Harris:

Q. You have testified about the United Construction Workers running somebody off the job at Oil Springs, off the Oil Springs school job, is that right? Did I get the name right?

A. That is right, yes, sir.

page 978 } Q. Were you working on the Oil Springs school job?

A. No, I was not.

Q. Were you present on the Oil Springs school job?

A. I was.

Q. Were you there at the time that the United Construction Workers came and ran them off?

A. I was not.

Q. Everything you have testified about the United Construction Workers running them off the Oil Springs school job was what you had heard somebody else say afterwards, wasn't it?

A. I wouldn't say that. We had been in conference with

*C. H. Patrick.*

the officials of the construction company, and I wouldn't exactly answer your question that way.

Q. You mean the construction company that was putting it up?

A. That is right.

Q. But you had not been in conference with any member of the United Construction Workers on the job, had you?

A. No, I had not.

Q. What you have testified is what another group, the contractor, told you, is that right, the construction contractor? When you say they ran them off the Oil Springs school job, you are repeating information that you got from the contractor?

page 979 } A. Did I say that they ran us off that job?

Q. I thought you did. What did you say?

A. I didn't say that.

Q. Do you remember mentioning the Oil Springs school job here this afternoon?

A. I do.

Q. What did you tell us about it? I didn't hear you right, maybe.

A. I answered your question, but what it was, I don't recall.

Q. It wasn't my question. It was a question of Mr. Robertson's.

A. Whoever's question it was, I don't recall it.

Q. You don't recall what you said about the Oil Springs school job.

You also said the United Construction Workers had run you off of two or three jobs on Beaver Creek?

A. I did not make that statement.

. . . . .

page 980 }

. . . . .

Q. When I said "ran you," I didn't mean you personally. I meant A. F. of L. unions.

Now, what was it that you said before about A. F. of L. unions being run off Beaver Creek?

A. I didn't mention it.

Q. You didn't mention A. F. of L. unions, but you said somebody was run off the job on Beaver Creek, didn't you?

*Chester Trimble.*

A. I don't recall that I said anything about Beaver Creek.

Q. You don't recall mentioning Beaver Creek within the last 15 minutes on examination by Mr. Robertson, is that right?

A. No.

page 981 } Colonel Harris: I believe that is all.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Patrick, when you were up on the top of the hill there, the day that Hart and his men came to the tipple, could you look over the edge of the work and look down there and see them?

A. I could very plainly, and watched very plainly.

Q. Did you ever go back to work after that over there?

A. I did not.

Q. Why?

A. I didn't feel it was safe.

. . . . .

page 982 }

. . . . .

CHESTER TRIMBLE,

called as a witness on behalf of Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Trimble, your name is Chester Trimble?

A. Yes, sir.

Q. Where do you live?

A. Barnett's Creek, Kentucky.

Q. How far is that from Paintsville?

A. Seven miles.

The Court: Mr. Trimble, talk loud so these gentlemen over here can hear you. Try to talk just about as loud as I am talking now.

*Chester Trimble.*

By Mr. Robertson:

Q. How far is your home on Barnett's Creek from the Laburnum Construction Corporation job site in Breathitt County, Kentucky?

A. Somewhere around 38 miles.

Q. How old are you?

A. Twenty-four.

Q. What kind of work do you do?

A. Carpenters work.

Q. Where are you working now?

page 983 } A. At Oxford, Ohio.

Q. Are you a member of any union?

A. Local 646, A. F. of L., Paintsville, Kentucky.

Q. In July, 1949, were you working for Laburnum Construction Corporation?

A. I was.

Q. Breathitt County.

I call your attention now to the week which began July 25, 1949. Before that Monday, had you got word, as a member of your union, that the United Construction Workers were coming to run you off the job?

A. I heard rumors of it.

Q. Were you working at the job site on Monday, July 25?

A. I was.

Q. In what part of it were you working?

A. I was working on the third floor.

The Court: Working where?

The Witness: Third floor.

By Mr. Robertson:

Q. Of the tipple?

A. Of the tipple.

Q. How high is that off the ground?

A. I guess it was around 50, maybe 60 feet.

Q. Did anything happen there to stop your work that Monday?

page 984 } A. No, sir.

Q. Then did you go back to work there the next day, Tuesday?

A. I did.

Q. Were you still working up on the third floor of the tipple?

A. Yes, sir.

*Chester Trimble.*

Q. Was the tipple running?

A. Yes, it was.

Q. Would the coal come in higher up than where you were working, or even with you, or lower than you?

A. It came in on the side of the tipple down the hill, on the bucket line.

Q. What was the first thing unusual, if anything, that happened there that Tuesday when you were working there on the tipple?

A. Nothing happened while I was working on the tipple. It was while we were eating dinner.

Q. What happened then?

A. I was sitting in the tool shack eating dinner, and I didn't hear anybody say anything about anybody coming. I looked up and the door was crammed full. They were crowding in pretty fast.

Q. Then what happened?

A. Mr. Hart came in, and he talked to Jack  
page 985 } Patrick. He said he had come over there to take  
the job over. Jack didn't say too much to him.  
He told him that Bert Preston was our Business Agent, and he  
was over there.

The Court: Don't talk quite so fast, Mr. Trimble.

The Witness: He told him to see Bert Preston; that he was representing us as our Business Agent, and to do his talking to him.

Bert came in there then, and Bert asked him what right he had to do that. He said he had the laborers signed up. Bert said, "That doesn't have anything to do with us, then," and asked him to see some of the cards.

He wouldn't show him none of the cards where he had them signed up. Bert asked, "Have they took their obligation?" And he said, "No."

He also went ahead to say that, by God, we were doing their work, and they were going to have it.

Bert said, "Well, we can't do that. We have got a contract." He said, "We have got to stand up with it."

He said, "You ain't going to work unless you sign up."

Bert said, "What are you going to do to keep us from working?"

He said, "I am going to stop the job."

Bert said, "How?"

He said, "I will put up a picket line."

*Chester Trimble.*

Bert said, "A picket line, according to law, we page 986 } can't cross it."

He said, "I will send a man over there at the foot of the stairs."

Bert said, "By God, we will go by him. He doesn't mean nothing standing there."

So he wrote out a picket sign and took it over there and hung it up. Bill Haslam made him take it down. He went ahead to say that he would take it over to the road and they didn't want to have to come back the next day and walk it.

Bert said, "We will work, sure as hell."

He said, "You go to work, and within two hours I will have 300 men from Beaver Creek, and we will kick your ass out of the holler."

By Mr. Robertson:

Q. During that episode there in the tool house, did you hear any conversation between Hart and a man named Arnett?

A. Yes, I did. John Arnett was in there, and he said, "Hart, you told these boys a god damned lie. You can't back up a god damned word of what you said."

Bert got hold of John and said, "John, I will do the talking. That is my job."

Me and my father, we went over and put our page 987 } arm around John and sort of got things quieted down. It looked like there might be trouble start any time. The boys were moving around a little bit and pulling there shirts for some reason or another, putting their hands in their pockets, and this, that, and the other. It don't look too damned healthy for a while.

Q. You weren't scared, were you?

A. I don't know whether I would be scared or not, but I like to live, the same as anybody else.

Q. Did you go back to work any more that day?

A. No, sir.

Q. Why?

A. By God, they said not to. They said to be damned sure we didn't.

Q. Were you scared to go back to work?

A. Well, to be honest, sir, yes, I was. I mean, I wanted to live, as I said before.

Q. Did you go to the union meeting that night at Paintsville?

A. Yes, sir.

Q. We have been all over that, so I won't go over that again.

*Chester Trimble.*

Did you go back out to the job Wednesday morning, the 27th?

A. Yes, sir, I did.

page 988 } Q. Did you meet with the other people and go, or go by yourself?

A. No, we all got together in Salyersville, a filling station over there.

Q. What did you do that for?

A. We figured it would give us a little better chance. The roads in there are out in the woods. They had just been built. We figured that in case of any trouble, it might give us a little bit more chance.

Q. When you got over to the job site, where did you go?

A. I stopped over at the office.

Q. What happened there?

A. There was a picket sign standing down there where they said it would, and said not to cross it. I didn't cross it. I stayed on this side of it.

Mr. Bryan, he went down and picked it up, and what he did with it, I don't know. I think he threw it over the hill, to the best of my memory.

He walked on over and was wanting us to go on to work. He was persuading pretty hard like. We tried to tell him he didn't know what he was talking about; that he was from Richmond and we were from down there, and we knew how them fellows done things down there.

Some of the boys went on over to the job with him, to the tool shack. I stood around a while and then  
page 989 } moseyed on over, too. We were all in the shack there, and he kept on wanting us to go to work, and begging us to go to work. He said if that was up in Richmond, they would run them damned fellows off there. They wouldn't come off their work at all for them.

I know personally I told Mr. Bryan "this ain't in Richmond. This is in Breathitt County, and these fellows down here don't run very damned good. There is a hell of a lot more of them than there are of us."

The Court: Did you hear that?

The Witness: I said, personally I told Mr. Bryan—you heard the part I told him, he was from Richmond. He said, "If it was in Richmond, the local up here would pay no attention to that." I said, "Mr. Bryan, this ain't in Richmond. This is in Breathitt County, and they have got us outnumbered a great deal." I said, "We can't even think about going back to work."

*Chester Trimble.*

By Mr. Robertson:

Q. Did you hear Jack Patrick ever say anything there that day about whether you would go back to work or not?

A. Yes. He was the steward on the job. He told Mr. Bryan it looked too dangerous for him, and as the steward he wouldn't insist and didn't want none of the men to go back to work for fear some of them would be hurt.

Q. Were you scared to go back to work?

page 990 } A. I didn't go back to work, sir.

Q. Why?

A. I guess you would say I was scared.

Q. Have you ever been back to work over there since then?

A. No, sir, I never have.

Q. Why?

A. After they lost their contract, and they took the job over, I just never did go back, sir.

Q. What is the reputation, if you know, of the United Construction Workers about running people off jobs in Eastern Kentucky, A. F. of L. men?

Colonel Harris: Same objection, and exception, to this line of questioning.

The Court: The same ruling.

The Witness: The A. F. of L. men?

By Mr. Robertson:

Q. Yes.

A. It has been pretty hard. I know of two jobs they took them from the A. F. of L.

Q. What two jobs were those?

A. That was the United Steel coal tippie at Lynch, Kentucky, and I think it was the Greenbrier Company over where they built the Dewey Dam. They were moving a graveyard over there, and they took a job over there.

page 991 } Q. Did you ever see Hart any after that date?

A. Yes, I saw him in Prestonsburg once after that.

Q. Did you have any talk with him?

A. I talked a few words with him. I went up there to look at a truck?

Q. What did he have to say then?

A. Oh, he was sort of talking about that job over there. He said we should have went in with him. He went far enough to say, "You boys used your heads when you didn't

*Chester Trimble.*

go to work over there that morning, because," he said, "I had men spotted all around that tippie." He said, "I had a bunch below it and a bunch above it.

Mr. Robertson: The witness is with you.

CROSS EXAMINATION.

By Colonel Harris:

Q. Where did you say you were born?

A. Paintsville, Kentucky.

Q. Were you raised out there in Paintsville, Kentucky?

A. I was raised partly in Paintsville and most of the time in Barnett's Creek. After I was about 6 years old, I was raised in Barnett's Creek.

Q. Have you spent all your life, practically, in Kentucky, up until the time of this Laburnum job?

A. The bigger part of it, sir.

Q. And you tell the jury that you, a Kentuckian, born and raised out there, were scared?

A. Sir, when a man damn right tells you not to do something, you better not do it.

Q. Was there anybody hurt out there on that occasion?

A. You mean on the job?

Q. Yes.

A. No, sir; as I know of, there was no one hurt.

Q. Was anybody hit?

A. As I know of, there was no one hit,—

Mr. Robertson: Let him finish.

Go ahead.

The Witness: —but they would have been.

Colonel Harris: Will Your Honor exclude that statement? I asked him if anybody was hit, and he said, "No, but they would have been."

The Witness: I said they could have been.

The Court: Let him finish his statement, and then make your motion.

Colonel Harris: Had you finished?

The Witness: I said there could have been; it would have went far enough to call their hand and done what they ordered us not to.

*Chester Trimble.*

Colonel Harris: We move to exclude that statement.

Mr. Robertson: I think it is relevant, Your Honor, to show whether they were just making out like they were page 993 { scared when they weren't, or whether they were actually afraid to go in there. They have made it very obvious that they are going to claim they weren't scared, but they didn't want to cross the picket line.

The Court: The Court will allow it for what it is worth.

Colonel Harris: We reserve an exception.

By Colonel Harris:

Q. In your judgment, there were about 150 of these men, weren't there?

A. There was a pretty good bunch of us.

Q. My question was: In your judgment, there were about 150 of these men?

A. I didn't count them, sir, but there still was a pretty good bunch of them.

Q. Will you tell me what your judgment was as to whether there was 150 of them?

A. There was a way up towards 100—there was, I would say roughly, just looking the crowd over, that there was in the number of 150.

Q. Did this 150 men divide up after you saw them, or did the 150 stick together?

A. What do you mean, sir? When they left the job, or—

Q. No, as between the schoolhouse and the tippie and the office.

page 994 { A. When they came there, I was in the tool shack eating dinner, and they were all out there when I walked out of the toolhouse after the talking had done been done. They were scattered around there.

Q. Did you see a group of them go into the toolhouse?

A. I was in there when they came in there, sir.

Q. Did you stay in there, or did you leave?

A. I stayed in there until well after he started to put up the picket line. When all the talking was done and he started to put up the picket line, I came on out.

Q. John Arnett started the rough talk in the toolhouse, didn't he?

A. That is right.

Q. He called Mr. Hart—he said, "You are just a God damned liar," didn't he?

A. He sure did, sir.

*Chester Trimble.*

Q. Is that fighting talk out in Kentucky?

A. Well, it could be,—

Mr. Robertson: Let him finish. Wait a minute.

The Witness: —but he didn't say that until after Hart said we were doing their God damned work and they were going to have it. That is pretty hard talk, too.

By Colonel Harris:

Q. Did anybody, either Mr. Hart himself or any of these men who were with him, offer to hit Arnett, to  
page 995 } mistreat him physically in any way, when he used that language to Mr. Hart?

A. There wasn't none of them hit him, sir, but there were several of them went in their pockets and were fumbling around their shirts, and Bert got him quieted down, I think, myself, just in time.

Q. You think Arnett would have brought on some sort of trouble if your Business Agent hadn't stopped him?

A. I don't think Arnett would. I think the United Construction men would.

Q. They didn't do anything, did they?

A. No, they didn't do anything, but I think they were in the notions of doing something.

Q. You think that with 15 or 20 men there in the toolhouse, the mere fact that Mr. Preston touches one of the A. F. of L. men on the arm and says, "Let me do the talking," you think that kept any trouble down right there?

A. Well, it kept trouble down, yes. I think if John Arnett had went ahead and talked too much, it would have started. He got stopped so quick that they didn't hardly get their morale up in time, that is all.

Q. But there wasn't any doubt in his saying what he did loud enough for everybody in that toolhouse to hear, was there?

A. There was a lot of noise going on in there,  
page 996 } sir. Everybody was talking like they usually do, and I know a number of them heard it.

Q. What was said about a picket sign or a picket line there in the toolhouse?

A. The only thing—he told him the only thing we would possibly recognize would be a legal picket line, according to the laws of the Brotherhood.

Q. He used the word "legal," and "according to the laws of the Brotherhood"?

*Chester Trimble.*

A. The law of the picket line, that is.

Q. You said just a minute ago—

A. Not just a man standing up there, but one stuck in the ground.

Q. You said a moment ago that he said "one that was legal according to the laws of the union," didn't you?

A. Of the union, all unions, that is right.

Q. You heard Bert Preston say that in the toolhouse?

A. In words to that effect, I sure did. I don't know whether he worded it just like that, but he meant that would be the only possible way that we could quit.

Colonel Harris: We move to exclude the statement, "but he meant that would be the only possible way we could," as not responsive to my question.

Mr. Robertson: I think it is responsive.

The Court: I will grant the motion. The page 997 } motion is sustained.

Gentlemen, disregard that last statement of the witness.

By Colonel Harris:

Q. Are you still a member of the union?

A. 646?

Q. Yes.

A. Yes, sir.

Q. How long has it been since you went to a union meeting down there?

A. It has been the first of this month. We just have a meeting once a month.

Q. I thought you were living somewhere out in Ohio.

A. My home is down there, sir. I come back every other week end. It is only a little bit over 200 miles.

Q. How many meetings have you attended down there, of Local 646 in Paintsville, during the past 12 months?

A. I guess I have attended the most of them.

Q. How many would be?

A. That would be 12. We have one each month.

Q. At how many of those meetings have you A. F. of L. members discussed what happened over at the Laburnum Construction Company's job site?

A. I couldn't tell you just the number of them, sir. It has been talked in one or two meetings, and maybe it page 998 } would miss one or two, and then maybe be brought up again. Just how many times it was ever named in the hall, I couldn't tell you.

*Chester Trimble.*

Q. But that has been one of the chief topics of discussion in your union for over a year, hasn't it?

A. No, sir, not altogether.

Mr. Robertson: Let him finish, please. He hadn't finished.

The Witness: It often has been brought up in the hall, but it never went into great discussion or anything like that.

page 999 } By Colonel Harris:

Q. Will you name some subject outside of the regular routine matters that have to come up in a union meeting, will you name some other subject—

A. You mean that has to come up in some or does come up in ours?

Q. Your union has a regular system of transacting its business?

A. That is right. You see, we have—go ahead and ask your question.

Q. I am not talking about the regular system where you start at the top and come down with your program, but will you name any other subject that has been talked as much in your union during the past 12 months—

A. As that has?

Q. Yes.

A. We have a very small union, sir, and we don't have a great deal of business. That is the reason we have only one meeting a month. About the only thing that we discuss in our union—we don't have too many jobs down there, in fact we haven't got a contract now. We have the regular routine that you go through and new members, if there are any, and paying the bills, and if anybody knows of anyone's getting work, and that is about all we have at the union meetings. We don't

have too many carpenters and we don't have any  
page 1000 } contracts at the present.

Q. My question was, do you know of any subject that has been discussed as much in those union meetings as this—

A. Yes, sir, either of them I named has been talked as much as that, because that hasn't been talked a great deal in the past year.

Q. Did you hear Mr. Hart on this occasion on the 26th of July say anything about carpenter helpers and laborers?

A. You mean them having them signed up?

Q. Yes.

*Chester Trimble.*

A. He said he had them signed up, yes, sir.

Q. You heard that yourself?

A. I heard that he said it.

Q. Was that said in the toolhouse?

A. That was said in the toolhouse. Our business agent asked him to see the cards and he wouldn't show them to him and he asked if they had taken the obligation and he said no, sir, they hadn't taken the obligation yet.

Mr. Robertson: Let him finish, please, Mr. Harris.

The Witness: That is all I had to say.

By Colonel Harris:

Q. Had you really finished that time?

A. Yes, sir.

Q. All right. That was close enough to where there was no chance for you to misunderstand what was said?  
page 1001 } A. That is right.

Colonel Harris: That is all.

#### RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. When Hart and his men came there on July 26 did they have the A. F. of L. men outnumbered?

A. I would say, sir, at least three or four to one.

\* \* \* \*

#### RE-CROSS EXAMINATION.

By Colonel Harris:

Q. You testified on direct examination that you knew that United Construction Workers ran men off the job at United Steel. Were you working at United Steel?

A. I wasn't working up there, sir, but the Hazard local—not the Hazard. It was the Harlan Local had the contract with the company. I think out of Chicago. I think that is where the company was from that was building the tipple. We had the second order for furnishing men for the tipple after the closest local furnished their men. We were the next closest. I know that is what happened to the job. I wasn't on the job, but I was up there.

*Chester Trimble.*

Q. You were not on the steel job at all?

A. I wasn't on it at all, sir.

page 1002 } Q. You say you were up there. Where do you mean?

A. I was up at the tippie site, not at the time it happened, but a very few days before, and the United Construction Company, I will go far enough to say this, had three or four men, I imagine they were big orders, and they were talking about the job and this was after the A. F. of L. had already signed the contract, and there was one big guy, Pedrouli, or something like that, said it didn't make a God-damned what they done in Chicago, that they were taking that job. I heard that. I heard it myself.

Q. You heard that out at Inland-Steel?

A. Right on the tippie site, sir, at United Steel.

Q. Did you happen to be present and hear some other organizers say something at the Greenbriar job?

A. No, sir; I didn't.

Q. All of this testimony that you have given about the Greenbriar job was stuff that you heard afterwards, wasn't it?

A. It was in the papers, sir, so I figure it was more or less true. I know one guy up here was working on the job, a carpenter.

Q. You got your information out of newspapers?

A. The biggest part of it I heard, but I know it was true. I know they quit work all at once.

Colonel Harris: We move to strike all of the page 1003 } testimony of this witness as to anybody being run off the job at Greenbrier for the reason that his testimony now shows that all of his knowledge is hearsay.

Mr. Robertson: It is common knowledge all out through the mountains there. It is admissible as evidence for what it is worth to show that this episode on the Breathitt County was just part of the general pattern that they follow throughout eastern Kentucky.

The Court: The motion is overruled.

Colonel Harris: We reserve an exception.

\* \* \* \* \*

### RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. When Hart was there on the 26th did you see his men do anything to any of the laborers to make them sign up?

*Chester Trimble.*

A. There would be two or three of them gang around with a pencil, just push it right in their hand and say, "Sign this or you won't work another day on this job." One of them asked me myself to sign up and I said, "I am a carpenter, I belong to the A. F. of L., I can't sign up."

He said, "You will sign up if you work any more."

That was some of Hart's associates, I figure, maybe next to him. I don't know.

Q. Did you ever see Hart after that date?

page 1004 } A. Yes, sir.

Q. Did you have any talk with him?

A. I saw him at Prestonsburg. I had a few words with him.

Q. I believe I covered that.

When you were in the toolhouse there and the men were shuffling around and reaching in their shirts, show us how they were doing it.

A. Some of them were just doing their shirt like that and some of them were putting their hands in their pockets, and just holding them in there sort of doing like that. I figured they were opening a knife. That is usually what they do. I have seen a lot of that done down there.

Mr. Robertson: I have no other questions.

The Court: Further questions, Colonel Harris?

### RE-CROSS EXAMINATION.

By Colonel Harris:

Q. You figured they were opening a knife in their pocket, although you couldn't see any knives?

A. I couldn't see, Mister, but I have lived down there. I was raised down there and I know how it goes.

Colonel Harris: That is all.

The Court: All right, stand aside.

The Witness: I didn't have that answer finished, Your Honor.

The Court: All right, have a seat.

page 1005 } The Witness: As I say, I was raised down there. I have saw knives come out of men's pockets already opened, and they were found to have opened them before they took them out.

The Court: Did you see any knives on this occasion?

*Paris Trimble.*

A. Outside of the shack. As I remember, there were no knives in anybody's hands in the shack, although there could have been and I didn't see it because it was pretty well full. Outside on the ground most of them had knives open whittling and this, that and the other.

The Court: Any further questions?

RE-CROSS EXAMINATION.

By Colonel Harris:

Q. You didn't see any man with a knife make a pass at anybody else with the knife, did you?

A. How do you mean that, sir?

Q. Make a slash at anybody with a knife.

A. No, sir. If they had they would have hit him, Mister.

. . . . .

page 1006 }

. . . . .

PARIS TRIMBLE

called as a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Trimble, is your name Paris Trimble?

A. That is right.

Q. How old are you, Mr. Trimble?

A. I am 59.

Q. 59?

A. Yes, sir.

Q. Where do you live?

A. I live in Johnson County, Kentucky.

. . . . .

Q. Are you a member of the A. F. of L. Local 646, Paintsville, Kentucky?

A. Yes, sir.

*Paris Trimble.*

Q. On July 26, 1949, were you working for the Laburnum Construction Corporation at Paintsville, Kentucky?

A. No, sir; not at Paintsville I wasn't working.

Q. I meant in Breathitt County Kentucky.

page 1007 } A. Yes, sir.

\* \* \* \* \*

Q. Were you in the toolhouse out on the job site on Tuesday morning, July 26 when Hart and his men came in there?

A. I went in the toolhouse after Hart come.

Q. What happened in the toolhouse while you were in there?

A. Johnny T. Arnett and Hart were having a discussion.

Q. What did they say to each other as far as you heard?

A. Johnny T. Arnett called Hart a God-damned liar and said he couldn't prove nothing that he had promised his men.

Q. Then what happened when he called him a God-damned liar?

A. Me and Bert Preston began to try to get him quieted down.

Q. Did you succeed?

A. Yes, sir.

Q. You don't look very big to me, and you are not young. How did you happen to stay in there and be trying to quieten him down?

A. I had some good friends in there and I had  
page 1008 } my son in there. I thought if trouble might occur I might be of some assistance.

Q. Were you an officer of the union at that time?

A. I was vice president.

Q. Did you go back out to the job site the next day, which would have been Wednesday morning?

A. Yes, sir.

Q. Did you meet with the other members of the union to go or did you go by yourself?

A. We met in a group and went together.

Q. Where did you meet?

A. At Salvorsville.

Q. Why did you meet to go together?

A. We didn't feel safe going alone.

Q. When you got out there to the job site did you see Mr. Bryan do anything?

A. Yes, sir.

Q. What did you see him do?

*Paris Trimble.*

A. I seen him get out of the car and walk down and pick a sign up which was setting on the right of the road up on some rocks.

Q. What did he do with it?

A. He threw it over in the weeds.

Q. Then what happened?

A. He come walking back up the hill.

page 1009 } Q. That didn't surprise you any, did it?

A. It certainly did. It surprised me.

Q. Why did it surprise you?

A. I didn't expect to see him walk back.

Q. Why?

A. Well, I knew the reputation around that country and the leaves were green everywhere.

Q. What do you mean by that?

Q. They had plenty of place to hide.

Q. Did you go to work that day?

A. No, sir.

Q. You haven't been back to work out there since?

A. No, sir.

Q. After Mr. Bryan pulled down the picket sign did you go down near the tippie?

A. Yes, sir; I went over to the tippie.

Q. Did you see anybody over there around the tippie?

A. Yes, sir.

Q. Who were they?

A. We had some men around there, and then Henry Starr was there, and a few of us carpenters were around.

Q. Did you see any people there who identified themselves as being from the United Construction Workers?

A. I don't believe I seen anybody identified themselves to me, that said they were United Construction Workers.

Q. Where were they?

page 1010 } A. I went out and saw a man who was sitting on some kind of big crate and I sat down by the side of him and talked to him a few words.

Q. What was the subject of your conversation with him?

A. He asked me if we were going to try to work, and I told him I didn't think so, or some words like that.

Q. What did he say to that?

A. He says, "If you men works, there will be plenty of men here in a little bit and they will come rough."

Q. Did he say how many would be there?

A. I don't know whether he said the number or not. I don't recall it.

*Paris Trimble.*

Q. Did he make any mention of Mr. Bryan there?

A. Yes, sir.

Q. What did he say about him?

A. He said "if that fellow out yonder with the straw hat on and if that big-bellied son-of-a-bitch comes out here he will be picked out of that pond here and he won't walk out."

Q. Did they call Mr. Bryan a little squirt with a straw hat on?

Colonel Harris: Objected to as leading.

page 1011 } By Mr. Robertson:

Q. State whether or not he called Mr. Bryan anything.

A. He said, "The fellow with the straw hat on."

Q. Who is the fellow he referred to as that big-bellied son-of-a-bitch?

A. That was Delinger.

Mr. Robertson: The witness is with you.

#### CROSS EXAMINATION.

By Colonel Harris:

Q. How many men would you say were with Mr. Hart?

A. Sir?

Q. How many men would you say were with Mr. Hart?

A. I would say we were outnumbered from three to five.

Q. My question was, how many men would you say were with Mr. Hart.

A. Sixty to 75.

Q. Did you say 60 or 75?

A. Somewhere in that neighborhood, sir.

Q. When you went in the toolhouse I will ask you if this did not happen: Hart said to Bert, and by Bert I mean Bert Preston, "You will not have any more work," and Bert said, "We will as sure as hell work if you don't put on a picket." Do you recall hearing that?

A. Yes, sir.

Q. And Hart said, "We will sure put on a picket," and he got a piece of cardboard and wrote a picket sign out and told one of the boys to start carrying.

A. Yes, sir.

Q. And that is the way it happened?

. . . . .

*Paris Trimble.*

The Witness: Yes, sir; that is the way it happened.

Colonel Harris: That is all.

The Witness: As I recall it.

Mr. Robertson: If Your Honor please, they examined this witness from his deposition in Paintsville and therefore I ask that I be permitted to read it to the jury. He was reading from it there, page 83. He just called my attention to it. You can't just pick out one piece out of its context.

Mr. Mullen: He just got some information to ask a question. He didn't ask him if he hadn't testified so and so.

Mr. Robertson: Yes, he did.

page 1013 } Mr. Mullen: He didn't ask him did you testify so and so. Had he done that you could have put it in but he didn't do it.

Mr. Robertson: I don't care whether he did it or not, he has examined this witness from his deposition in Paintsville, Kentucky and he cannot deny it and I am entitled in fairness to this witness and in fairness to this Plaintiff to read the whole thing to the jury to see whether or not this witness is consistent or inconsistent. They have opened it by using it for their purpose. They having brought it in, I am entitled to use it.

Mr. Mullen: There was no reference to it, Your Honor. He didn't say did you testify so and so in a deposition.

Mr. Robertson: He did. I asked him what page and he said page 83.

Mr. Mullen: You asked where he got the information from. But he didn't ask him "Did you testify so and so."

The Court: The objection is sustained.

Mr. Robertson: The objection is sustained?

The Court: The objection is sustained.

Mr. Robertson: Exception for the reasons stated.

You may stand aside, Mr. Trimble.

(Witness excused.)

page 1014 } Mr. Robertson: Mr. Monroe F. Sublett.

Whereupon,

MONROE F. SUBLETT

a witness called for Plaintiff, having been first duly sworn,  
was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Sublett, your name is Monroe F. Sublett?

A. Yes, sir.

Q. Where do you live?

A. Paintsville.

Q. How old are you?

A. 53 years old.

Q. What kind of work do you do?

A. Carpenter work.

Q. Are you a member of the Paintsville Local 646, A. F.  
of L.?

A. Yes, sir.

Q. How long have you been a member of that union?

A. Nine years.

Q. In July, 1949, were you any sort of officer in the union?

A. Yes, sir.

Q. What office did you hold?

A. President of the local.

page 1015 } Q. I think I can skip a lot of this.

Were you working for the Laburnum Construction Corporation at its Breathitt County job on the week that began July 25, 1949?

A. Yes, sir.

Q. Take Monday of that week, where were you working?

A. Up at the head house at the top of the hill, the strip mine.

. . . . .

Q. Did you put in a full day's work that day, that Monday, July 25, up at the top of the hill?

A. Yes, sir.

Q. Then on the next day, Tuesday, July 26, did you go back to work?

A. Yes, sir.

Q. On that day were you working up on top of the hill or down at the tippie?

A. Working at the same place.

Q. Did anything unusual happen that day?

*Monroe F. Sublett.*

A. We were up there working and I heard that the United Construction were coming, and along about 12 o'clock in the day I seen some cars come across by the office at the foot of the hill, while we were off for dinner. It  
page 1016 } wasn't but a little bit until Miller, I believe it was, was high line man up at the telephone, and he said the men are down there. But we worked all day that day and they never did come down to where we were.

Q. When you got the message that they were down there did you go down to the tippie?

A. No, sir.

Q. Why?

A. I was employed at the top of the hill.

Q. Then, take Wednesday, July-27. Did you go back out to the job site to work that day?

A. We went back.

Q. Before I come to that, did you attend the meeting of the Paintsville Union on Tuesday night?

A. Yes, sir.

Q. We have been all over that so I won't go into that again.

Then the next day, Wednesday morning, did you go back out to the job site by yourself or how did you go?

A. We went in a group.

Q. Where did you meet?

A. We met over there at Salyersville.

Q. Why did you go in a group?

A. Some of them thought it was best that we all go together.

page 1017 } Q. When you got over to the job site did you see Mr. Bryan there?

A. Yes, sir; Mr. Bryan was there.

Q. What happened?

A. He wanted to know how many were going to work, and the boys didn't talk much. We hadn't much more than got there until the truck rolled up with some men in it. We sat around there a little bit and directly a fellow approached me with a card. I never taken his card and looked at it. He said his name was Robinson. He said he was representing the United Construction as their business agent out of Pikeville. He said, "Are you fellows going to work, are you going to recognize our picket line?"

I said, "Where is your picket line?"

He said, "Right down there."

I said "Whereabouts right down there?"

He looked and he never could see no card up. There was

*Monroe F. Sublett.*

nobody walking the picket line down there but there was a man standing down just across the road from where the picket had been, up kinda on the edge of the other road, that turns down across the creek.

Q. Then what happened?

A. We fooled around there a while and I went over to the tippie directly. Some of the boys had already gone over.

When we got over there I fooled around there a  
page 1018 } little bit and then I got with Jack Patrick and  
we went up through the tippie. Mr. Delinger  
came up there, Laburnum's superintendent. We all got together and decided we would cease for a day or two and see if it wouldn't die down. We all went home.

Q. Were you scared to go to work that day?

A. Well, we didn't go to work.

Q. Why didn't you go to work?

A. We didn't because we thought it was the best not to go to work.

Q. Why did you think it was best no to go to work?

A. If you had been in these places you would soon find out down in that part of the country.

Q. When you went down near the tippie did you see any spotters down there for United Construction Workers?

A. I seen two men sitting over on a pile of lumber, and I passed out and I just don't recall who it was who said there is two spotters. You had better be careful. I went on out toward the saw filing shack apiece. I believe I went around into the saw filing shack that morning. We went back up in the tippie and Mr. Delinger came back up where we were, and we decided to call it off that day and not work.

Q. Did you have any conversation at any time with the two men who were sitting down there?

A. No, sir.

page 1019 } Q. Why?

A. I thought that was their business what they were doing there.

The Court: I didn't hear you. What was the answer to that question?

The Witness: I did not have any conversation with the two men sitting on the lumber pile.

By Mr. Robertson:

Q. After that Wednesday did you see Hart at all after that?

*Monroe F. Sublett.*

A. Anywhere?

Q. Yes, sir.

A. The next time I seen Hart was over at Paintsville.

Q. About when was that?

A. I believe it was the next day. I wouldn't be positive just what date it was. I never made no memorandum of it.

Q. Did you have any conversation with him there in Paintsville?

A. Not at that time, I didn't.

Q. Did you hear him say anything to anybody?

A. No, sir; I didn't.

Q. You just saw him on the street?

A. I seen him right in front of the Howard Hotel.

Q. But you didn't hear any conversation?

page 1020 } A. No, sir.

Q. Have you had any conversation with him at all since you left from the job site?

A. Yes, sir; I have talked some with him since then.

Q. About when was that, on one occasion or more than one occasion?

A. Oh, I have talked with him two or three times since then.

Q. Take the first time after you left the job site, what was your conversation with him, if you recall?

A. He came over there. We had a little case in court there and he came through the courthouse and said "How are you doing?" We said we just don't know yet until it is finished up.

Q. Have you had any conversation with him about the Breathitt County job?

A. No, sir. He sent me word that he wanted to see me, that he wanted me to give him a statement. I told him, the man who told me, "I think the next statement I make will be in court, wherever it will be."

Q. Did you give your deposition at Paintsville, Kentucky, last August?

A. Yes, sir.

Q. Do you know what the reputation of the United Mine Construction Workers is for being law abiding  
page 1021 } or otherwise in dealing with A. F. of L. people on jobs in Kentucky?

Colonel Harris: Same objection and exception that we made to that question before, Your Honor.

The Court: Same ruling. You may answer the question.

*Monroe F. Sublett.*

The Witness: Answer the question? Well, according to the papers of other jobs and especially one that I went over to Lynch—When we went over there and I went out and talked to the steward of the job, it looked to me like about 12 or 15 men standing up by the fire. I had started back out and got just down from where they were working into the edge of the street next to where we had parked the car, and there was a great big man walked down, I forget what he said his name was, and he said, "What is your fellows' business over here?"

I said "I guess I have already seen the men out in the street."

He said "If you have come over here to see this job we are going to do this job. We don't give a God-damn what they do in Chicago, we are going to take this job and raise our banner over it. If you fellows have any business you better be going."

By Mr. Robertson:

Q. Did you stay or go?

A. We left, after we talked with him two or  
page 1022 } three minutes, then we started on home.

Q. Have you been back since?

A. No, sir.

Q. Have you been back out to the job site in Breathitt County since you last worked out there?

A. I went back and got my tools.

Q. When was that?

A. I believe it was about a week later, maybe ten days. I wouldn't say positively. I don't have any—

Q. Have you been back any since you got the tools.

A. No, sir.

Q. Why?

A. I didn't have any business over there.

Q. Do you know a man named Lonnie Dixon?

A. Yes, sir.

Q. Do you call him that when you talk to him?

A. We call him Lonnie.

Q. Did you ever have any talk with Mr. Delinger, the Laburnum superintendent, about signing up laborers on the Laburnum job?

A. Not exactly with Mr. Delinger, I didn't, as I remember of, just what was said. I have talked with Mr. Delinger once or twice up on top of the hill after I went back up on top of the hill.

*Lonnie Dixon.*

Q. Whatever you have had to do about signing up any laborers on the Laburnum job, will you tell what it was?

A. I was president of the local, I guess at the time you are speaking about, but we had a business agent to take care of our business over there. I think he was a man from Paintsville by the name of Robert Poe who had the papers going around and seeing if they wanted to sign up with the A. F. of L.

page 1024 }

LONNIE DIXON

a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Dixon, your name is Lonnie Dixon?

A. Yes, sir.

Q. How old are you?

A. Forty-four.

Q. Where do you live?

A. I live at Paintsville, Johnson County.

page 1025 } Q. Do you live in Paintsville?

A. No, sir, about six miles out.

Q. Is that up a hollow?

A. Yes.

Q. What is the name of that hollow?

A. Whippoorwill.

Q. Is it pretty dark up there at night?

A. Yes, at night it is.

Q. If people come up there and holler as they are coming, can you hear them at your house?

A. How is that?

Q. If people holler as they come up the creek, can you hear them at your house?

A. If they come up the creek could I hear them at my house?

Q. If they holler.

*Lonnie Dixon.*

A. If they holler at me, and if I am there, yes sir. (Laughter.)

The Court: Let's move along, gentlemen.

By Mr. Robertson:

Q. Mr. Dixon, what kind of work do you do?

A. Well, I am a miner right now.

Q. Do you own your own mine, where you dig the coal and truck it out yourself?

A. Not at the time I don't.

page 1026 } Q. You are not doing that now?

A. No, sir, not now.

Q. What kind of work were you doing in July, 1949?

A. I was a carpenter.

Q. Were you working for the Laburnum Construction Corporation in Breathitt County at that time?

A. Yes, sir.

Q. I am referring now to the week which began Monday, July 25, 1949. Did you work out there that week?

A. July 25? Yes, I was out there.

Q. Were you there the day that Hart and the group of men came to the job site?

A. Yes, sir.

Q. Where were you working?

A. I was on the tippie.

Q. Then how many men would you estimate came with Hart?

A. They must have been fifty or seventy-five. I don't know how many. There was a big crowd of men.

Q. Did they have the A. F. of L. men outnumbered?

A. Oh, yes, more men than the A. F. of L., yes, sir.

Q. Were you in the toolhouse there when Hart went in there and had a talk with various people?

A. I was in there as he came in. I ate my dinner in there and came out as he was going in.

page 1027 } Q. So you were not in there after he got in the toolhouse.

A. No, I thought it was about work time, and I came right out to go to work. I had eaten my dinner. As I came out Hart was coming in, and a bunch of men with him. He was talking to Jack there. He stopped and talked to Jack Patrick and asked where the business agent was. Old man Preston was coming through, and I said, "Mr. Preston, they want you up there." He came on up and I came on out.

BLEED THROUGH

BLURRED COPY

*Lonnie Dixon.*

Q. Did you go back to work that afternoon?

A. No, sir, I didn't.

Q. Why?

A. They threw a picket line up.

Q. Were you scared to go to work?

A. Well, I didn't cross the picket line.

Q. Was it on account of the picket line or on account of being scared, or both?

A. Well, we are supposed to honor a picket line. We ain't supposed to cross that line, you see.

Q. I understand that, but I want to know whether you were scared to go back to work that evening.

A. I wasn't afraid of nobody, but I would rather not went across it.

Q. Why would you prefer not to go across it?

A. I don't believe it would have been safe to run across.

Q. Why?

page 1028 } A. It would cause trouble.

Q. Did any of the United Construction Workers say anything about what would happen to you if you went back to work that afternoon?

A. No, sir, they never said nothing to me.

Q. Did you ever go back out there to work after that day?

A. No, sir, I didn't.

Q. Why?

A. It wasn't settled.

Q. Were you scared to go back?

The Court: He said it wasn't settled? Is that what you said?

The Witness: That is what I said.

By Mr. Robertson:

Q. I am asking if you were scared to go back.

A. I would rather not went back, I tell you that.

Mr. Robertson: The witness is with you.

Colonel Harris: Thank you very much. That is all.

(Witness excused.)

Mr. Robertson: Estle Robinson.

Whereupon,

ESTLE ROBINSON

a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

page 1029 } DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Robinson, your name is Estle Robinson?

A. Yes, sir.

Q. How old are you?

A. Forty-seven.

Q. Where do you live?

A. East Point, Kentucky.

Q. How far is that from Paintsville?

A. Six miles.

Q. How far is it from the Breathitt County job site of the Laburnum Construction Company?

A. Fifty-one miles.

Q. Are you a member of a union?

A. Yes, sir.

Q. What union?

A. 646.

Q. A. F. of L., Paintsville?

A. A. F. of L., carpenters union, Paintsville, Kentucky.

Q. Were you working for Laburnum in July, 1949?

A. Yes, sir.

Q. Were you working at the job site when Hart and his group came there on Tuesday, July 26?

A. I was.

Q. What part of the job were you working on?

page 1030 } A. I was working carpenter work. I was on the top of the tipple, almost to the top of the tipple, putting metal on the side.

Q. Did you eat your lunch up on the tipple or come down?

A. I eat up on the tipple.

Q. Did you work after lunch?

A. No, sir.

Q. How did you happen to stop?

A. They told us not to go back.

Q. Why didn't you go back?

A. I didn't think it was a healthy thing to do. I wanted to go back home.

Q. Did you ever go back out there to work after that day?

*Estle Robinson.*

A. No, sir.

Q. Why?

A. Well, I didn't think it was safe.

Q. After that day did you ever have any conversation with William E. Hart?

A. Yes, sir, I did.

Q. Do you remember about when it was?

A. I believe it was on Thursday following that, the 27th.

Q. Where did that conversation occur?

A. Paintsville.

Q. What was it?

A. We asked him why he run us off from over  
page 1031 } there, and he said he didn't want the carpenters  
to be in his local, but he wanted the laborers.

Q. Did he say anything about whether he would let the laborers work if they didn't all join up or not?

A. Sir?

Q. Did he say whether he would let the carpenters work if the laborers didn't join up?

A. No, he didn't say.

Q. Were you ever working up on Jennings Creek and have a conversation with him?

A. No, I wasn't.

Mr. Robertson: I have no other questions.

### CROSS EXAMINATION.

By Colonel Harris:

Q. Would you like to go back home now?

A. Sure.

Colonel Harris: You can go.

The Witness: Thank you.

(Witness excused.)

Mr. Robertson: Otto Preston.

Whereupon,

OTTO PRESTON

a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

page 1032 } By Mr. Robertson:

Q. Mr. Preston, your name is Otto Preston?

A. Yes, sir.

Q. Are you related to Mr. Bert Preston, who has testified previously?

A. Yes, sir.

Q. What kin are you to him?

A. First cousin.

Q. How old are you, Mr. Preston?

A. Fifty-one.

Q. Where do you live?

A. West Van Lear, Kentucky.

Q. How far is that from Paintsville?

A. About six miles.

Q. How far is it from the Breathitt County job site of the Laburnum Company?

A. Well, let's see. I would guess about thirty-nine miles.

Q. What kind of work do you do?

A. Carpentering.

Q. Are you a member of Paintsville Local 646, A. F. of L.?

A. Yes, sir.

Q. Were you working for Laburnum Construction Corporation during the week that commenced July 25, 1949?

A. Yes, sir.

page 1033 } Q. In Breathitt County, Kentucky?

A. Yes, sir.

Q. Were you at the job site on Tuesday, July 26, when Hart and a group of men came there?

A. Yes, sir.

Q. Where were you working on that day?

A. I was working on the ground around the tipple.

Q. Did you hear Hart say anything about whether or not he had any instructions from Tom Raney?

A. Yes, sir.

Q. What did he say about that?

A. Bert Preston asked him if he wasn't going to stop the other men on the tipple the same as he was stopping us, and he said he had called Tom Raney and had instructions not to stop them unless he further notified him so.

*Otto Preston.*

Q. Were you in the toolhouse when Hart was in there on the 26th?

A. I was in the toolhouse when Hart came in.

Q. Did you hear any conversation between Hart and Johnny Arnett?

A. Yes, sir.

Q. What was it?

A. Hart was trying to organize the laborers or the men in that section of the country, and the way he had been telling the men, he would get them a raise in their wages  
page 1034 } from what they were getting then. The conversation came on up until John Arnett told Hart that he had misrepresented the case to the men and Hart said he hadn't. John Arnett said, "You're a God damned liar."

Q. Then what happened?

A. Well, what happened didn't happen what I thought was going to happen. I thought we were all going to get killed. That is exactly what I thought, now, if you are asking for my thoughts.

The Court: He asked you what happened.

The Witness: By the time this came up I guess there were somewhere around ten or fifteen men that crowded in the little tool house that we had. We had just finished eating lunch, and I was laying on the floor. I got up off the floor as Hart came in, and sat down in the corner, right square in the corner of the toolhouse in a nail keg. I would say there were somewhere between ten or fifteen men came with Hart, with Hart in front. He stopped and talked to Jack Patrick about joining their union. Jack told him no. Also LeGrand Mayo. LeGrand Mayo showed him his card and his book, that he already belonged to a union.

By Mr. Robertson:

Q. What did Hart say to that, if anything?

A. He told him if we worked there we would have to join his union.

page 1035 } Q. Subsequent to that did you have a conversation with Hart in the Odd Fellows Hall in Paintsville?

A. You mean before that?

Q. No, after that.

A. Yes, on the street and in the hall together.

Q. State where you first met and what you did and what you talked about.

*Otto Preston.*

A. Hart came over and met some of the boys, and they sent after Bert Preston. In the meantime others of us were in front of the Howard Hotel and had walked maybe a little off down the street when Bert came in, when Bert got out of the car. I believe Chester Trimble went and got Bert.

Hart, when he first seen Bert, came over and told Bert he had come to apologize for running us out, off the job over there.

Q. What was said to that?

A. Bert said, "Do you still have your pickets up over there?" Hart said, "Yes." Bert said, "I don't have any talk for you."

Q. Did Hart say it would be all right to go on back and work without joining up with the United Construction Workers?

A. If he ever did, I never did hear it.

Q. Was that a conversation on the street or in the Odd Fellows Hall?

page 1936 } A. This conversation was on the street.

Q. Did you then go on into the Odd Fellows Hall?

A. Yes.

Q. What was the conversation up there?

A. It was more or less just a bunch of all of us talking at the same time. He gave us a list of all the different crafts and hour wage scales, which would have been higher than what we were getting, just along that line—still, I assumed, trying to get us to change our mind or something like that.

Q. Did he say you could go to work without joining up with his crowd?

A. No, sir.

Mr. Robertson: I have no other questions.

#### CROSS EXAMINATION.

By Colonel Harris:

Q. If anybody called you a God damned liar, there would have been a fight right then, wouldn't there?

A. I don't know, with me outnumbered about ten or fifteen to one. If it had just been one man, there would have been.

Q. And what you expected was a fight, wasn't it?

A. I expected shooting to start right there.

Colonel Harris: That is all.

*Otto Preston.*

RE-DIRECT EXAMINATION.

page 1037 } By Mr. Robertson:

Q. When Hart's men came up there did you see any of them drunk on Tuesday?

A. What constitutes a drunk man?

Q. I am asking you.

A. I will say that they were drunk or abnormal from something. They wasn't like myself or you or these other men in this court. You could tell; anybody could tell. You can tell a man who has had—

Q. He wasn't like this gentleman right here, was he (indicating Mr. Mullen)?

A. He doesn't look to be under the influence of whisky.

Q. Did you hear any shots?

A. Yes, sir, I did.

Q. How many?

A. There were about half a dozen, I guess.

Q. It didn't worry you any, did it?

A. No, it was up above me. It didn't worry me any there.

Mr. Robertson: I have no other questions.

RE-CROSS EXAMINATION.

By Colonel Harris:

Q. Is it at all unusual for people in Kentucky to drink liquor?

A. Unusual?

page 1038 } Q. I say, is it out of the ordinary and unusual for people in Kentucky to drink liquor?

A. Oh, I don't suppose it is out of the ordinary anywhere.

Colonel Harris: That is all.

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did you see any of Hart's crowd make any effort to sign up any of the laborers on the Laburnum job?

A. I did.

Q. What was that?

A. I watched them sign up two, and to my way of looking at it they just forced them to sign, because they just ganged around the man and just kind of pushed and shoved him

*Le Grand Mayo.*

along until he got up to, I believe maybe it was a barrel or maybe a pile of lumber or something or other, and the poor fellow was scared to death. He was shaking until he could hardly sign his name. Estle Robinson walked up to me about that time and said, "Ain't that a God damned shame?"

Mr. Robertson: I have no other questions.

## RE-CROSS EXAMINATION.

By Colonel Harris:

Q. Who was that poor trembling man?

A. The laborers there are something that I couldn't tell you his name to save my life. I wish I could.

Q. You never made any effort to find out the page 1039 } name of this man?

A. I never thought anything would ever be needed. I never had any idea that there would ever be anything like this come up over that.

. . . . .

## LE GRAND MAYO

a witness for the Plaintiff, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Mayo, your name is LeGrand Mayo?

A. Yes, sir.

Q. Where do you live?

A. Auxier, Floyd County, Kentucky.

Q. How big a town is that?

A. It is a mine camp of about 1,500 people. It is not altogether a mining camp. It has been in the past, but at the present time it is owned by individuals.

Q. How far is that from Paintsville?

A. I would say about nine miles.

Q. How far from the Laburnum job site in page 1040 } Breathitt County, Kentucky?

A. I would say sixty or sixty-five miles.

Q. How old are you?

A. I am sixty-four years old, past.

Q. What kind of work do you do?

*Le Grand Mayo.*

A. Principally carpenter work.

Q. Are you a member of Local 646 at Paintsville, an A. F. of L. union?

A. Yes, sir.

Q. Were you working for Laburnum Construction Corporation at the job site in Breathitt County, Kentucky, during the week that commenced July 25, 1949?

A. Yes, sir.

Q. Whereabouts were you working?

A. I was rated as a saw filer there. I worked in what was called the toolhouse.

Q. Was that down near the tipple?

A. Yes; that is mostly adjoining the tipple.

Q. Were you there on Tuesday, July 26, when Hart and a crowd of men came to the job site?

A. Yes, sir.

Q. Had you gotten a report as a union member that they were going to come there and run you off the job?

A. Yes, sir.

Q. What was the first you knew that Hart and  
page 1041 } his crowd were there?

A. I was just finishing lunch. I believe I was packing my lunch pail. I had just had lunch. This bunch of men came rushing in and entered the room, led by this man Hart. He introduced himself. He said he was an organizer for this work. I believe he first maybe spoke to Jack Patrick, and in their conversation he accused us of scabbing there. I just spoke up and said, "I beg to differ with you. I am not scabbing here." So I went in my pocket and got my union book and my card and also my permission to work through the Paintsville local out of our local. I handed it to him, and he examined it and handed it to me, and he said, "That is all right, but if you work here you will have to sign up with us."

Q. What did you say to that?

A. Of course I told him I wouldn't sign up with him. It didn't suit me.

Q. Were you there when Hart had a run-in with Arnett?

A. Yes, sir.

Q. What happened then?

A. I would say some five or six men first came in with Hart, and it was a small place there, with not very much room. When Arnett gave Hart the lie there, damned lie, these men, several more crowded in. There is a window right here beside that door. The door is right in the end of the shack, and

*Le Grand Mayo.*

then there is a double window there. That is  
 page 1042 } where I sawed files. They crowded up all around  
 this window here and crowded in right against  
 the building.

Q. That didn't worry you any, did it?

A. Sir?

Q. That didn't worry you any, did it?

A. Well, I felt that I was safe as long as I wasn't acrossing them. I didn't think I would have any trouble as long as I wasn't acrossing them. I tried to laugh it off with them.

Q. Did you go back to work any that afternoon?

A. No, sir.

Q. Why?

A. Well, they had ordered us not to work, and I knowed they meant what they said. I was raised in that country, and I didn't feel it safe to go back to work there.

Q. Were you scared to go back to work?

A. I really was.

Q. Did you go back to work out there the next day?

A. No, sir, I didn't go back the next day.

Q. Have you ever been back to work out there?

A. Sometime after that, maybe a month or so, I was called up by Haefner, the superintendent of that coal company, and he wanted me to come and go to work for them, and I went over and worked for them a couple or three weeks until the general coal strike came.

Q. Was that after Laburnum had left there?

page 1043 } A. Yes, sir.

Q. Did you have any conversation with Hart after that?

A. Not personally. I was in a crowd where he was having a conversation with Mr. Preston. Of course we were all interested.

Q. What was that conversation?

A. That conversation must have been on the 28th of July on the street in Paintsville, about him talking with Mr. Preston. We tried to get him to let them have the labor, if they liked to, and let us go on with our contract. He came in there and inquired of Mr. Preston. Some of the boys hunted up Mr. Preston. We were all around there together, and Mr. Hart came up, and him and Mr. Preston had a talk.

Mr. Preston, as I understand it, was the business agent for this union, the Paintsville union, and he and Mr. Hart were talking. Mr. Hart, the way I got it there—I was kind of pleased with it. I thought we were going to get to go back to

*Le Grand Mayo.*

work. He said he was kind of sorry the way things had been done over there, that he wanted to cooperate with us. The conversation just went on. I probably couldn't repeat it all. We said we would go to the hall, so we went from there to the local union hall, where they met. We talked some more up there.

Q. Did he say you could come back and go to page 1044 } work without signing up with the United Construction Workers?

A. No. He said if we went back to work over there—he asked us up in the hall just all to join up with them and go to work, and of course we didn't make that agreement.

Q. Did he say whether you could or could not go back to work over there if you didn't join up with him?

A. I wouldn't say that he just said that there, but anyway he was reading his scale of wages. He took out a paper and told us their scale and told us the viewpoints of their side of it. Bert asked him something, if he would take his picket line down, and he said, "You will have to sign up with us over there if your work over there."

Q. Did you have any talk with the laborers on the Laburnum job about the laborers getting into the A. F. of L.?

A. Yes, sir. That was on the morning previous, the same morning that Mr. Hart came in there. That was before noon.

Q. What was that conversation?

A. Those laborers came in there and asked me. They said, "You are an old union man. Why can't you help us rush this thing up and get us signed up? We understand that United Construction is coming in here, and if they do, they are liable to make us sign up with them, and we would rather belong to you all." One of them went ahead and told me he had worked a good deal at carpenter work, and he had made cabinets. He told me what all he had made. I told him if he page 1045 } was that kind of man, if he went in as apprentice and could do that kind of work, I would recommend him as a carpenter and he could advance to carpenter.

That was my first knowing of them trying to take the laborers into the A. F. of L.

Q. Where are you working now, Mr. Mayo?

A. I haven't been working since I left Breathitt County. I am right at home.

Q. On Tuesday did you hear Hart say anything about bringing anybody over from Beaver Creek?

A. Yes. In his conversation Bert asked him what he would

*Le Grand Mayo.*

do if he didn't get out or something like that. He said, "Well, we will put you out, and if it takes it, we will bring a bunch of men from Beaver Creek." In our discussion some of them said it was 300 or 400, but it is my understanding that he said 500 men.

Q. Did that make you feel better or worse?

A. I was like Mr. Preston, I knowed practically all those men. I knowed that that many men agin a small bunch of men like that, we couldn't work there.

Q. What is the general reputation of the United Construction Workers about how they take over a job?

Colonel Harris: Same objection to this whole line.

The Court: The same ruling.

The Witness: The general reputation is that  
page 1046 } when they undertake to take over a job, they  
carry it out, so I would say their reputation was  
bad.

Mr. Robertson: I have no other questions?

## CROSS EXAMINATION.

By Colonel Harris:

Q. When you were in the toolhouse Mr. Bert Preston said, "They are going to put up a picket line, and we can't cross the picket line, and we will have to wait and try to get it straightened out," didn't he?

A. I don't believe I heard it in that way. Mr. Preston did tell him if he put up a picket line that according to law we couldn't cross his picket line. He told us that.

Q. You gave a deposition in this case?

A. Yes, sir.

Mr. Robertson: What page, please?

Colonel Harris: Let me identify the time and the place.

Mr. Robertson: Identify the deposition, too.

The Court: He will tell you in just a minute, Mr. Robertson.

By Colonel Harris:

Q. You gave a deposition in this case before Mrs. Mabel Louise Porter, in the office of Meade and Johnson in the city of Paintsville, Johnson County, Kentucky, on the 18th and 19th days of August, 1950, didn't you?

page 1047 } A. Yes, sir.

. . . . .

BLEED THROUGH

BLURRED COPY

*Le Grand Mayo.*

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. . . . .

Colonel Harris: If you will let me have it I will read it for you and the lawyer over there can check me up.

I am reading on page 157, question 19:

"Question: Then on the following day, which would be Tuesday, July 26, did anything out of the ordinary happen on that day?

"Answer: Yes, sir. We worked until noontime and at noontime while we were having lunch a bunch of fellows came in there and wanted us to cease work there and there was quite a bit of argument, and the old man Preston, as I understood it, was business agent for this Paintsville local, and he and this man Hart were talking, and all the rest listening. And old man Preston told Hart we were all union men and said, "I understand that you advertise that you are for higher wages and better working conditions", and Hart said that was right. And we showed him our cards and checks, what we were getting there, and he said that was all right, and he said they were going to take that over and we would have to cease work. Old man Preston told him we had a contract there and we would have to fulfill our part of the contract, and Hart said

we couldn't, that if it took it they would take us page 1050 } by the seat of the pants and throw us out, and if that wouldn't do they would call men in from Beaver Creek and Hart said 'Come on in, boys', and I guess there were 50 or 75 fellows out there and they crowded on in and seemed to be mad, and it looked like there was going to be some trouble, and finally the old man, Preston, said 'They are going to set up a picket line and we can't cross their picket line and it looks like we will have to hold up until we get this thing straightened out and see what can be done about it.' "

By Colonel Harris:

Q. Does that refresh your recollection and is that the way you testified out there?

A. If that is in the record, that talk is bound to have happened there, but you can't testify to just the word for word having happened in a place like that among that many men where you think there is going to be trouble. I hope the jury don't take me to be that kind of man. My memory is not that good, especially when I am nervous.

*Le Grand Mayo.*

Q. Is that what you testified?

A. I would have to admit it if it is in that record.

Q. Some question has been asked, I think, about you going back out there the next day, which was Wednesday the 27th. Still helping him on account of his eyes I will read him the question.

page 1051 } Mr. Robertson: What page?

Colonel Harris: On page 159, question 30:

"Now, did you go back there the next day, which was Wednesday the 27th?

"Answer: Yes, sir."

"Question: What was the situation out there then?

"Answer: Well, they still had their picket line up, and men there with the pickets, but at that time they moved it over to about where the Laburnum Construction Company's office was, and they said there would be no work, and we sat around for a while."

By Mr. Harris:

Q. Is that what you testified on that occasion?

A. It must be if that is in the record, but—

Colonel Harris: That is all.

The Witness: But it was on the next day following it that I was there.

By Colonel Harris:

Q. That is right. That is the 27th, the next day.

A. It must have been on Thursday. There is one day in between there that I didn't go over there. The next morning after this trouble came up there I wasn't back there. I was back there then the following day then after Mr. Hart and them had their talk there on the street and we went up into the office of the union hall there.

page 1052 } Q. The change you want to make is that instead of its being Wednesday the 27th, it was Thursday the 28th, is that right?

A. That would be right.

Colonel Harris: All right, that is all, sir.

*Le Grand Mayo.*

RE-DIRECT EXAMINATION.

By Mr. Robertson:

Q. Did you go out there to get your pay check?

A. I believe that was payday time there. I am not positive of that.

Q. Was payday Wednesday or Thursday?

A. There were several others. I don't remember these dates.

Mr. Robertson: I have no more questions, Your Honor.

If Your Honor please, they examined the witness from his deposition at Paintsville and according to what they themselves said when they did that in the first instance with Bert Preston, I am entitled to read it to the jury to see whether this man is testifying substantially the same or substantially different.

Colonel Harris: We don't object.

The Court: There is no objection. We will read it tomorrow, not today.

Is that your last witness, Mr. Robertson, for today?

Mr. Robertson: My last Kentucky witness.

page 1053 } The Court: Gentlemen, let me see counsel behind the bench a second before I discharge the jury.

(Conference at the bench.)

The Court: Sheriff, you may excuse the jury until tomorrow morning at ten o'clock.

(Whereupon, at 4:55 o'clock p. m. the Court was recessed until 10:00 o'clock a. m. Wednesday, January 31, 1951.)

. . . . .

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. . . . .

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Sneed, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on January 31, 1951.

*Le Grand Mayo.*

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., William A. Johnson, Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Colonel Crampton Harris, Counsel for Defendants.

Also Present: Robert N. Pollard, Jr.

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## PROCEEDINGS.

(Roll call of the jury.)

The Court: All right, Mr. Robertson.

Mr. Robertson: If Your Honor please, we offer in evidence now the deposition of Le Grand Mayo taken at Paintsville, Kentucky, on August 19, 1950. It was agreed yesterday by counsel for the defendants that it might be offered in evidence this morning.

The Court: All right. Take the stand, Mr. Robertson.

(At this point the deposition of Le Grand Mayo was read to the jury. Mr. Allen reading the questions and Mr. Robertson reading the answers, as follows:)

"The witness,

LE GRAND MAYO,

being first duly sworn, testified as follows, to-wit:

## "DIRECT EXAMINATION.

"Question 1. Mr. Mayo, you have just stated that your name is Le Grand Mayo.

"Answer. Yes, sir.

"Question 2. What is your age?

"Answer. 64.

"Question 3. What is your occupation?

"Answer. A carpenter by trade.

"Question 4. Where do you live?

"Answer. Auxier, Floyd County, Kentucky.

page 1056 } "Question 5. How far from Paintsville?

"Answer. About 12 miles.

"Question 6. Were you born and raised in that territory?

*Le Grand Mayo.*

"Answer. Yes, sir, in this locality.

"Question 7. Are you a member of any union?

"Answer. Yes, sir.

"Question 8. What union is that?

"Answer. I belong to the Brotherhood of Carpenters and Joiners.

"Question 9. Is that affiliated with the American Federation of Labor?

"Yes, sir.

"Question 10. What local do you belong to?

"Answer. Prestonsburg Local.

"Question 11. Along in July last summer were you working at the Pond Creek Pocahontas No. 1 Mine in Breathitt County in Evanston, Kentucky, where the Laburnum Construction Company and Springs Fork Development Company were developing a mine?

"Answer. I was, yes, sir.

"Question 12. Was any arrangement made between your local and the Paintsville Local whereby you got the necessary information to work out there?

"Answer. Yes, sir.

page 1057 } "Question 13. Where were you staying out there on the job?

"Answer. I boarded with Codell Construction Company,

"Question 14. How far from the No. 1 mine?

"Answer. It was up the creek I would say a mile or maybe a mile and a quarter.

"Question 15. Is that rugged country out there?

"Answer. That is pretty rugged country, and that mine operation is the only thing in there.

"Question 19. Then on the following day, which was Tuesday"—

Mr. Robertson: Wait a minute. I didn't finish it.

"I didn't see any dwelling houses or anything around there.

"Question 16. We are talking principally about Monday, Tuesday, and Wednesday, July 25, 26, 27, 1949, last summer. During a period there a short while before Monday, the 25th of July 1949, did you as a member of the carpenters union working there hear any reports that the United Construction Workers were going to run you off the job there?

"Answer. Yes, sir. It was reported in the camp there. I boarded with the Construction men, and quite a number of them said at the table or made remarks that they heard we

*Le Grand Mayo.*

were going to be run out of there, that they would be in tomorrow at noon to run us out.  
page 1058 } "Question 17. Where were you working?"—

Mr. Allen: What is that?

Colonel Harris: We had an objection to that question, if the Court please.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

"Question 17. Where were you working at the tippie or at the schoolhouse?

"Answer. I was working at the tippie.

"Question 18. On Monday, July 25, did you work all day that day?

"Answer. Yes, sir. I believe I worked all day that day.

"Question 19. Then on the following day, which would be Tuesday, July 26, did anything out of the ordinary happen on that day?

"Answer. Yes, sir. We worked until noontime, and at noontime while we were having lunch a bunch of fellows came in there and wanted us to cease work there and there was quite a bit of argument, and the old man Preston, as I understand it, was business agent for this Paintsville local, and he and this man Hart were talking and all the rest listening. And Old Man Preston told Hart we were all union men and said 'I understand that you advertise that you  
page 1059 } are for higher wages and better working conditions', and Hart said that was right. We showed him our cards and checks, what we were getting there, and he said that was all right, and he said they were going to take that over and we would have to cease work. And old man Preston told him we had a contract there and we would have to fulfil our part of the contract. Hart said we couldn't, that if it took it, they would take us by the seat of the pants and throw us out, and if that wouldn't do, they would call men in from Beaver Creek. Hart said 'Come on in, boys' and I guess there were 50 or 75 fellows out there, and they crowded on in and seemed to be mad, and it looked like there was going to be some trouble. Finally the old man Preston said 'They are going to set up a picket line and we can't cross that picket line and it looks like we will have to hold up until we get this thing straightened out and see what can be done about it.'"

*Le Grand Mayo.*

"Question 20. Did you see any evidence of whisky there?

"Answer. Yes, sir. There were men there that seemed to be very much intoxicated.

"Question 21. Was there any cursing going on there?

"Answer. Yes, sir. There were loud, boisterous talk there.

"Question 22. Did those men pass any membership applications around there?

"Answer. Yes, sir. One of them asked me to  
page 1060 } sign up, and there were United Mine Workers  
there, and a fellow said 'No, it wasn't United  
Mine Workers, it was United Construction Workers, and he  
said it was all the same thing. I told him I wouldn't sign  
up with him.

"Question 23. When you say he called the boys into the  
shed who was that argument between, Mr. Preston and Mr.  
Hart?

"Answer. Yes, sir.

"Question 24. Was a man by the name of Arnett there?

"Answer. Yes, sir.

"Question 25. Do you know of a run-in he and Mr. Hart  
had?

"Answer. Yes, sir. Mr. Preston, the business agent, got  
them calmed down some way.

"Question 26. Did you work any more that day?

"A. No, sir.

"Question 27. Why didn't you work?

"Answer. I couldn't afford to. I was afraid to work there  
at that time.

"Question 28. Are you a married man?

"Answer. Yes, sir.

"Question 29. Got a family?

"Answer. Yes, sir.

"Question 30. Now, did you go back there the  
page 1061 } next day, which was Wednesday the 27th?

"Answer. Yes, sir.

"Question 31. What was the situation out there then?

"Answer. Well, they still had their picket line up and men  
there were the pickets, but at that time they had moved it  
over to about where the Laburnum Construction Company's  
office was and they said there would be no work and we sat  
around for a while.

"Question 32. Were any of Hart's men around there the  
next morning?

"Answer. Yes, sir. The men I seen there that day were  
still there with their pickets that morning.

*Le Grand Mayo.*

"Question 33. Was anything said there Wednesday morning about whether you would work or wouldn't work?

"Answer. I just can't recall just all that was said.

"Question 34. Did you work any there that Wednesday morning?

"Answer. No, sir, I was just like I was the day before, I thought it would be dangerous.

"Question 35. Have you ever been back there to work since at Mine No. 1?

"Answer. No, sir. I never worked any more at Mine No. 1 after that.

"Question 36. Why?

"Answer. I worked for the company some page 1062 } after some three or four weeks after Laburnum Construction Corporation moved out and the company took over. They called me and I went back and filed saws for them.

"Question 37. Did you ever go back to work there any more while Laburnum Construction Corporation was there?

"Answer. No, sir. I went back and got my tools and they were loading their stuff.

"Question 38. Why didn't you work any more there while Laburnum Construction Corporation was there?

"Answer. I couldn't afford to. I felt there was danger there."

Mr. Allen: Now there is cross examination. Do you all want to read cross examination?

Mr. Mullen: You can go ahead and read it.

page 1063 } (The reading of the deposition continued as follows:)

**"CROSS EXAMINATION.**

"By Mr. Pollard:

"Question 1. Mr. Mayo, you say you are a member of the Prestonsburg Local?

"Answer. Yes, sir.

"Question 2. When did you go to work for Laburnum Construction Corporation?

"Answer. It was in July, 1949, I believe it was. I believe that is about the time.

"Question 3. Then you went to work just after the matters which Mr. Robertson was questioning—"

*Le Grand Mayo.*

Mr. Robertson: You read it wrong.

(The reading of the deposition continued as follows:)

"Question 3. Then you went to work just before the matters which Mr. Robertson was questioning you about occurred?

"Answer. I believe that was my third week, as I recall it.

"Question 4. Are you familiar with an organization known as the Paintsville Local?

"Answer. Yes, sir. I have worked with these people before.

"Question 5. To whom did you pay your union dues?

"Answer. I paid my dues in to the Prestonsburg Local regularly, but I paid my permit to work on that page 1064 } Laburnum Corporation job to Mr. Preston, who was Business Agent for the Paintsville Local.

"Question 6. How much were your dues?

"Answer. One dollar a month to the Prestonsburg Local, and I paid a permit of \$1.50 a month to work through this Paintsville Local.

"Question 7. Exactly what is this permit?

"Answer. It is giving you a right to work with brothers of a different local.

"Question 8. In other words, you couldn't work on the Laburnum job where the Paintsville Local was working, without a permit?

"Answer. No, sir. If they had a contract, I would automatically have to have a permit to work with those people.

"Question 9. Why is all that?

"Answer. That is the regulations of the order, as I understand it.

"Question 10. Who is the order?

"Answer. It is the United Brotherhood of Carpenters and Joiners of America.

"Question 11. Did you ever see the contract that Laburnum Construction Corporation had with the Paintsville Local?

"A. No, sir.

"Question 12. You don't know what was in that?

"Answer. No, sir.

page 1065 } "Question 13. What was the rate of pay you received there?

"Answer. \$1.75 an hour was what Laburnum Construction Corporation gave.

*Le Grand Mayo.*

"Question 14. There was quite a bit of construction work going on in this area at that time?

"Answer. Yes, sir, I believe there was right smart of carpenter work or construction work going on at that time.

"Question 15. How did it happen that you had to come over from Prestonsburg to work for the Paintsville Local when it cost you \$1.50 a month for a permit?

"Answer. These Paintsville fellows needed a saw filer, and they called me to come because, you know, everyone don't file saws, and they needed me there.

"Question 16. Do saw filers get a higher rate of pay?

"Answer. No, sir, they receive the same rate of pay.

"Question 17. Did I understand you to say you were at the tippie on July 26, which was the day that Mr. Hart and Mr. Preston were talking?

"Answer. Yes, sir.

"Question 18. Did I understand you to say that Mr. Preston made the statement that if they put up a picket line you wouldn't walk across it?

"Answer. Mr. Preston told the men there in page 1066 } the shop that we couldn't stop just on their say-  
so, but if they put up a picket line, of course we couldn't cross the picket line. But he changed his mind, I reckon, because we stopped before they brought out any pickets.

"Question 19. The reason you stopped in the beginning was to find out what it was all about?

"Answer. Mr. Hart, when he came in, said, 'Boys, we are going to have to ask you to cease work here,' and Mr. Preston told him, 'We have a contract here with these people, and we just can't quit our work here.' And Hart told him, 'You fellows are scabbing,' and Mr. Preston told him we were not, that we belonged to the Carpenters Union. He said that was all right, but we would have to quit work until he got a settlement, and that he was organizing.

"Question 20. There were other people working on the job besides carpenters?

"Answer. I believe the company had begun running some coal there that day.

"Question 21. There were other men working there that were not carpenters, were there not?

"Answer. Yes, sir, there were some other men working there.

"Question 22. Common laborers?

"Answer. Yes, sir, common laborers and helpers.

*Le Grand Mayo.*

“Question 23. Were they members of the Paintsville Local?  
page 1067 } “Answer. Some of them had received appli-  
cations, but whether they had paid, I am not  
able to say.

“Question 24. What is the initiation fee?

“Answer. I believe the initiation fee is \$25.

“Question 25. Did you attend the meetings of the Paints-  
ville Local?

“Answer. I was at two or three of them.

“Question 26. Then you wouldn't know whether these la-  
borers came to the meetings or not, would you?

“Answer. No, sir, I wouldn't know. I know some of them  
were at the meeting here in Paintsville, the last one I was at.

“Question 27. Do you remember any of their names?

“Answer. No, sir.

“Question 28. You didn't see anyone take a drink up there  
that day, did you?

“Answer. No, sir.

“Question 29. And no one hit you?

“Answer. No, sir.

“Question 30. And you were not harmed in any way?

“Answer. No, sir, just threats. ‘We have come here to  
stop it, and we mean to stop it,’ and things like that.

“Question 31. Did I understand you to say when you went  
back for your tools, that the Laburnum Construction Corpo-  
ration was moving out?

“Answer. Yes, sir, as I understood it. There  
page 1068 } was a man there loading Laburnum Construction  
Corporation tools in a car.

“RE-DIRECT EXAMINATION.

“By Mr. Robertson:

“Question 1. During the course of Hart's conversation,  
did he make any threats about bringing a larger bunch of men  
from some other place?

“Answer. Yes, sir. He told Mr. Preston that if necessary,  
he would bring 500 or 600 men from Beaver Creek.”

Colonel Harris: You read that wrong.

(The reading of the deposition continued as follows:)

“Answer. \* \* \* 500 or 1,000 men from Beaver Creek.

*Raymond E. Salvati.*

“RE-CROSS EXAMINATION.

“By Mr. Pollard:

“Question 1. Do you remember the day you went back up there to get the tools?

“Answer. Not exactly. I would say it was probably a week or probably 8 or 10 days after this day that they stopped us from working there.

“Question 2. Some 8 or 10 days after the 26th?

“Answer. Yes, sir.

“Further deponent saith not.”

Mr. Robertson: If Your Honor please, we are going to offer the deposition of Mr. Raymond E. Salvati which was taken for the Defendants at Huntington, West Virginia, on June 15, 1950, and then we are going to offer the page 1069 } deposition of Mr. Salvati which was taken for the Plaintiff in Huntington, West Virginia, on September 18, 1950.

Mr. Allen: If Your Honor please, this deposition was taken on behalf of the Defendants, to be read in evidence on behalf of the Defendants, and it is being offered by us.

Mr. Mullen: Which one?

Mr. Allen: The one on June 15.

(At this point the deposition of Raymond E. Salvati was read to the jury, Mr. Allen reading the questions and Mr. Robertson reading the answers, as follows:)

“RAYMOND E. SALVATI,  
the witness, having been first duly sworn, testified as follows:

“DIRECT EXAMINATION.

“By Mr. Mullen:

“Question. Mr. Salvati, will you please state your name, residence and business?

“Answer. My name is Raymond E. Salvati. I am presently President of the Island Creek Coal Company, Pond Creek Pocahontas Company, Marianna Smokeless Coal Company. I live at 1130 Ritter Park, Huntington, West Virginia.”

Mr. Allen: These questions are not numbered, Colonel Harris.

*Raymond E. Salvati.*

Mr. Mullen: That is right.

(The reading of the deposition continued as follows:)

“Question. What is the connection, if any, of  
page 1070 } the Spring Fork Development Company with the  
Pond Creek Pocahontas Company?”

“Answer. The Spring Fork Development Company is a wholly owned subsidiary of the Pond Creek Pocahontas Company.

“Question. How long have you been President of the Pond Creek Pocahontas Company?”

“Answer. One year.

“Question. What was your position prior to that time with them?”

“Answer. Vice-President in charge of operations.

“Question. And were you Vice-President in charge of operations in 1948 and 1949?”

“Answer. I was in '48 and for the first six months of '49.

“Question. Did the Pond Creek Pocahontas Company enter into a contract in 1948 with the Laburnum Construction Corporation, a Virginia corporation, to have any work done in Kentucky?”

“Answer. Well, the Spring Fork Development Company did.

“Question. The Spring Fork Development Company? Didn't the Pond Creek Pocahontas Company also enter into a contract? The plaintiff alleges in their notice of motion that there were two contracts.

“Answer. Yes, that is correct. The Pond Creek Pocahontas Company did enter into an agreement with  
page 1071 } the Laburnum Construction Company for the  
erection of the tippie and the Spring Fork Development Company, which is a wholly owned subsidiary of Pond Creek, entered into a contract for the construction of houses.

“Question. Was the work completed under the Pond Creek Pocahontas Company contract by the Laburnum Corporation?”

“Answer. No.

“Question. Was the work completed under the Spring Fork Development Company contract?”

“Answer. No, sir.

“Question. Were the contracts terminated at any time before the completion of the work?”

*Raymond E. Salvati.*

"Answer. It was.

"Question. Was that by letter?

"Answer. By letter.

"Question. And who prepared that letter?

"Answer. Mr. Macdonald, our attorney.

"Question. You signed it?

"Answer. I signed it.

"Question. In the letter terminating each of the contracts, which are filed as exhibits with the notice of motion, this language appears: 'About noon on July 26, 1949, we understand that your men were prevented from continuing to work on the tippie by threats and other action of representatives of the United Construction Workers, a branch of  
page 1072 } District 50 of the United Mine Workers of America. Since that time no further work has been done on the tippie.' Do you know of your own knowledge of the threats or other action of the representatives of the construction workers or was that on information?

"Answer. Not personal knowledge, only through information.

"Question. The contract with the Pond Creek Pocahontas Company provided for a maximum fee for doing the work of \$12,000. Do you know what part of that fee was paid to the Laburnum Construction Corporation up till the time that the contract was terminated?

"Answer. I do not, and I suggest that in Mr. Smith's testimony he can tell you as to that.

"Question. And the same thing applies to the fee to be paid by the Spring Fork Development Company?

"Answer. Yes.

"Question. Has either of the two companies mentioned let any work to the Laburnum Corporation subsequently to the termination of those two contracts that we have spoken of?

"Answer. Do you mean after—

"Question. After the termination of the contract.

"Answer. No work has been done.

"Question. Subsequent to that time has any work been let by the Pond Creek Pocahontas Company or  
page 1073 } the Spring Fork Development Company?

"Answer. We had two contracts let since that time.

"Question. About what was the size of those, do you know?

"Answer. Let's see—about forty houses and a school-house and a store.

"Question. Were they let on bids?

*Raymond E. Salvati.*

"Answer. Yes, they were let on bids.

"Question. Did the Laburnum Company bid on them?

"Answer. They did not.

"Question. If the Laburnum Company had bid and had been the low bidder, would the work have been let to them?

"Answer. Yes, it would have been.

"Question. Were you down at the site of the work being done by the Laburnum Construction Company at the time of the trouble there?

"Answer. I was present on an inspection trip on one particular day when trouble did arise.

"Question. Did you see a picket line there at that time?

"Answer. I did.

"Question. Did you note any violence or hear of any threats while you were there?

"Answer. I did not.

"Question. Do you know whose employees composed the picket line?

page 1074 } "Answer. I couldn't—I don't know.

"Question. Did the Pond Creek Pocahontas Company have contracts with the Allen-Codell Construction Company, Incorporated, for work at the site on the property where the Laburnum Construction Company were working at the same time?"

Mr. Robertson: There was an objection, and then:

(The reading of the deposition continued as follows:)

"Answer. I can answer it?

"Question. Yes.

"Answer. We did have a contract with those two concerns.

"Question. Do you know whether the employees of either of those concerns were on strike at the time, that is, between July 25 and August the 2d, at the time that the Laburnum Corporation terminated their work?

"Answer. I do not know.

"And further this deponent saith not."

. . . . .

page 1075 } Mr. Allen: Your Honor, this deposition of  
Mr. Salvati was taken on behalf of the Plaintiff  
to be read in evidence on behalf of Plaintiff.

*Raymond E. Salvati.*

The Court: All right.

Mr. Robertson: At the second page read there at the top of the page, too, Mr. Allen.

The Court: When were these depositions taken?

Mr. Robertson: The 18th of September, 1950.

(At this point the deposition of Raymond E. Salvati was read to the jury, Mr. Allen reading the question and Mr. Robertson reading the answers, as follows:)

The witness,

RAYMOND E. SALVATI,

being first duly sworn, testified as follows, to-wit:

"Mr. Robertson: I wish the record to show that at the taking of these depositions there were present Mr. Noble Hobbs, Mr. David Hunter, Mr. Yelverton Cowherd, general counsel for the United Construction Workers and District 50 affiliated with the United Mine Workers.

"DIRECT EXAMINATION.

"By Mr. Robertson:

"Question. Mr. Salvati, your name is Raymond E. Salvati?

"Answer. That is correct.

"Question. And you are the same Mr. Salvati who gave your deposition for the defendant in this action on June 15, 1950?

"Answer. That is correct.

page 1076 } "Question. Just to get the context complete, will you state again your residence and business?

"Answer. I am President of Island Creek Coal Company, President of the Pond Creek Pocahontas Company.

"Question. How long have you been President of these two companies?

"Answer. Since June, 1949.

"Question. And what was your connection, if any, with each of these companies prior to that date?

"Answer. I was Vice-President in charge of operations.

"Question. Does the Island Creek Coal Company have any associated or subsidiary companies?

"Answer. It does.

*Raymond E. Salvati.*

"Question. Could you name them, please?

"Answer. Island Creek Coal Company as a parent Company has subsidiaries Island Creek Coal Sales Company, the Island Creek Fuel and Transportation Company, Queen City Coal Company, Carnegie Coal Corporation and the Carnegie Coal Corporation owns the subsidiary of the Carnegie Dock and Fuel Company and the Brooks County Coal Company. Another subsidiary of Island Creek is United Thacker Coal Company. They in turn own the Pigeon Creek Development Company.

"Another subsidiary of the Island Creek Company is Aldredge Realty Company. The Pond Creek Pocahontas Company is a parent company and has as its subsidiaries Marianna Smokeless Coal Company, Bartley Land Company, Bartley Water Company and Spring Fork Development Company.

"Question. Mr. Salvati, in tonnage produced how did Island Creek Coal Company compare in size with other commercial coal companies in the United States during the years 1948, 1949, and 1950?"

Mr. Mullen: There was an objection interposed at that point, Your Honor, based on the ground that it is irrelevant and has no bearing on any issue in this case.

Mr. Robertson: We think it is relevant, Your Honor, as showing the value of the business connection which Laburnum had built up.

The Court: The Court will allow the question for what it is worth.

Mr. Mullen: We note an exception.

Mr. Allen: I will repeat the question.

(The reading of the deposition continued as follows:)

"Question. Mr. Salvati, in tonnage produced how did Island Creek Coal Company compare in size with other commercial coal companies in the United States during the year 1948, 1949, and 1950?"

Mr. Robertson: There is another question that goes with that.

page 1078 } (Reading of the deposition continued as follows:)

*Raymond E. Salvati.*

"Question. I mean that to include the Pond Creek Pocahontas Company also.

"Answer. In the year '48 Island Creek and Pond Creek and their subsidiaries were the third largest in the state of West Virginia. In '49 they came out with the same standing for commercial mines.

"Question. You said in West Virginia. Did you mean in West Virginia or in the United States?

"Answer. In the United States.

"Question. How did they rank in size, in tonnage produced in the state of West Virginia?

"Answer. They are the largest.

"Question. I think in the list you gave there you stated the connection between the Island Creek Coal Company and the Pigeon Creek Development Company.

"Answer. Island Creek Coal Company and Pigeon Creek Development Company, that is correct.

"Question. I don't know whether you said this or not. What was your position with the Pond Creek Pocahontas Company and the Island Creek Coal Company prior to the time you became president of both those companies?

"Answer. I was Vice-President in charge of operations.

"Question. And did you occupy that position during the month of October, 1948?

page 1079 } "Answer. I did.

"Question. Did the Pond Creek Pocahontas Company enter into a contract with Laburnum Construction Corporation dated October 28, 1948, for the construction of a coal preparation plant at the number one Kentucky mine of the Pond Creek Pocahontas Company in Breathitt County, Kentucky?

"Answer. It did.

"Question. Have you a copy of that contract?

"Answer. I do have."

Mr. Allen: Then the contract is offered in evidence and it already has been offered here, Your Honor.

(Reading of the deposition continued as follows:)

"Question. Did you execute that contract on behalf of Pond Creek Pocahontas Company as its Vice-President?

"Answer. I did.

"Question. When the contract that we have just introduced was executed did the Pond Creek Pocahontas Company

*Raymond E. Salvati.*

contemplate construction work in Breathitt County, Kentucky, in addition to work on the coal preparation plant at the No. 1 mine?

"Answer. It did."

Mr. Mullen: If Your Honor please, there was an objection interposed at that point to the question and answer, it being that it called merely for speculative information, has no bearing on the question, and is shown to be speculative by the word "contemplate"

page 1080 }  
Mr. Robertson: It is the same objection that has been ruled on.

The Court: I overrule the objection and will allow the question and answer for what it is worth.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

"Question. What additional work did the company contemplate?"

Mr. Mullen: The same objection.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

"Question Answer the question, please

"Answer. We have it listed here, and the work that I submitted to my Board of Directors through our President at that time and was asked by the members of the Board to explain just what was necessary in the construction of our entire facilities in Breathitt County for the operation of our number one and number three mines.

"The tabulation showed, and was approved by our Board of Directors, the following:

"Machine shop—\$60,000

"Lamp House, superintendent's office, oil house—\$12,000

"Warehouse building—\$25,000

"200 houses—\$300,000.

page 1081 } "Ten supervisor houses—\$60,000

"A large store—\$75,000

"One service store—\$15,000

"A heating plant for tipple at our mine No. 1—\$23,000

"Tipple Shop—\$3,000

*Raymond E. Salvati.*

“Foundations for tipple at our Mine No. 3—\$25,000

“Sand house—\$7,000

“A water system in connection with our preparation plants and houses, \$12,500, for a total of \$617,500.

“Question. And you say that work was authorized by the Board of Directors?

“Answer. It was.

“Question. When the contract that we have introduced here, dated October 28, 1948, was executed, did the Pond Creek Pocahontas Company or did you as Vice-President of Pond Creek Pocahontas Company have any understanding with Laburnum Construction Corporation with reference to the additional work that you have just tabulated?

“Answer. I did.”

Mr. Mullen: The same objection, Your Honor.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

“Question. What was the understanding?

“Answer. At the time that Mr. Bryan, President of Laburnum Construction Company, came to Huntington within this same office I asked him if he would not consider going over into Breathitt County and building our preparation plant. I told him that the country was undeveloped, they had no roads, had no houses, had no people, and that it would be a hard job to do, that if he would go over there and undertake the installation of this preparation plant that I would consider and give to him the additional work that would be necessary in connection with the operation of those mines, that I felt that once in the job necessary tools, necessary buildings to house those men and all the facilities in connection with the preparation plant would be there, that he would be in a position to go ahead and do this additional work.

“This list that I just gave, I said it was approved by our Board of Directors. It was gone over with him and I said that there wasn't any reason at all that he shouldn't go right ahead with all the construction of all these things in connection with the facilities in the operation of those two preparation plants.

“Question. Were you influenced in that decision by any proficiency his organization would acquire by virtue of hav-

*Raymond E. Salvati.*

ing done this original work on the preparation plant in that particular Territory for the kind of work?

“Answer I felt that once situated there and had the experience in the building of that preparation plant, he would be better prepared to do the job on these other items than anybody else that we would get.”

Mr. Mullen: Your Honor, there is an objection at that point on the ground that what might have influenced the witness is not proper evidence.

Mr. Robertson: It is the same objection, just in a different form, Your Honor.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

“Question. Mr. Salvati, you have testified that for several years Island Creek and Pond Creek and their subsidiary companies were the third largest producers of coal in the United States and the largest producers of coal in the West Virginia field. By virtue of the volume of their production are those companies constantly engaged in construction work such as Laburnum is qualified to do and has done?”

“Answer. That is correct.

“Question. And would you expect that company to have other work if that agreement had continued in addition to the work you have tabulated there?”

“Answer. We always have work at all times in connection with the construction of new mines and new facilities, rehabilitating our companies, and our company always has some sort of construction work going on most all the time.

page 1084 } “Question. Did the Spring Fork Development Company enter into a contract with Laburnum Construction Corporation dated December 15, 1948, for the construction of twenty-five dwellings on sites near the number one mine of Pond Creek Pocahontas Company in Breathitt County, Kentucky?”

“Answer. That is correct.

“Question. Have you got a copy of that contract?”

“Answer. I do have.”

Mr. Allen: I think, Your honor, that contract has already been offered in evidence.

*Raymond E. Salvati.*

The Court: It has been offered in evidence.

(Reading of the deposition continued as follows:)

“Question. Was this work to be performed by Laburnum Construction Corporation on a basis of cost plus a fee of five per cent, the total amount of the fee not to exceed the sum of \$2,500?

“Answer. That is correct.

“Do you mean by that that the work for the construction of the twenty-five houses, dwellings?

“Answer. That is correct.

“Question. Was the work for the construction of the twenty-five houses a part of the additional work contemplated in your understanding with Laburnum Construction Corporation regarding additional work about which you have testified?

“Answer. It was.

page 1085 } “Question. Did the Pond Creek Pocahontas Company enter into a contract with Laburnum Construction Corporation dated December 8, 1948, for the construction of a telephone line approximately eleven miles in length extending from Carver, Kentucky, to the number one Kentucky mine?

“Answer. That is correct.

“Question. How did it happen to go from Carver, Kentucky, to mine number one?

“Answer. That was the only available place that we could have telephone connections.

“Question. Was the construction of the telephone line by Laburnum Construction Corporation on a basis of cost plus a fee of five per cent?

“Answer. It was.

“Question. Have you a copy of that contract for the construction of the telephone line?

“Answer. I do.”

Mr. Allen: I think that is already in evidence, Your Honor.  
The Court: I think it is in evidence.

(Reading of the deposition continued as follows:)

“Question. Did I ask you, was the contract for the construction of the telephone line a part of the work contem-

*Raymond E. Salvati.*

plated in your understanding with Mr. Bryan for additional work?

"Answer. It was.

"Question. And that work was done on a five page 1086 } per cent basis?

"Answer. On a cost plus fee of five per cent.  
"Question. Did the Pond Creek Pocahontas Company during the month of July 1949 instruct Laburnum Construction Corporation to construct a schoolhouse near the number one Kentucky mine of Pond Creek Pocahontas Company in Breathitt County?

"Answer. That is correct.

"Question. Did Laburnum Construction Corporation proceed with the construction of the schoolhouse?

"Answer. They did.

"Question. Was this work to be performed by Laburnum Construction Corporation on a basis of cost plus a fee of five per cent?

"Answer. That is correct.

"Q. Was this a part of the additional work covered by your understanding with Laburnum Construction Corporation regarding additional work?

"Answer. It was.

"Question. Did the Pond Creek Pocahontas Company advise Laburnum Construction Corporation during July, 1949, to prepare to proceed with the construction of the concrete foundations for the coal preparation plant at the number two mine of Pond Creek Pocahontas Company in page 1087 } Breathitt County, Kentucky, during August 1949?

"Answer. That's right.

"Question. Was this work to be performed by Laburnum Construction Corporation on a basis of cost plus a fee of five per cent?

"Answer. That is right.

"Question. Was this a part of the additional work covered by your understanding with Laburnum Construction Corporation regarding additional work?

"Answer. That is correct.

"Question. Did Laburnum Construction Corporation proceed with the construction of the concrete foundations for the coal preparation plant at the number two mine?

"Answer. They did not.

"Question. Why not, if you know?

*Raymond E. Salvati.*

"Answer. They were interfered with, and with the District 50 United Mine Workers and the experience they had at our number one preparation plant, being run off of the job there, made it impossible for them to start on this particular work that was assigned to them."

Mr. Mullen: If Your Honor please, there was an objection interposed there. The answer is objected to as being hearsay. The witness does not have the knowledge and does not testify that he knew this of his own knowledge.

Mr. Robertson: That is the same objection page 1088 } that has been, Your Honor. It came to him as president of the company, and he is testifying as president of the company.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

"Question. Was that information reported to you in the regular course of your duties and responsibilities as president of the company?

"Answer. I was vice-president in charge of operations at the time. The manager of the property reported to me, and in my official capacity I am testifying as to what I just said.

"Question. Did the Pond Creek Pocahontas Company or the Spring Fork Development Company advise Laburnum Construction Corporation that it should proceed to install asbestos shingles on the twenty-five dwellings during August, 1949.

"Answer. Yes.

"Question. Were those shingles on the roof or on the side of the houses or on both, or do you recall?

"Answer. No, the lumber was cut there on the job and after the houses were constructed they just didn't look as good and weren't as comfortable as they should be, and we felt that those asbestos shingles would make a much warmer and safer and better job and look better and be better for the employees, and at that time we decided to go ahead and use page 1089 } this asbestos shingle and it's on the sides of the house and not on the roof.

Q. "Was this shingle work to be performed by Laburnum Construction Corporation on a basis of cost plus a fee of five per cent?

"Answer. That is correct.

*Raymond E. Salvati.*

Question. Was that shingle work a part of the additional work covered by your understanding with Laburnum Construction Corporation regarding additional work?

"Answer. That is correct."

Mr. Mullen: If Your Honor please, there was an objection interposed at that point. The question and answer are objected to because the witness has already testified that this matter arose after the houses were completed and because of their appearance and it therefore could not have been part of the work contemplated prior to the work being let.

Mr. Robertson: If the Court please, it is the same objection that has been made time and again and the Court has already ruled on it. It is admissible to show the value of the business connection which Laburnum built up with the companies out there.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

page 1090 } (Reading of the deposition was continued as follows:)

"Question. Since August the 4th, 1949, has the Pond Creek Pocahontas Company constructed an addition on the rear of the coal preparation plant at the number one mine in Breathitt County, Kentucky?

"Answer. That is right.

"Question. What was the cost of that work?

"Answer. In the neighborhood of \$4,000.

"Question. Was that work a part of the additional work covered by your understanding with Laburnum Construction Corporation regarding additional work?

"Answer. That is correct. And I want to say that any of these items that you have asked me about, such as the shingles, the building of the schoolhouse and other items that came up during the construction, I told Mr. Bryan that any work of that kind—he would be given the work and installation of any work that might come up at any time.

"Question. With reference to the other portions of the additional work contemplated when the contract between Pond Creek Pocahontas Company and Laburnum Construction Corporation dated October 28, 1948, was executed, would you have had Laburnum Construction Corporation perform that work on the basis of cost plus a fee of five per cent if Laburnum Construction Corporation had still had its organization and

*Raymond E. Salvati.*

equipment at the job site and if the United Mine  
page 1091 } Workers of America and its branches had not  
threatened to interfere with the work?

“Answer. I would have.”

Mr. Mullen: There is an objection interposed at that point on the ground that what the witness might have done under the circumstances did not rise are immaterial and irrelevant to the issues in this case.

Mr. Robertson: That is the same ruling. What I replied out there was that it was relevant and material and admissible for the same reasons already stated, which is to show the value of the business relationship.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition was continued as follows:)

“Question. When the contract between Laburnum Construction Corporation and the Pond Creek Pocahontas Company dated October 28, 1948, was executed, did you know that Laburnum Construction Corporation intended to use workers who were members of local unions affiliated with the American Federation of Labor?

“Answer. I did, and in explanation of that, with my engineers and our operating people, in entering into any cost fee basis it was necessary for us to know the rates that he contemplated paying for his skilled and unskilled men, and

Mr. Bryan showed me the various rates and said  
page 1092 } at that time he was affiliated—his company—with  
the American Federation of Labor and consequently must pay its rates as outlined in the book that he showed me, and so because of my asking him as to the rates is my reason for knowing his affiliation with the American Federation of Labor.

“Question. You have mentioned the work at the coal preparation plant at the number one mine and the work on the twenty-five houses and the work on the telephone line and on the schoolhouse and in putting asbestos shingles on the houses. In addition to that had Laburnum Construction Corporation performed other work for Pond Creek Pocahontas Company or Island Creek Coal Company?

“Answer. They have.

“Question. Have you got a tabulation there showing how many contracts there were altogether?

*Raymond E. Salvati*

"Answer. I have here a memorandum showing the contract dates, the job number, description and the amount of each of those particular jobs. This is for Pond Creek, Island Creek and our subsidiaries.

"Question. Does that show whether any of them had been commitments prior to October 28th, 1948.

"Answer. Yes. There are several here on this list that were prior to that time.

"Question. Does this show which they are, or would you have to read it into the record?  
page 1093 } "Answer. I can read it into the record, if you like.

"Question. I would like you to show which are prior to October 28th and I will introduce the entire list."

Mr. Mullen: To be consistent, Your Honor, that was objected to earlier in the case and the same objection arises here.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

Mr. Allen: I will repeat the question so he will not have to repeat the objection.

(Reading of the deposition was continued as follows:)

"Question. I would like you to show which are prior to October 28th and I will introduce the entire list.

(The objection.)

"Question. Will you state which of those commitments were prior to October 28, 1948?

"Answer. Here is a contract date on fifty prefabricated dwellings. The date is 9/6/47 in the amount of \$95,631. Two stores, Brookside and Valley View Stores, the date 6/29/48, in the amount of \$66,486. Appliance warehouse, contract date 9/19/48, cost of \$40,895. Coal preparation plant, date 10/28/48 in the amount of \$265,370. I think that's all that were prior to October the 10th.

"Question. I call your attention there to the fourth item.

"Answer. Store number fifteen, on the 10th,  
page 1094 } 21st, '48, total amount of \$54,313."

Mr. Allen: That is offered in evidence.

Mr. Robertson: I want to show that to the jury, please. It is with those exhibits there.

*Raymond E. Salvati.*

(Document exhibited to the jury.)

(Reading of the deposition continued as follows:)

"Question. Mr. Salvati, had the United Mine Workers of America or the United Construction Workers or District 50 affiliated with United Mine Workers of America or United Mine Workers of America interfered with the operations of Laburnum Construction Corporation on any of the jobs you have mentioned prior to July 1949?"

Mr. Robertson: That question was objected to and reframed.

Mr. Mullen: It was reframed.

The Court: Read it as reframed.

(Reading of the deposition was continued as follows:)

"Question. Did it come to your attention or not as an officer of the company that either the United Construction Workers District 50 affiliated with the United Mine Workers of America or United Mine Workers of America had interfered with the performance by Laburnum Construction Corporation of any of the commitments under discussion prior to the interference which commenced in July, 1949?"

page 1095 { "Answer. I can answer the question?"

"Question. Yes, sir.

"Answer. We had no interference in the list of contracts that I just read into the record. All of them started on time and were completed at the time that the contract was entered into as to the completion date, and in my official capacity as Vice-President no official notice came to me that any interference was made in the construction of these particular jobs.

"Question. My question directed your attention to July 1949. You are referring to work done prior to that time, I take it.

"Answer. That's right.

"Question. Did Island Creek Coal Company or one of its associated or subsidiary companies enter into a contract with Hamill Construction Company of Huntington, West Virginia, for the construction of an office building near Delbarton, West Virginia?"

Mr. Mullen: If Your Honor please, that is objected to. The contract with some other party for some other work is not pertinent to the issue in this case.

*Raymond E. Salvati.*

Mr. Robertson: It is to show the pattern in eastern Kentucky and that they ran them off that job, if my memory serves me right. I think that will be brought out page 1096 } in a few questions.

The Court: The Court will allow the question for what it is worth.

Colonel Harris: We reserve an exception.

(Reading of the deposition was continued as follows:)

"Question. Answer the question, please.

"Answer. We did enter into a contract with the Hamill Construction Company.

"Question. Was the Hamill Construction Company able to complete that contract?

"Answer. They were not.

"Question. Why?

"Answer. They were interfered with by the District 50 United Mine Workers and the men were run off the job and unable to complete the work."

Mr. Harris: If the Court please, I understood that we had an objection which extended to everything on "why" questions.

The Court: Is that the understanding of you gentlemen?

Mr. Robertson: Yes.

The Court: That is the understanding.

(Reading of the deposition continued as follows:)

"Question. Did Island Creek Coal Company during the sprong of 1950 invite Laburnum Construction Corporation to submit a proposal for the construction of a church and a recreation building near Delbarton or Holden, West Virginia?

"Answer. They did.

"Question. Did Laburnum Construction Corporation submit a proposal for that work?

"Answer. Mr. Bryan came in to see me a couple of days before the dates of the time for the proposal to be submitted and said at that time that he felt that under the circumstances that it would be impossible for him to bid, he could bid but he couldn't complete the job.

"He felt that if I wanted to enter into an agreement with him in some manner as to having guards to guard the job, even the building that he might put up, keep them from being

*Raymond E. Salvati.*

burned down and his men submitted to all the threats and violence, that he then would submit a bid.

"I told him that I would like to consider the matter but it wasn't a matter that I felt that the company should be drawn into and I wanted to confer with the chairman of our board because it was a pretty important situation with us and I didn't want to take the entire responsibility of answering that particular day.

"Subsequently I did confer with our chairman and after the conference we felt that it was inadvisable for Laburnum Construction Corporation to bid on these two particular buildings, that we felt that if they did it might  
page 1098 } cause us a lot of trouble around our mines, and  
I wrote him a letter within two or three days of that conference."

Mr. Mullen: If Your Honor please, the same objection to that, the frame of mind of the witness is immaterial to this case and improper.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition was continued as follows:)

"Question. In this connection I hand you what purports to be a letter dated May 18, 1950, from you to Mr. Bryan and ask you if that's the letter to which you referred?

"Answer. That is correct. That is the letter."

Mr. Allen: The letter is offered as Exhibit 5, according to the deposition here.

Mr. Mullen: It was already introduced and objection made at the time it was introduced.

The Court: Very well.

(Reading of the deposition continued as follows:)

"Question. In the course of the last mentioned conversation you had with Mr. Bryan, did he tell you whether or not he had had a conversation with Mr. David Hunter regarding this proposed work?

"Answer. He did refer to a conference that he had with Mr. Hunter at Pikeville, I guess.

*Raymond E. Salvati.*

"Question. Do you recall what the substance page 1099 } of that conversation was as reported to you by Mr. Bryan?"

Mr. Mullen: There was an objection there, that that was purely hearsay under those circumstances.

Mr. Robertson: We think it is admissible, Your Honor, as showing why this business relationship was broken up, one of the things in the whole chain of evidence as to why it was broken up.

The Court: The Court will sustain that objection.

Mr. Robertson: Plaintiff excepts for the reasons stated.

Will you state where I may commence again, Your Honor? Maybe we should just go ahead with the next question.

The Court: Yes.

(Reading of the deposition continued as follows:)

"Question. I hand you what appears to be a copy of a letter dated May 23, 1950, from Mr. Bryan to you and ask you if you received the original of that letter in response to your letter to Mr. Bryan of May 18, 1950.

"Answer. I have the original here."

Mr. Allen: The letter is offered in evidence, Your Honor, and there is objection.

Mr. Mullen: There is objection. It was offered on the examination of Mr. Bryan and objected to. As I recall at that time it was withdrawn and Your Honor did not rule on it. We make the same objection. It is a self-page 1100 } serving declaration from Mr. Bryan written long after this suit had been brought.

Mr. Robertson: That is right, and I withdraw it now.

The Court: Very well.

Mr. Allen: Suppose you start about the middle of page 26.

(Reading of the deposition continued as follows:)

"Question. Mr. Salvati, has the Laburnum Construction Corporation been invited by Pond Creek Pocahontas Company or Island Creek Coal Company or any of their associated or subsidiary companies to submit proposals for any work since May 18, 1950?

"Answer. They have not.

"Question. Why?

*Raymond E. Salvati.*

"Answer. I think it is pretty well established by my letter here in May that we felt that any invitation that we would extend to Laburnum, that it would cause us a great deal of trouble and we possibly wouldn't get the work completed and felt it advisable to not ask him to bid on any business that we have given since that time."

Mr. Allen: Do you insist on the objection there, Mr. Mullen?

Mr. Mullen: We already have objection to any "why's", so we need not repeat it, since that is continuing.

page 1101 } (Reading of the deposition continued as follows:)

"Question. What was the situation which developed as outlined in your testimony here today? Would you expect Laburnum Construction Corporation to have continuously since July, 1949, and down to this time and in the future, be doing work for the Pond Creek Pocahontas Company and the Island Creek Coal Company?"

Mr. Mullen: We objected to that, Your Honor, on the ground it calls solely for an opinion of the witness, for speculation as to future events, and he could not know at the time what circumstances might arise or how the matter might have affected it.

Mr. Robertson: Your Honor has ruled repeatedly that it is admissible for what it is worth to show the value of the relationship that Laburnum had built up.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Reading of the deposition continued as follows:)

"Question. Will you answer the question, please?"

"Answer. We couldn't be assured of a completion of a job that we might give to Laburnum Construction Corporation with the experience in the last year and a half that he has had, of ever having that job completed. In the opinion of the operating people and myself, we felt that it was inadvisable, as it might spread to the operation of our coal  
page 1102 } mines and other work we might be doing, so because of that situation we feel it inadvisable to ask Mr. Bryan of Laburnum Construction Corporation for bids on any work that we might have.

*Raymond E. Salvati.*

“Question. What is the connection between the Island Creek Coal Company and the Pond Creek Company?”

“Answer. Island Creek Coal company and Pond Creek Pocahontas Company have common management but entirely different directorship and are two different companies entirely.”

Mr. Allen: There is cross examination by Mr. Mullen. Do you all want to help me out by reading this?

Mr. Mullen: We will do it if you want help.

The Court: Let's recess for five minutes.

(Brief recess.)

page 1103 } Mr. Mullen: If Your Honor please, we are going to withdraw the objection we made to the question at the bottom of page 24, and let him answer it.

The Court: No. 24?

Mr. Mullen: Yes. That is the one Your Honor sustained the objection on. We are going to withdraw it.

Mr. Robertson: You read the question.

(The reading of the deposition continued as follows:)

“Question. Do you recall what the substance of that conversation was as reported to you by Mr. Bryan?”

“Answer. He said that Mr. Hunter told him that if he bid on that job and came over into Mingo County to put up these two buildings that he would—without any contract with their organization—that he would absolutely do everything in his power to see that he did not build those buildings.”

Mr. Robertson: Go ahead, now. You have withdrawn. Let's keep on going, now. Read the next question.

(The reading of the deposition continued as follows:)

“Question. Did he indicate what kind of things in his power he would do?”

“Answer. I don't recall specifically just exactly what he said in that regard other than he certainly wasn't going to let him build the buildings.”

Mr. Mullen: Do you want us to read the cross examination?

page 1104 } Mr. Allen: If you please.

*Raymond E. Salvati.*

(The reading of the deposition continue as follows, Mr. Mullen reading the questions and Mr. Robertson reading the answers:)

“CROSS EXAMINATION.

“By Mr. Mullen:

“Question. Mr. Salvati, was the agreement that you say you made with Mr. Bryan to do future work approved by your Board?

“Answer. It's not necessary to be approved by my Board.

“Question. The work that you spoke of in connection with putting shingles on and work on the schoolhouse and other items prior to that, they were merely changes and developments in the contract as it went along, were they not?

“Answer. I would say that they were changes that are made from time to time as you go along on any construction job.

“Question. And when you make those changes the contractor doing the job is the one to carry out those changes?

“Answer. Not necessarily, but in this particular case it was arranged as well as understood that Laburnum Construction Company would have that right.

“Question. In the letter of May the 18th, 1950, which you wrote Mr. Bryan you state, ‘In view of this situation, it seems to me that it would be better that you refrain  
page 1105 } from bidding because of the facts outlined to me in our conversation Monday evening.’ Did you have personal knowledge of those facts or was this letter written merely on what he stated to you?

“Answer. I had personal knowledge of what he had said to me the day before and the experience that he had in all the jobs and not completing them, and in view of the fact that he didn't complete our preparation plant, he didn't complete the foundation work at number two, he didn't finish the schoolhouse job, and it gave us a lot of trouble, cost us a lot of money as well, that I felt it wasn't advisable to give him any further work, and after he discussed the situation with me and told me about his discussion with Mr. Hunter that I felt it would be inadvisable, as I gave here a little while ago my evidence, that I didn't take that responsibility on myself. I conferred with the chairman of our Board and he agreed with me and as a result of our conference this letter went forward to Mr. Bryan.

“Question. But as to any threats or anything that he

*Raymond E. Salvati.*

claimed that Mr. Hunter had made, you had no personal knowledge of those. They were only what he reported to you?

"Answer. That's right. Nobody reported other than Mr. Bryan.

"Question. Mr. Salvati, the miners and the workers at the tipple where the contracts were being per-  
page 1106 } formed, are they members of a union?

"Answer. Yes, sir."

Mr. Robertson: I withdraw all my objections to everything in his deposition.

Mr. Mullen: That question had been answered before the objection was interposed.

(The reading of the deposition continued as follows:)

"Answer. Mr. Mullen, at the time, however, as I remember now, we didn't have our charter yet. They didn't have the charter. Our charter was not delivered until about August the 1st of 1949, so when I answered that they were members, they subsequently became members.

"Question. You dealt with the United Mine Workers or their representative prior to that date?

"Answer. Oh, yes.

"Question. Did any of those members take part in any of the incidents which are charged in this suit as interference by the union sued?

"Answer. Not to my knowledge.

"Question. Did Mr. Bryan ever give you any reason as to why he would not deal with the United Construction Workers for his unskilled labor?

"Answer. He did not."

Mr. Mullen: Do you want me to read the re-  
page 1107 } direct, too?

Mr. Allen: If you don't mind.

(The reading of the deposition continued as follows:)

**"RE-DIRECT EXAMINATION.**

"By Mr. Robertson:

"Question. Mr. Salvati, you said that Mr. Bryan reported to you the threats that had been made against his men on the work. Did he report that to you as an official of your company to whom he was responsible?

*Cecil M. Delinger.*

"Answer. That is correct.

"Question. And then in response to a question by Mr. Mullen, I think you said—I think he asked you whether or not any of the United Mine Workers participated in any of the unlawful acts charged against them in this action. Didn't you undertake to say that they did not or you don't know whether they did or not?

"Answer. Not to my knowledge. I was speaking of the United Mine Workers of America, the particular district that we deal with.

"Question. Do you mean to your knowledge they did not or you don't know or not of your own knowledge?

"Answer. I don't know.

"Question. You do not know one way or the other?

"Answer. No.

"And further this deponent saith not."

. . . . .

page 1108 {

. . . . .

#### CECIL M. DELINGER

was called as a witness on behalf of Plaintiff, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Delinger, your name is Cecil M. Delinger?

A. That is right, sir.

Q. How old are you?

A. Forty-nine.

Q. Where do you live?

A. On Floyd Avenue in Richmond, 1822.

Q. Are you employed by Laburnum Construction Corporation?

A. Yes, sir.

page 1109 { Q. In what capacity?

A. Construction Superintendent.

Q. How long have you been with that company?

A. Almost six years.

*Cecil M. Delinger.*

Q. How long have you been in the construction business with one company or another?

A. Around about 30 years, I guess.

Q. Were you the Superintendent in charge of the Laburnum Construction work on the job site in Breathitt County, Kentucky, in the year 1949?

A. Yes, sir.

Q. Were you the Superintendent in charge of the work when it first was started?

A. No, sir, not when we first started the work.

Q. When did you get there?

A. It was the first part of May, the 9th, I think.

Q. What year?

A. 1949.

Q. I call your attention to a calendar over there, for the month of July, 1949, and I call your attention to July 14, which was Thursday, and ask you if you had a telephone conversation that day with Mr. Bryan regarding a man named William O. Hart?

A. Yes, sir.

Q. Where were you and where was Mr. Bryan?

page 1110 } A. I was at my field office in Breathitt County, and Mr. Bryan was in Richmond.

Q. What was the substance of that conversation?

Colonel Harris: We object to it on the ground that it is hearsay.

Mr. Robertson: It is the same objection which has been made before, Your Honor. He is a subordinate employee, and in the regular course of his business he communicates with the head of the business about the business.

The Court: The objection is overruled.

Colonel Harris: I understood it was a conversation both ways, and the directions that the *alter ego* of the Plaintiff gave him, in particular, are not a report to the head of a business. This conversation was with the head of the business where directions are given to him.

Mr. Robertson: It is admissible either way, Your Honor. It is reports he got or instructions he gave, conducting the business. It is the only way a corporation can conduct its business.

The Court: The objection is overruled.

Colonel Harris: May we add the further objection that it is a self-serving declaration, and reserve an exception; and

*Cecil M. Delinger.*

may we have the hearsay and the self-serving objection to all this line of questions, and an exception?

The Court: There is no objection to that by counsel?

Mr. Robertson: No.

page 1111 } The Court: It will be considered that you  
have objected and reserved an exception.

By Mr. Robertson:

Q. What was the substance of your telephone conversation with Mr. Bryan on Thursday, July 14, 1949?

A. Mr. Bryan said that he had received a call from William O. Hart in Pikeville, Kentucky, and that Mr. Hart had asked him to recognize the United Construction Workers and sign an agreement with them on the work in Kentucky.

Mr. Bryan said that he refused to do that, and asked me if I heard of any such thing out in Kentucky. I told him I hadn't. He asked me if our laborers were organizezd.

The Court: He asked you what?

The Witness: If our common labore:s were organizezd.

I told him I didn't think so. He asked me to check into it, and if they were not, to see if we could get them organized. I told him I would.

By Mr. Robertson:

Q. At that time, had you received any complaint from any of your men, laborers or anybody else, on account of the rate of pay they were getting?

A. No, sir, I had not.

Q. Had you received any complaint from any laborers or any other men you were employing, about work-  
page 1112 } ing conditions or dissatisfaction in any way?

A. No, sir, I never did.

Q. Do you recall whether or not you had a telephone conversation with Mr. Bryan on the Friday of the following week, which was July 22, regarding Hart?

A. We had several calls in between that time, but I think on the 22nd—I don't remember whether I called Mr. Bryan or whether he called me. I think I called him and told him I had heard rumors that there would be a gang there to stop us from work the following Monday.

Q. Did you ask Mr. Bryan to come to the job site?

A. Yes, sir, I did.

Q. Why?

A. I thought he would be a help to us. Naturally, being

*Cecil M. Delinger.*

the head of the company, he would know more about the administrative policies of the company than I would.

Q. Did he agree to come, or not?

Colonel Harris: We object to him leading, if the Court please.

Mr. Robertson: It is not leading, Your Honor. I asked whether he did agree or whether he didn't. I don't know what the witness is going to say any more than Your Honor does.

The Court: I will overrule the objection and allow the question.

page 1113 } The Witness: Yes, I did ask him to come, and he said he had just made a trip out there, and he had other appointments, and it didn't suit him to come back right away.

By Mr. Robertson:

Q. Did he tell you what to do in the meantime?

A. He told me to try to continue on with my work as usual, and if anyone did molest us, not to pay any attention to the United Construction Workers.

Q. Were you at the job site on Monday, July 25?

A. Yes, sir.

Q. Did anybody come to run your men off the job that day?

A. No, sir, there didn't anyone come there to run us off that day.

Q. Did you have occasion to telephone Mr. Bryan that day?

A. Yes. He called me that morning right about noon, and asked if anyone had been there that day to chase us off the job, and I told him we hadn't seen anyone there yet.

Q. Did you call him back later in the day?

A. I called him back that night about 7:30 or 8:00 o'clock.

Q. What was that conversation with him?

A. Soon after we got back to Salyersville that Monday evening, Mr. Henry Starr, from over in Paintsville, called me, and he said that he had been reliably informed that this gang would be there the next morning about noon.

I called Mr. Bryan and told him the message that I had received. I asked him again please to make every effort to come out and be with us when this thing happened.

Q. Why did you do that?

*Cecil M. Delinger.*

A. I thought since he was President of the concern, I thought it was his place to be there.

Q. Were you scared?

A. I wasn't any too comfortable.

Q. Did Mr. Bryan tell you he would come, or wouldn't come?

A. He said he would make every effort to be there by noon on Tuesday. He told me if Mr. Hart or any of that crowd came, to try to get them to hold off until he could get there and talk with them.

Q. What time did Mr. Bryan actually get there that day, as nearly as you remember, on Tuesday, July 26?

A. I guess it must have been close to 3:00 o'clock in the afternoon when he got there.

Q. In the meantime, had Hart and his men been there?

A. Yes, sir.

Q. How many men would you estimate were with him?

A. I counted 47, and I know that is not all of them. There was more than that.

page 1115 } Q. What sort of crowd was it?

A. Oh, it was a very rough, boisterous crowd. A lot of them looked like they hadn't shaved in a week or two. They had on dirty and in some cases ragged clothing. It reminded me of an outlaw gang like you see in the movies. It was very similar to that type of people.

Q. During that boisterous behavior, did anybody call you any particular kind of son-of-a-bitch that day?

A. No, sir, not that I heard.

Q. If they had, you wouldn't have taken it, would you?

A. There wasn't anything else I could do but take it. There was cursing going on, but I didn't hear any directed at any specific individual.

Q. You didn't hear anybody call you a "big-bellied son-of-a-bitch"?

A. No, sir.

Q. Then was Hart there with these men?

A. Yes, sir.

Q. Did you give him the message that Mr. Bryan had asked you to give him?

A. No, I didn't see Mr. Hart until later on in the afternoon. I mean, I didn't talk with him until later on in the afternoon.

Q. Did you stay up at your office or go down around the tippie while they were down there?

*Cecil M. Delinger.*

page 1116 } A. Bill Maynard and I left the tippie, I guess, about five minutes after twelve, and there hadn't anyone arrived at that time. We decided we would go get lunch. We didn't think anything would happen until about 12:30 when the men were to resume work. Mr. Maynard wanted me to go on up to the Pond Creek camp with him and have lunch with him, as I had done on a number of occasions. I told him I thought I ought to stay at my office and eat my lunch there.

Q. Did you go back down to the tippie while Hart's crowd were there?

A. No, sir, I didn't.

Q. Why?

A. As I was eating lunch, this gang of cars passed the office. And just as I finished eating and started out the door, Mr. William, our carpenter foreman, who had been on the schoolhouse job, was walking down the road, and he called to me. I stopped and waited until he came up, and he told me about the disturbance they had had at the schoolhouse. We discussed that some, and I started down to the tippie again, then.

When I was about 100 or 150 feet from the office, I could see that the gang was breaking up at the tippie and coming back toward the office, so I waited over there until they came back by the office.

Q. When Mr. Bryan reached the job site, did you report to him what had happened?

page 1117 } A. Yes, sir.

Q. Were you with Mr. Bryan when he met Hart down by the railroad crossing between the field office and the store?

A. Yes, sir.

Q. Did you hear any conversation there between Mr. Bryan and Mr. Hart?

A. I did.

Q. How many people were with Hart?

A. There were three men besides Mr. Hart, four in the group.

Q. Were any of them drunk?

A. Two of them were very drunk. They could walk, but they were right drunk.

Q. State the circumstances under which Mr. Hart and Mr. Bryan had this conversation, and what the conversation was, as you recall it?

A. As we were driving up to the Pond Creek camp, we passed this car with four men in the car. They kind of threw

*Cecil M. Delinger.*

up their hands, more or less, to say good morning. Mr. Bryan said, "Who are those fellows?" I said I thought it was part of the gang that had been down to the tipple.

We drove on across the tracks, and parked the car and walked back. Mr. Bryan asked if any of those fellows knew where he could get in touch with Mr. Hart. The  
page 1118 } fellow sitting in the driver's seat said that he was Hart. Mr. Bryan said he would like to talk with him a few minutes. Mr. Hart said, "O. K.," and all four of them got out of the car and run the glass up and locked the doors.

In the meantime, Mr. Bryan and Mr. Meli and I had stepped about 10 or 15 paces out in front of the car, and all four of these men came over to where we were standing. Mr. Bryan told Mr. Hart that he was sorry that he had stopped his job before he had had a chance to talk to him; and Mr. Bryan said he had tried to call Mr. Hart early that morning in Pikeville, but was told he was out of town; that he had talked with Mr. Hunter and asked Mr. Hunter to give Mr. Hart a message not to interfere with our men until Mr. Bryan could get there and talk to him.

Mr. Hart said he had received that message, but all his arrangements had been made and there wasn't anything he could do about it.

Mr. Bryan asked him why he brought such a large gang of men out to stop our work; and Mr. Hart said that we were working in United Mine Worker territory, and he had come out to take over. He said we had no reason to complain; that he had stopped several other contractors from working in their territory, and he didn't see why we should object.

Mr. Bryan told Hart that all our men were members or  
page 1119 } had made application for membership in the A. F. of L. organization, and told him also that we worked A. F. of L. men all over the country, and he thought that since our job was very nearly finished, Mr. Hart should leave us alone and go after some of the contractors that were non-union operators.

Q. What did Hart say to that?

A. I think Mr. Bryan went on to say—no, I think Mr. Hart said that he wasn't interested in that angle of it. He was interested in getting us to sign up with his organization; that he didn't have interests outside of the eastern part of Kentucky; that that was his territory.

Mr. Bryan told him that he intended to have our men back to work the following morning; and Mr. Hart said he didn't

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*Cecil M. Delinger.*

think they would be there, they would be too God damned afraid to come back. He said, "If they do come back, I will bring in another gang of men and will be damned sure they don't work." He said, "I bet you \$500 right now that you won't ever finish this job unless you do use UCW men."

Mr. Bryan said if he didn't intend to take that line down, he would hold Hart and the United Mine Workers responsible for what had happened that day.

I think that is about all there was to it.

Q. Did Hart say anything about Bryan bucking the United Mine Workers?

A. Yes. He said "couldn't anybody buck the United Mine Workers and get away with it."

Q. Did the conversation get pretty hot, sour, page 1120 } or was everything courteous and pleasant?

A. The only part that was really what I would call a normal conversation was when they first started talking. Both of them were a little hot after that.

Q. Did you go with Mr. Bryan that night to attend a meeting of the Paintsville Local 646, A. F. of L.?

A. Yes, sir.

Q. We have already been over that, so I won't go over that again.

On Tuesday morning when Hart came to the job, did you see any of his men trying to sign up any of your laborers?

A. No, sir, I did not.

Q. Up to the time he came, did you know anything about his trying to organize your laborers?

A. Yes. Before they came there, on July 15, I think, I noticed two men there at the tipple just before noon. They were sitting on a pile of timber we had there. I didn't pay very much attention to them because I just thought they were somebody looking for work or something of that sort.

Bill Maynard and I went up to the Pond Creek camp for lunch, and after we came back I never thought any more about the men. I don't remember seeing them there after I came back from lunch. I guess it must have been an hour or an hour and a half, maybe, after we went back to page 1121 } work that Mr. Lee Bach, our labor foreman, came to me and said there had been two UCW men there trying to get him and his laborers to sign up with them. He said that these men told them that if they didn't sign up with them, they would lose their jobs.

I told Mr. Bach not to worry about his job; that those fellows didn't have anything to do with it. I said, "When you

*Cecil M. Delinger.*

hear it from me, you can pay some attention to it." I said, "After all, we pay you. They don't have anything to do with you."

Q. Did he say anything to you about whether or not he wanted to join the A. F. of L.?

A. He said the men had been talking of joining some local, but they weren't right sure what to do about it.

Q. What was making them undecided, according to Mr. Bach?

A. I don't think he stated why that was.

Q. Did he give you the form of application that these United Construction Workers' organizers had given to him?

A. No, sir, he did not.

Q. At that time, did you know whether or not your laborers were either in the A. F. of L. or in the United Construction Workers?

A. I knew that they weren't in the A. F. of L. at that time.

Q. Did you know anything about whether or not they were in the United Construction Workers?

page 1122 } A. I didn't think they were. I couldn't say  
for sure whether they were or not. I don't think they were.

Q. Did you at any time on that job tell any laborers or anybody else that they had to join the A. F. of L. in order to keep their jobs?

A. No, sir, I did not. I wasn't that much concerned with it.

Q. Did you try to make them join the A. F. of L.?

A. No, sir, I did not.

Q. Did you try to keep them out of the A. F. of L.

A. No, sir, I did not.

Q. I believe that you went back to the job site with Mr. Bryan on Wednesday morning? That would be July 27.

A. Yes, sir, I went back.

Q. We have been over that pretty thoroughly.

Then did you receive a message from the United Construction Workers through a gentleman engaged in the real estate business in Salyersville?

A. I received a message, but I don't know who it was from.

Q. Who was the man that gave you the message?

A. He was a man down in Salyersville that I had talked to on several occasions.

Q. What was his name?

A. His name was Adams.

*Cecil M. Delinger.*

page 1123 } Q. What was his business?

A. I am not sure what business he was in.

Q. What was his message?

Colonel Harris: As I understand, we have an objection to all these hearsay conversations.

The Court: That is understood.

Colonel Harris: And an exception.

The Court: That is understood, Colonel Harris.

By Mr. Robertson:

Q. What was his message?

A. I was standing in front of the Carpenter Hotel on this night, and he came up and told me that he would like to talk to me. He said, "Let's walk across the street."

The Court: He told you what?

The Witness: That he would like to talk to me, and for us to walk across the street. I agreed, and we went over in front of the Court House. There were a few benches over there. We sat down on one of those benches. He said, "I have a message for you. I am afraid to give it to you, and I am afraid not to give it to you. I am caught in the middle, through no efforts of mine. If I do tell you, I want you to treat it in the strictest confidence; and if you ever use my name in connection with it, I will deny the whole thing."

Finally he said that he had been asked to tell me that if I wanted to get out of Kentucky alive and in good health, to get the hell out of there before Sunday; not to go back in Breathitt County after Sunday.

By Mr. Robertson:

Q. You didn't take that very seriously, did you?

A. I said, "Who gave you that message?"

He said, "I can't tell you. My life wouldn't be worth any more than yours if I told you that."

I said, "What would you do about it?"

He said, "I would do exactly what they said to do. What are you going to do about it?"

I said, "I don't think I will even be here Sunday." (Laughter.)

He said, "That's using your head."

Q. Do you remember what day it was that you had that talk with that man, what day of the week?

*Cecil M. Delinger.*

A. That was Wednesday night, I think it was, the night of the 27th.

Q. Were you living in Salyersville at that time?

A. Yes, sir. I lived in the hotel there, yes, sir.

Q. Did you telephone Mr. Bryan the next day over in Huntington regarding that message?

A. The next morning, Mr. Ragan and I went back out to the job. He had some pay checks that hadn't been taken up the day before, and he thought someone might be out there after them. We got back to town about 11:00 or page 1125 } 11:30, I guess.

I was standing in front of the hotel, and Mr. Freeman, A. F. of L. representative, came by and saw me, and parked his car and came back, and we had a general discussion of what had taken place. I told him Mr. Bryan had been wanting to talk with him, and he said he would like to talk with Mr. Bryan. So we walked up to the telephone exchange. I called Mr. Bryan in Huntington, and turned the phone over then to Mr. Freeman. Weaver Freeman is his name.

During their conversation, Mr. Freeman told him of the message I had received. Then Mr. Bryan asked him to put me back on the phone; that he would like to talk to me. He asked if that was true, and I told him it was. He wanted to know what I was going to do. I said, "I would like to be relieved here and get back to a little bit more civilized part of the country."

He said, "Go ahead and make arrangements, and report back to the Richmond office."

Q. Did you stay around until after Sunday, or did you leave before Sunday?

A. Friday morning, Mr. Ragan and I went back out to the job. I had a few personal things out there. I picked them up, and we came on back, and I left Friday afternoon.

Q. Were you scared?

A. Well, a fellow sort of hates to admit he page 1126 } was scared, but I made up my mind that I would get away from out there. I didn't see any use in making a fool of yourself.

Q. Did you think it necessary for you to go back to the meeting at Salyersville the next week, on the 2nd of August?

A. I didn't know anything about that meeting until after it was over with.

Q. Have you ever been out to the job site since you left that Friday?

*Cecil M. Delinger.*

A. No, sir.

Q. Are you going back?

A. If they gave me a coal mine out there and I had to go out there and run it, I would tell them to keep the damned thing; that I didn't want it.

Q. When you first got there, what sort of road did they have from Salyersville over to the job site?

A. They didn't have hardly any road. About 6 or 7 miles you had to drive right up the creek bed and run right in the water. That was the only way you could get up there. From there on in, it was just a very little, narrow road that our bulldozers had plowed out of the side of the mountain, which was just wide enough for one car or one truck, except at a few places where we had it wide enough where you could pull in to pass each other.

Q. You have been on construction work for 30 years, haven't you?

page 1127 } A. Yes, sir.

Q. Was that about like the other jobs you have been on, or do you think it rougher?

A. As far as the personnel is concerned, it is about as rough as one as I have ever had, and I have been on work in foreign countries as well as in the United States.

Q. I think this will finish up what I want to ask you:

After your telephone talk with Mr. Bryan on the 14th of July, which was that Thursday, what, if anything, did you do about getting the laborers or anybody else into the A. F. of L.?

A. That afternoon, if I remember correctly, just before noon when I talked to Mr. Bryan—naturally, since I had charge of the construction work, I had to travel all over and cover the whole area—that afternoon I went to the top of the mountain, which was about four miles by road from our office, and talked to Mr. Sublett. He was president of the Carpenters Local in Paintsville. I told him about my conversation with Mr. Bryan, and suggested to him that he try to get the laborers to organize. He said that he would.

Q. In your talk with any of those laborers, did any of them express themselves about that Laburnum job and the treatment they were getting from Laburnum, whether it was good or bad?

A. Yes, sir. After they started running coal  
page 1128 } over the tippie—when they started, I should say,  
when they started running the coal, Bill Maynard, who was tippie foreman for the Pond Creek people, had

*Cecil M. Delinger.*

talked to me and said there were a few of our laborers there that he would like to have transferred over to him for the purpose of using them on the tippie operation. Our labor foreman, and I think it was five or maybe six laborers, transferred over with the Pond Creek Company. The foreman and each of those laborers came to me and told me what they were doing, and more or less apologizing for their action. I told them that I thought it was the thing for them to do, since they were given permanent work, and that was more than I could offer *the*. Each and every one of them told me that they had enjoyed working for us, and hoped we didn't have any hard feelings toward them for going to work for the Coal Company.

I told them, "No," I understood the conditions, and we had no hard feelings at all. I said, "I hate to lose you boys. You are right good men."

But every one of them was very much concerned as to how we would feel about them transferring away from us.

Q. At any time that Hart was out there on the job, do you know anything about a strike, other than those picket signs that they put up out there? Did any of the men report to you that any of your people were striking?

A. No, sir, we never had any strike.

page 1129 } Mr. Robertson: The witness is with you.

### CROSS EXAMINATION.

By Colonel Harris:

Q. What effort had you made to look after getting the laborers and the carpenter helpers into a union before Mr. Bryan called you up on the 14th day of July?

A. What efforts had I made, you say?

Q. Yes.

A. I hadn't made any efforts. It was no concern of mine. I had no reason to make any efforts.

Q. But Mr. Bryan told you to get busy and see if you couldn't get those laborers and helpers into an A. F. of L. union, didn't he?

A. He asked me to see if we could get them organized.

Q. To see if you couldn't get them organized.

At that time, Mr. Bryan told you in that telephone conversation that he didn't like the United Construction Workers,

*Cecil M. Delinger.*

and he was not going to deal with them, and he never would deal with them, didn't he?

A. No, sir, he did not.

Q. Did he say anything at all about the United Construction Workers?

A. He said that Mr. Hart had told him that he wanted Mr. Bryan to sign up with him. Mr. Bryan told me in that telephone conversation that he had told Mr. Hart page 1130 } that he had agreements with the Richmond Building and Construction Trades Council and with other A. F. of L. unions, and that he didn't think that he could sign up with him, due to the fact that these other agreements were still binding.

Q. But the Carpenters' helpers and laborers were not getting any benefit from your contract with the A. F. of L., were they?

A. They were getting the union scale,—

Q. They were getting 90 cents an hour, weren't they?

Mr. Robertson: I don't think he had finished. Let him finish, please.

The Witness: They were getting 90 cents an hour, which was recognized through verbal, I think verbal agreement that that would be the recognized scale. That was a lot more money than they had ever got out there before.

By Colonel Harris:

Q. The United Construction Workers' scale for those same men was \$1.36 an hour, wasn't it?

A. I heard that that was it. I never saw anybody paid \$1.36 an hour.

Q. Most of your testimony has been on things you heard, and you heard that these laborers, if they joined the UCW, would be on a \$1.36 an hour scale?

A. I heard Mr. Hart tell Mr. Bryan that. That is all I know about that scale.

Q. After your boss told you to see if you page 1131 } couldn't get the laborers into the A. F. of L., did you try to do it, or did you just sit still and let time pass by?

A. I stated a few minutes ago, I went up on top of the mountain and made the suggestion to Mr. Sublett, the president of the Carpenters Local.

Q. Do you know a man named Poe?

A. Yes, sir.

*Cecil M. Delinger.*

Q. Did he work for the Laburnum Construction Company?

A. Yes, sir.

Q. How long was it after you hung up the telephone before you talked to Mr. Poe?

A. If I talked to Mr. Poe at all, it was sometime that afternoon.

Q. Didn't you give Mr. Poe time off, with pay, so that he could go out and try to get laborers and carpenters' helpers into the A. F. of L.?

A. That was several days after the telephone conversation.

Q. How many days off did you give Mr. Poe to try to get the laborers and carpenters' helpers signed up with the A. F. of L.?

A. I guess Mr. Poe was maybe an hour or an hour and a half at the most.

Q. Were you there when the applications for the A. F. of L. membership were all dated? Was that done in your presence?

page 1132 } A. No, sir.

Q. Were you there when somebody filled out, except one application, somebody filled out the others?

A. I don't know who filled them out. I didn't see any of that. I couldn't say who filled them out.

Q. You never saw any laborer fill them out, did you?

A. No, sir, I can't say that I did. I saw Mr. Poe approach these various laborers and talk with them, but I didn't stand right there and see them sign any applications.

Q. When you talked to this man Adams, you can't tell this jury of your own knowledge whether or not a United Construction Worker asked him to deliver you a message, can you?

A. I can't truthfully say that he did, no, sir. I don't know who asked him to.

Q. All you have is the hearsay report of a man named Adams, what Adams told you?

A. That is right.

Q. Is Mr. Adams still alive?

A. I don't know. I haven't seen or heard of him since I left out there.

Q. Had you been particularly friendly with Mr. Adams before that?

A. No. I had talked with him on several different occasions there on the streets or in the restaurant there in Salyersville.

*Cecil M. Delinger.*

page 1133 } Q. Do you know of any reason, had you done  
him any favor so that he would be willing to risk  
his life in your hands?

A. I don't think that I ever did, but nevertheless, if one of  
those guys told him to deliver that message, he would deliver  
it, whether he thought that much of me or not.

Colonel Harris: We move to exclude that statement. That  
is an argument from the witness, if the Court pleases, and  
not responsible to our question.

Mr. Robertson: The gentleman talks a lot about "why"  
here. He asked him, in effect, "Why?" The witness is tell-  
ing him why. It is circumstantial evidence which the jury  
can believe or disbelieve, as to whether this man's life was  
threatened and who threatened it.

Colonel Harris: No. I asked him, as I recall, if he ever  
did this man any favor so that this man would risk his life  
in his hands. That was the question. He either did him a  
favor or he didn't. And then he proceeds to make a speech  
for his employer.

Mr. Robertson: I object to that gratuitous comment, Your  
Honor. The witness has heretofore testified that Adams was  
scared to deliver the message and scared not to deliver it,  
and said he was caught in the middle. Now he has asked him  
why, and the witness has a right to tell him why.

Colonel Harris: If the Court is in any doubt  
page 1134 } about what my question was, I would like to have  
it read.

The Court: Read the question and answer.

(The last question and answer were read by the reporter.)

Colonel Harris: The latter part of the answer neverthe-  
less, I think, is not responsive to our question.

The Court: The motion is granted.

Gentlemen, disregard the latter part of his answer as not  
responsive to the question.

page 1135 } By Colonel Harris:

Q. Have you helped Mr. Bryan to prepare this  
case for trial?

A. The only help, if you could term it such—

The Court: Talk a little louder, please.

The Witness: The only help, if you could term it as such,

*Cecil M. Delinger.*

was that he questioned me as to what had happened out there, and from memory I went over the case with him.

By Colonel Harris:

Q. Did you and he discuss what witnesses you could use in this trial?

A. No, sir; we did not.

Q. As superintendent, rather as an employee—

Mr. Robertson: No, as superintendent. That is what he was.

By Colonel Harris:

Q. Are you still superintendent, because I am talking about within recent months?

A. Yes, sir.

Q. All right. Have you made any effort whatsoever to find out if the man Adams is still alive or made any effort to get him here as a witness in this case?

A. No, I have not.

Q. You stated that since your job was very near finished—

Will you tell the jury how near finished each page 1136 } one of those jobs was, in your judgment, as superintendent of construction.

A. I would say offhand, as a whole, the job was about 80 to 85 per cent complete.

Q. That is the average for all of them, taking the average. Some of them were more than 85, weren't they?

A. Yes, sir.

Q. Some of them were 95?

A. Yes, sir.

Q. Were there any of those jobs on which the Laburnum Construction Company had been fully and completely paid?

A. I am sorry, I can't answer that question. I don't know the answer to it.

Q. You don't have anything to do with the bookkeeping?

A. No, sir.

Q. That isn't under your supervision at all?

A. No, sir.

Q. One question, and then I am through, I think. Those roads leading up to the job site were in such condition that they would be impassable for the ordinary low-slung passenger car, were they not?

A. At what particular time are you referring now?

*Maynard C. Ragan.*

Q. Before you all smoothed them out in your operation up there.

A. When the operation first started there page 1137 } wasn't hardly any roads at all, but at the time this trouble happened there were very good roads. You could drive 30 or 40 miles all the way right to the job, thirty or forty miles an hour, I mean.

Q. But the roads generally in that country were in pretty bad condition, weren't they, when you first went there?

A. When we first went there, yes.

Q. The only ones that you repaired and fixed up were the ones that the men had to use in coming from the job and coming from home to the job site and back, is that right?

A. You mean when we first started work?

Q. Yes.

A. Yes.

Q. How many roads were there that you would say you repaired?

A. There is only one that I know of. We didn't repair that. Pond Creek people did that. The coal company people did that.

Q. You don't know of them repairing but one?

A. No. That is the only one I traveled on.

Mr. Robertson: Let him finish, please, Mr. Harris.

The Witness: No, sir; I don't know about any others.

. . . . .

page 1138 }

. . . . .

MAYNARD C. RAGAN

called as a witness for Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Ragan, your name is Maynard C. Ragan?

A. Yes, sir.

Q. Speak loud enough for all these gentlemen to hear you, please.

How old are you?

*Maynard C. Ragan.*

A. 30 years old.

Q. Where do you live?

A. I live in Sandston, Virginia right now.

Q. Are you employed by Laburnum Construction Corporation?

A. Yes, sir.

Q. In what capacity?

A. Chief clerk.

Q. Were you employed by them as chief clerk at their Breathitt County, Kentucky job site in July, 1949?

A. Yes, sir.

Q. How long have you been with Laburnum?

A. I have been with Laburnum almost five years now.

Q. Before that time where did you work and page 1139 } what kind of work did you do?

A. My biggest job prior to that time was at the Solvay Process Plant in Detroit, Michigan as chief clerk. We handled all the administrative affairs of the project.

Q. Where were you born and raised?

A. I was born and raised in Charleston, South Carolina.

Q. What were your duties generally as chief clerk on the job site in Breathitt County, Kentucky?

A. Administrative assistant to the superintendent, paymaster, personnel director. I managed the mess hall and camp facilities. I prepared payrolls and computed taxes and insurance in connection with the payrolls. I received, inspected and expedited and purchased materials and supplies. I guess that about covers most of it.

Q. Did you pay the men off?

A. Yes, sir.

Q. Did you hear—I am just trying to find out whether you did or whether you didn't—any part of a telephone conversation between Mr. Delinger and Mr. Bryan on Thursday, July 14, 1949?

A. Yes, sir; I did. I don't recall the exact words, but I knew later on from Mr. Delinger that Mr. Bryan had called him about a call from Mr. William Hart, in Pikesville.

Q. I don't want you to tell about that now. I page 1140 } just want to know if that conversation came to your attention.

A. Yes, sir.

Q. By what Mr. Delinger told you afterwards?

A. Yes, sir.

Q. But you didn't actually hear it while it was being made?

*Maynard C. Ragan.*

A. I heard the call, yes, sir, but I can't describe any of the language that was used or anything in connection with the call.

Q. Personally did you hear any part of a call that Delinger made to Mr. Bryan on the following Friday, July 22?

A. No, sir. Mr. Delinger called Mr. Bryan on that day, but I believe he called from the Hotel Carpenter in Salyersville and I didn't hear it.

Q. Did you personally hear any call from Mr. Delinger to Mr. Bryan on the 25th of July, which was Monday, about Mr. Bryan coming out there, or was that told to you later?

A. That was told to me later.

Q. When was the first you knew yourself about any report of this man Hart and a crowd coming there to run the men off the work?

A. The first I heard of it was from Mr. Delinger, about Hart's conversation with Mr. Bryan. After that I heard rumors all the way up to the time that they actually came in there.

Q. Were you at the job site when they came page 1141 } in there on Tuesday, July 26th?

A. Yes, sir; I was there.

Q. We have been into that pretty thoroughly.

About what time did Mr. Bryan get there that day?

A. Mr. Bryan arrived there about three o'clock.

Q. Did you, together with Mr. Delinger, report to him what had happened there that day when Hart and his men came there?

A. Yes, sir. I knew that Mr. Bryan was anxious to get in touch with Hart, so I asked Hart to wait to talk to Mr. Bryan.

Q. Were you present that afternoon of July 26 when Bryan and Delinger met Hart at the railroad crossing and Bryan and Hart had that talk?

A. No, sir; I wasn't there. I was working in the office at that time.

Q. Did you go to the Paintsville Local Union meeting that night, July 26?

A. No, sir; I didn't attend that meeting.

Q. At any time out there on the job did you have anything to do with arranging or helping laborers or anybody else to join any union?

A. No, sir. I had no part at all in that.

Q. Through that Tuesday, July 26, did you know whether or not the laborers at that time were organized?

*Maynard C. Ragan.*

page 1142 } A. They had signed applications with the A. F.  
of L. carpenters local in Salyersville, Kentucky  
to become carpenters' helpers.

Q. How do you know that?

A. I saw the application blanks after they had been filled in and signed by the laborers.

Q. Did those application blanks come into your possession?

A. Yes, sir; they did.

Q. Do you remember when?

A. No, sir; I can't recall the exact date right now.

Q. Do you remember how you happened to get them?

A. I asked Robert Poe if he would let me see them and let me have them, and he did that, so I sent them to Mr. Bryan in Richmond.

Q. I hand you 16 applications and ask you if you can tell by looking at them whether or not they are the ones that Poe gave you and that you forwarded to Bryan. Look at them closely enough to tell (documents handed to the witness).

A. Yes, sir; these are the applications that I had.

Mr. Robertson: The applications to which I refer are those which have been introduced as Plaintiff's Exhibit 57, sub-numbered 1 through 16, both inclusive.

page 1143 } By Mr. Robertson:

Q. Were you present when Poe got any of those applications?

A. No, sir; I wasn't present when the laborers were being signed.

Q. Did you furnish Poe with any of the application forms or know where he got them?

A. No, sir. I know where he got them but I didn't furnish them. He got them from Mr. Frank Dixon, an international representative of the A. F. of L. in the State of Kentucky.

Q. On July 26 or at any other time do you know whether or not any of your laborers were on strike?

A. No, sir. We had no labor troubles at all prior to that time.

Q. In the performance of your duties as chief clerk, including paying the men off, did you ever receive any complaints from the common laborers or anyone else about the rates of pay?

A. No, sir; I didn't receive any complaints and didn't hear of any complaints.

*Maynard C. Ragan.*

Q. Did any of the laborers ever tell you that they wanted to join the United Construction Workers?

A. No, sir; they never volunteered that information to me.

Q. Did you ever try to make any of them join page 1144 } the A. F. of L.?

A. No, sir; not at all. That was entirely their choice.

Q. At any time while you were at the job site did any of the laborers state to you that they would like to join the A. F. of L. before the United Construction Workers put the heat on them?

A. Yes, sir. Lee Bach and Dan Combs are two in particular that I mentioned that were very anxious to become members of the Salyersville Local.

Q. At the job site on July 26 did you have any talk with this man Hart about Tom Raney?

A. Yes, sir; I certainly did. I went down to the tipple a little before they were supposed to resume work at 12:30, and asked to see Hart. I asked some of our men to point him out to me. So I found Hart and I said, "Hart, what in the hell is the meaning of your coming in here with this group of men trying to stop our work?"

He said, "We are taking over."

I said "Under whose authority are you taking such a step"?

He said, "I am under orders from Mr. Tom Raney of Pikeville, Kentucky, and over him is Mr. A. D. Lewis, whose office is in Washington, D. C."

Mr. Robertson: The witness is with you.

page 1145 } CROSS EXAMINATION.

By Mr. Harris:

Q. Are you a member of the Salyersville Local Union?

A. No, sir. I am not.

Q. Were you a member then of the Salyersville Local Union?

A. No, sir. I have never had any connections with any labor organization.

Q. Had you been in the habit of getting applications for membership in the Salyersville Local Union?

A. No, sir; I had no interest in that at all.

Q. Who asked you to get those application blanks from Mr. Poe?

A. Mr. Bryan asked me to get them from Mr. Poe.

Q. Mr. Bryan?

*Maynard C. Ragan.*

A. Yes, sir.

Q. Do you recall what day of the week and what date of the month it was that Mr. Bryan asked you to get those application blanks from Mr. Poe?

A. No, sir; I can't recall the date. It was in July. I don't know the exact date at all.

Q. Did he ask you in a conversation face to face or did he ask you over long distance?

A. I believe it was over long distance.

Q. Did he call anybody else, or was the call to page 1146 } you and you alone?

A. I don't remember if that call was directed to me or to Mr. Delinger, and right now I would like to say I don't remember whether Mr. Bryan or Mr. Delinger asked me to get those applications.

The Court: Face the jury, please.

Mr. Allen: Repeat your answer, please.

The Witness: I would like to say right now that I don't know whether the request came from Mr. Bryan or Mr. Delinger and I also would like to say I don't know whether Mr. Bryan or Mr. Delinger actually asked me to get those application blanks.

By Colonel Harris:

Q. That was the first and only time in your life that you ever participated in union work and got application blanks, wasn't it?

A. I am trying to recall. I believe it was.

Q. Do you tell this jury that on the only occasion that you ever did anything like that, your memory is such that you don't know whether Mr. Bryan asked you to do it or whether Mr. Delinger asked you to do it or whether neither one of them asked you to do it?

Mr. Robertson: I object to that, Your Honor. He said one or the other did ask him to do it. It is not fair to the witness to twist it around the other way.

The Court: If that was his answer, the witness page 1147 } is on cross-examination and you may proceed along that line on redirect.

Colonel Harris: Will you read the question to him, Mr. Dudley.

The Witness: I placed no particular importance on that. As I recollect, that was the first job I was ever on that all the crafts weren't organized.

*Maynard C. Ragan.*

By Colonel Harris:

Q. My question was—and you haven't answered it—do you tell this jury that you don't know on that single solitary occasion whether Mr. Delinger asked you to do it, whether Mr. Bryan asked you to do it, or whether neither one of them asked you to do it? You haven't answered that question.

A. To me it was just a routine thing. I didn't place any particular importance on that. Am I supposed to remember everything that ever happened on the job?

Q. You are supposed to answer the question that I asked you.

A. I answered—

The Court: You are positive that either one of those two gentlemen asked you to do it?

The Witness: Yes, sir.

The Court: That is what you were trying to  
page 1149 } get at?

Colonel Harris: Yes.

By Colonel Harris:

Q. I understood you to say on your direct examination that before the application blanks were turned in to you, you knew where Poe got the blanks.

A. Certainly I knew where he got the blanks.

Q. Did you see him get them?

A. I didn't actually see anybody of the laborers sign the blanks, but I knew where they had come from. I knew that the men had signed them. Some of them told me they were glad to be in the A. F. of L.

Q. I am not asking you anything about what the men said. I am asking you if you knew where Poe got the blanks.

A. You mean before they were signed or after?

Q. Before they were signed, where did Poe get the blanks?

A. He got the blanks from Mr. Frank Dixon.

Q. How do you know he got them from Mr. Frank Dixon?

A. Because Poe told me so.

Q. When did Poe tell you that he got them from Frank Dixon?

A. It was within the first hour after we started work, I believe it was about July 20. It was early one morning he told me that he had obtained the blanks from Mr. Dixon.

Q. Don't you know that in order to get those  
page 1149 } blanks you had to send off to Louisville to get them?

*Maynard C. Ragan.*

A. No, he didn't have to do that.

Q. All right. What day was payday on that job?

A. Wednesday.

Q. Poe was an employee of the Laburnum Construction Company, wasn't he?

A. Yes, sir.

Q. Was he also an officer of the union?

A. Yes, sir—I am not positive. I think he was an officer in the Salyersville local.

Q. How long had Mr. Poe been an employee of the Laburnum Construction Company?

A. I don't know. You would have to refer to the employment records to find that.

Q. Did Lee Bach and Dan Combs come to you and solicit your help in getting in as members of the Salyersville local?

A. No, sir.

Q. You took no part personally in getting them in to that local, did you?

A. No, sir. It was no affair of mine.

Q. But it was an affair of yours after the 14th day of July, 1949, to get those laborers and carpenters, helpers in?

A. It was no affair of mine then.

Q. Did you have anything to do with helping Mr. Poe get the application blanks?  
page 1150 } A. No, sir; nothing at all.

Q. Have you ever had possession of the application blanks?

A. When I was transmitting them to Mr. Bryan after they had been filled out and signed.

Q. From whom did you get them?

A. From Mr. Robert Poe.

Q. Do you recall the date you got them?

A. No, sir; I can't recall the exact date.

Q. Do you recall the day of the week you got them?

A. No, sir; I can't recall that.

Q. Did you see Poe or anybody else fill out all those applications except one?

A. No, sir. I saw no signing and no filling out and no talking to or anything in connection with the application blanks.

Q. When you got them they were in the same condition that they are now?

A. Exactly.

Colonel Harris: That is all.

*Maynard C. Ragan.*

Mr. Robertson: Stand aside.

(Witness excused.)

Mr. Robertson: If Your Honor please, we have reached the point that it is necessary to take up several matters with the Court in chambers. I don't want to mislead you. page 1151 } I think it probably will take several hours. It might not.

The Court: What do you mean by several?

Mr. Robertson: I would say two or three, but just if they agree with everything it will take but five minutes.

Colonel Harris: I can't conceive of anybody agreeing with everything that Mr. Robertson would ask.

Mr. Robertson: I know you never will, my friend.

The Court: What do you think of excusing the jury until tomorrow morning, then?

Mr. Robertson: I think you might as well do it, Your Honor.

The Court: I expect so, gentlemen. You gentlemen have an opportunity to attend to some of your business affairs this afternoon. We will adjourn then until tomorrow morning at ten o'clock.

(Whereupon, at 12:30 o'clock p. m. the jury was excused.)

page 1152 } (The following proceedings were had in Chambers:)

Mr. Lowden: On Monday morning we had Mr. Joinville who was summoned in your Court as a witness for the Defendant up in the court upstairs, and when we got through you were in session. I undertook to tell him that I didn't think we would need him that day and I was to find out from you when you wanted him to come back. I don't think I had authority to do that.

The Court: He was recognized to be back as a witness for you gentlemen, wasn't he?

Mr. Mullen: Yes. He reported and I told him we were not going to call him that day.

Mr. Lowden: He said if we would let him know when we wanted him he will be available.

The Court: All right, sir.

Mr. Lowden: Do you think it will be this week? I think he is going to be tied up on Friday all day in another court.

The Court: If he will be available we will let him know when to appear.

Mr. Robertson, what was this conference called for? I just

want to get a bird's eye view of it and we will come back after lunch.

Mr. Robertson: I will tell you what it is and what our position is. We are at the point now where we page 1153 } think it is necessary to have the ruling of the Court on these various interrogatories. We have looked up the law and we are prepared to argue the law. Our position is going to be this—

The Court: I didn't want to rush you. I don't see Mr. Allen here. Do you want to wait for him?

Mr. Robertson: I have already talked to him.

The Court: All right, go ahead.

Mr. Robertson: Our position is that we are going to offer in evidence all of the interrogatories. We then think under the law, which we would like to argue after lunch, it becomes necessary for the Court to determine which interrogatories are relevant and which are not relevant. Then we think that under the law all relevant interrogatories and answers may be read in evidence, but we think the law is that the Court one by one determine which ones are relevant; then of those that are determined by the Court to be relevant, that the Plaintiff read in such as they want and the Defendant read in such as they want.

I am not going into the argument now, but I am going to ask Mr. Moore to make the argument and then Mr. Allen to close it for our side.

The reason we think, putting it in a nutshell, that our position is correct is that if it were not correct you would find yourself in this situation: That Laburnum an- page 1154 } swered a whole lot of interrogatories. They said a lot of them were self-serving declarations, hearsay, irrelevant, prejudicial, *everything* I can think of, and therefore they are not properly in the case. If our position is not right, if the position they took in here last week is right, under that statute, you would have to read all of that to the jury, which just can not be the law. If it was the law, so far as all that irrelevant stuff, they would be at our mercy. We could offer them all in and get stuff before the jury and into this case which we have no more right to put in here than we have to put in something here about the law of nations or something.

What we think is going to be necessary here—and that is why I said I thought this phase of the case was going to take several hours—is that the Court would want to hear argument on what the law is, and then if the Court thinks we are correct on it, as I think it will, I don't see any escape from our going through here and the Court's determining which ones are relevant and which ones are irrelevant. There is a whole mass of

them here that I would think everybody would admit were irrelevant. Frankly, I think what Mr. Pellard had in mind last week was to force us to read a book of stuff that would bore and irritate the jury beyond endurance. I don't think that the Court is going to rule that all that irrelevant stuff has to be read to the jury.

Mr. Mullen: Our position, Your Honor, is page 1155 } this: In the first place, he is referring to the interrogatories that we addressed to them and to which they made self-service answers. They have nothing to do with them. If we choose to put them in, we put them in. If we don't choose to put them in, they can't touch them. The same thing applies to the ones they addressed to us. We can't put them in, but our position is if they put them in, they must put in the entire interrogatory and read it to the jury. They can't put it in as an exhibit. We have cases to support that.

As to the relevancy, it is rather strange that they want to raise the question of the relevancy of their own interrogatories.

Mr. Robertson: We are willing for you to do whatever you want with ours, put them in or leave them out, read them or not read them.

Mr. Mullen: I am not talking about yours. I am talking about the ones you addressed to us. It is a very curious idea that you, who addressed them, are raising the question of relevancy. We could raise the question of relevancy. It is rather strange that the party that addressed the interrogatories to the other party now, in order to get out of the hole they are in, want to raise the question of relevancy.

Mr. Robertson: We are not in any hole. I think it is the duty of the Court to run the law case according page 1156 } to the law.

Mr. Mullen: So do I. I agree with you entirely.

The Court: Gentlemen, we will recess then until 2:15.

Colonel Harris: Here is that order you asked for.

Mr. Allen: Judge, may I say this: 2:15 is ample time, but there is a set of depositions and the question is coming up here as to whether certain depositions are admissible and whether they are not. In order to determine that question in my own mind, I would like to have just enough time to read those depositions. I think we can get through anyway with all our stuff this afternoon, can't we, Mr. Robertson?

Mr. Robertson: I don't know. It depends on how long it takes you to read them. I thought you had read them once.

Mr. Allen: No. I think I can read the depositions in 30 minutes. I want to be careful about it, Judge. I don't want to leave out any depositions that we are entitled to. I don't

want to offer any that I think are inadmissible, and if any parts of them are inadmissible I want to be in a position to say frankly that they are.

The Court: You would want additional time?

Mr. Allen: Probably 30 minutes additional time to read those depositions.

page 1157 } The Court: I wonder if we could make it 2:30 instead of 2:15.

Mr. Allen: 2:30 will be all right.

Mr. Mullen: As to what depositions are you going to raise the question?

Mr. Allen: I am not raising any question as to them. I am talking about depositions that we have not offered, that we are proposing to offer, that I want to study carefully with a view of determining their admissibility.

Mr. Mullen: Oh.

The Court: I wonder if you couldn't read those tonight and take it up tomorrow.

Mr. Allen: I can do that, certainly.

The Court: I think that would be better.

Mr. Robertson: I think we ought to keep this thing moving.

Mr. Allen: That will be all right.

The Court: Then we will meet at 2:15.

Mr. Mullen: Then in the morning you are going to state what depositions you want to offer?

Mr. Robertson: I don't know whether I am or not. I am going to meet each problem as it comes up and not commit myself in advance.

The Court: In other words, we will pass on the depositions when he raises the question.

page 1158 } Mr. Mullen: There are depositions that we will object to any part of.

The Court: Will you gentlemen ask for this order, Mr. Mullen? I filed several days ago the two affidavits that Mr. Pollard lodged with the Court. I entered an order filing those affidavits. I just want to tell you that.

Do you gentlemen want to endorse this order, Mr. Robertson? That is filing the motion for mistrial, which was made January 29.

Colonel Harris: I dated it the 29th.

The Court: The order will be entered filing the motion as of that day.

We will recess until 2:15.

(Whereupon, at 12:50 o'clock p. m. a recess was taken until 2:15 o'clock p. m. the same day.)

(End of Volume II.)

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**Supreme Court of the United States**

**OCTOBER TERM, 1933**

**No. 188**

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**UNITED CONSTRUCTION WORKERS, AFFILIATED  
WITH UNITED MINE WORKERS OF AMERICA,  
ET AL, PETITIONERS,**

**vs.**

**LADUENUM CONSTRUCTION CORPORATION**

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**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF APPEALS OF  
THE COMMONWEALTH OF VIRGINIA**

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**RECEIVED FOR RECORDED JULY 12, 1934**

**RECORDED JANUARY 12, 1934**

## Vol. III

page 1159 } AFTERNOON SESSION.

2:15 p. m.

(The following proceedings were had in Chambers:)

Mr. Robertson: If Your Honor please, Mr. Moore has prepared a memorandum on the law about these interrogatories, in addition to the memorandum that Mr. Allen prepared; and I am going to ask Mr. Moore to lead off for our side, and Mr. Allen to wind up for our side.

Mr. Moore: Your Honor, as we have stated in this brief memorandum, we believe the cause now pending before this Court affords a unique situation in that from the very beginning of this proceeding there was much material information which was within the exclusive control of the Defendants. Since this information was essential to the Plaintiff's case, it was necessary for the Plaintiff to propound a large number of interrogatories to the three Defendants.

Under the procedure followed by this Court in the pre-trial conferences, a final ruling on each question was reserved until the trial of the case when such question and answer were sought to be introduced in evidence. In other words, the Court temporarily required the parties to answer certain questions before the trial, but the Court still may decide that all of the questions or none of the questions shall be answered and admissible in evidence.

In the present case, the Plaintiff filed interrogatories pursuant to Section 8-320 *et seq.* of the Code of page 1160 } Virginia, 1950. The meaning of Section 8-320 was settled in the case of *Long v. Hawse*, 155 Va. 769 (1931), where the court said at page 377:

"The purpose of section 6236 (now 8-320) is to give a party to an action at law a simple and expeditious method of securing in his action at law the information which he might obtain by a bill of discovery in equity, and a proceeding under

this section affords as full and ample relief as can be had under a pure bill of discovery."

Exactly what relief is obtainable is a pure bill of discovery is explained by Professor W. M. Lile in his well known treatise on Equity, Pleading and Practice at pages 75 and 76. Here it is stated that the object of a pure bill of discovery is to give the party any information which may be material to his case. See also *M'Farland v. Hunter*, 8 Leigh (35 Va.) 489 (1836); *Larkey v. Gardner*, 105 Va. 718 (1906); 6 Michie's Jurisprudence 195.

It is further provided in Section 8-321 that interrogatories shall be answered "when the court in which the case is, \* \* \*, is satisfied that the interrogatories are relevant."

The next section of the Code (Section 8-322) provides answers to interrogatories shall be used in the same manner as if obtained upon a bill of discovery. The cases explaining the manner in which the answers to a pure bill of page 1161 } discovery may be used show first, that answers may be introduced in evidence only by the party who propounded the questions. See *M'Farland v. Hunter*, *supra*; *Vaughn v. Garland*, 11 Leigh (38 Va.) 251; 6 Michie's Jurisprudence 207.

Secondly, the cases show that when part of an answer to a question is read, the whole of that answer must be read so as to include any part that may be favorable or prejudicial to either side. Authorities for that proposition are *Fant v. Miller*, 17 Gratt. 187, and again, *M'Farland v. Hunter*. These two cases also show that the weight to be given the answer or answers introduced in evidence is to be determined by the jury in comparison with the other evidence offered in the case.

The third principle to be derived from the above cases is that once one question and answer have been read to the jury, the whole of the questions and answers must be introduced in evidence. But these cases do not hold, nor do any other Virginia cases hold that the whole of all of the questions and answers must be read to the jury as contended by the Defendants in the present case.

As we view it, there are two possible solutions to the problem of the interrogatories filed in the present case. The first is set out on page 4 of our memorandum:

In order to expedite the trial of the present case, the Plaintiff is willing to waive all objections to any of the page 1162 } interrogatories and introduce all of them in evidence. If this arrangement is satisfactory to all parties, then each side would be permitted to read to the jury

any questions and answers they wish to be brought to the particular attention of the jury. The obvious advantage of this solution to both sides is that it would cause the least delay. To hear objections and argument on each question and answer would likely take several days.

The second solution would be necessary if all parties are not willing to adopt the expeditious method set forth above. Under this method, the Court would be required to hear argument on each question and answer since the law provides irrelevant questions in interrogatories may be objected to. The questions and answers which the Court rules are admissible will be introduced as evidence to go to the jury. Since the law does not require that all of the questions and answers must be read to the jury, the parties may read to the jury only such admissible questions as they desire.

It should also be noted that the interrogatories directed to the various parties in the present case have been propounded in different sets or series. In this connection, there is nothing in the law which requires a party who introduces one set or series to also introduce all other sets of interrogatories propounded by that party. Therefore, if the Plaintiff introduces Interrogatories Number 4, 5 and 6, for example, that action does not mean the Plaintiff has to also introduce all other sets of interrogatories propounded by him.

I think Mr. Allen would like to discuss his memorandum and go into more detail on a few points of law.

Mr. Allen: I thought you would discuss the whole thing, and then I could conclude the discussion.

Mr. Moore: Either way you gentlemen want to work it. It is up to you.

Mr. Allen: I think, Your Honor, since we have received no reply to our brief, it would be better to let them come along, and then let me close the discussion on our side, because you have had a copy of the brief and I think I gave a copy to both Mr. Mullen and Colonel Harris.

The Court: Is there any objection to that procedure, gentlemen?

Mr. Mullen: I would like to hear them open pretty fully, Judge.

Mr. Allen: I opened as fully as I could in the memorandum that I wrote, and I am relying upon that. If you wish me just to discuss that, I should be glad to do so, but I shall follow the memorandum pretty closely.

The Court: It is up to you gentlemen. I have read the memorandum, and I have read your memorandum page 1164 { dum, also, Mr. Mullen.

Colonel Harris: I have not read the memorandum that Mr. Allen furnished me.

The Court: Would you like Mr. Allen to discuss this memorandum, Colonel Harris?

Colonel Harris: I am going to rely on Mr. Mullen to do practically all the argument for our side. It is a question of Virginia practice and procedure, and he knows vastly more about it than I will ever know.

The Court: Very well.

Mr. Mullen?

Mr. Mullen: If Your Honor please, this question is not unique in Virginia law. It has been decided, and there are no cases contrary to the three decisions that have been handed down by our Supreme Court of Appeals.

. . . . .

page 1169 {

. . . . .

I don't believe the English language could be any clearer. All three of those cases states specifically that if the interrogatory is used, it must be read as a whole to the jury.

The decision in *McFarland v. Hunter*, the conclusion of which I have read to the Court, followed a long discussion of cases, some from the English courts, some from ours, and I submit that every one of those cases as cited on pages 3 and 4 in that discussion, and on page 5, is absolutely in substantiation of what has been said in the cases decided by our own Supreme Court.

The Court passes, in determining whether questions should be answered, whether they are relevant to require answer. It doesn't pass at that time on the relevancy of them in the trial. That is another question.

The question that we are speaking of here now is that the Court decided these were proper questions and had to be answered. That is all that the statute refers to with reference to relevancy.

The solutions suggested would be entirely contrary to the decisions of our Court. They were: "In order to expedite the trial of the present case, the Plaintiff is willing to

waive all objections to any of the interrogatories  
page 1170 } and introduce all of them in evidence.”

The Plaintiff doesn't say they will read  
them all.

“If this arrangement is satisfactory to all parties, then each side would be permitted to read to the jury any questions and answers they wish to be brought to the particular attention of the jury. The obvious advantage of this solution to both sides is that it would cause the least delay.”

We are not the ones who brought about this situation. I thought all the time when they were filing all these long interrogatories, that they were simply piling up trouble for themselves, and that is what has happened, and that is what they now want to get out of.

The second thing is: “If all parties are not willing to adopt the expeditious method set forth above, the Court will be required to hear argument on each question and answer since the law provides irrelevant questions in interrogatories may be objected to.”

We have already objected to the questions as irrelevant to be asked, and that is what Your Honor has passed on, and that is what the statute says. When the Court is satisfied it is relevant to ask the questions, then the interrogatories must be answered. It doesn't mean that at a later time at the trial they can't be objected to, but certainly it is a new proposition that a party propounding the ques-  
page 1171 } tions can raise the question of the relevancy of the questions which it has propounded. That is the most remarkable argument that I have ever heard.

They want to come in court now and say, “Yes, we asked these questions, but they are not relevant and therefore we don't want to read them to the jury. We ask the Court to say they are not relevant.”

That is the most unusual request. I can't imagine any possible right to take any such position as that.

As to the question of whether they can read different series, if they had separate and independent interrogatories, probably they could. If they have addressed them to different defendants, 4, 5, and 6, I don't know anything to prevent them from reading 4 and not reading 5 and 6; but if they read 4, they have to read all of 4, and if they read 5, they have to read all of 5.

It would be manifestly unfair to permit them to address interrogatories and then undertake to pick out those which are favorable and those which are not favorable.

These cases which I have read stress that. They stress that you must read not only those admissions which are against the party to whom they are propounded, but it says even the affirmative arguments that they may make in those answers must be read. It is manifest that it was never intended that interrogatories should be used for

page 1172 } the purpose of getting discovery and culling out that which they want and leaving that which they don't want and that which is against interest. That is the reason these cases point out they must be read as a whole. The word used all through these cases is that they must be read as a whole.

page 1173 } The Court: What about these lengthy documents and journals, Mr. Mullen?

Mr. Mullen: They are part of their interrogatories.

The Court: For instance, the Defendants furnished certain copies of the journals of the Defendants. Do you contend that they have to pick up each journal and start at the first page and go right through?

Mr. Mullen: They called for them as part of the answer that they wanted?

Colonel Harris: Judge, in one particular I have a slightly different opinion about the law from what Mr. Mullen has argued. We haven't had time to consult on that. You were through, weren't you? I don't mean to interrupt.

The Court: I didn't mean to interrupt you Mr. Mullen.

Colonel Harris: I beg your pardon. I thought you were through. You go ahead.

The Court: You may want to answer that question.

Mr. Mullen: In 1 A. L. R. at pages 88-91 it is stated:

"b. Answers to bills of discovery. In the case of answers to bills of discovery, made use of against the pleaders in actions at law, the rule is that the whole of the answers must be offered into evidence, and not merely, as in the case of answers in equity suits for relief, the portions thereof relating to the admissions desired to be taken advantage of by the complainants. The complainant in the bill of discovery, if he introduces into the legal action, in aid of which the bill is filed, any portion of the defendant's answer thereto, is bound to introduce the whole of it into evidence."

Then it further states:

"c. Answers to interrogatories authorized by statute. Under statutes providing for the filing of interrogatories in

actions at law, and the use of the answers as evidence in the same manner as if procured upon bills in chancery for discovery, the answers to such interrogatories are, in analogy to the answers to bills of discovery, to be offered as a whole by the proponent, if he makes use of any part thereof. And it has been pointed out *supra* that no exception to this rule exists, on the ground of the irresponsiveness of any portion of the answers so made in reply to interrogatories."

I think, Your Honor, that the law is very clear. I don't think there is any question about it. Mr. Allen's statement that the Court was not passing on interrogatories in one of the cases, at least, I don't think is an answer because this is statutory. The statute says that they may be read with the same effect as a bill of discovery, and therefore a decision of our court as to when a bill of discovery can page 1175 } be read and the manner in which it can be read is just as much a decision on interrogatories as it is on a bill of discovery, because the statute has made them one and the same for that purpose.

Now, Colonel.

Colonel Harris: The point occurs to me—and I offer it with all deference—that the whole rule that Mr. Mullen has read to you could be circumvented completely if a litigant could ask 20 interrogatories on the first and 20 more on the 8th, and 20 more on the 15th, and break his questions up into separate sets. Interrogatories are never just one question. I have never bumped into an interrogatories with just one question in it in my life, and no matter whether those questions are put on one set or two sets or three sets they all constitute the interrogatories. The rule of law, it seems to me, that would obtain—and I judge that there is no Virginia decision on it—is that they can't by splitting up into sets, escape the requirements of the cases that they have to read all their interrogatories or none of them.

That is all I have to say, Your Honor.

The Court: All right, gentlemen.

Mr. Allen: May it please Your Honor, interrogatories are merely an additional means of discovery, a statutory means of discovery, a means of discovery in addition to page 1176 } that provided for a pure bill of discovery. The statute provides for the issuance of the interrogatories and that statute uses the word "relevant." I think that is very significant. That statute uses the word "relevant." We may concede, just for the purpose of this argument, without admitting it, that you did pass on the relevancy. Although you reserved all of your rulings in connection with

the interrogatories, for the moment let's concede that when you decided to compel them to answer the interrogatories that you did pass on the relevancy. Nothing was said in the statute about the materiality of the answers. All of the cases on the subject provide that the answers are admissible only when material. That is for the protection of the plaintiff. If the plaintiff asks an interrogatory that is relevant and Your Honor rules that the defendant has to answer it, the defendant can't make a self-serving, irresponsible, immaterial answer and compel us to read it. The question is not whether the interrogatories are admissible, but whether the interrogatories taken together with the answers furnish material evidence. Just as the bill of discovery law provides that the object of a pure bill of discovery is to seek material evidence in the hands of the defendant, the object of the statutory interrogatories is to seek material evidence that is relevant.

Your interrogatory first has to be relevant.  
 page 1177 } The statute wisely uses only the word "relevant" because the Court cannot determine the materiality of them until it sees the answers.

To adopt the rule followed by these gentlemen, we would have to read the answers however immaterial. When we go inside of the defense, so to speak, by statutory interrogatories to seek information that they alone had in connection with the relationship of these several unions, we are not bound by information that is immaterial; we are not required to read to the jury a lot of answers which show nothing. A lot of the information we asked for they claimed they didn't have. The answer just means nothing. There isn't anything to it at all.

If you bear the principle in mind that there is a distinction made between the use of the word "relevant" in the interrogatory and the word "material" in the cases when they come to the question of the admissibility of the answers, I think the question is easier of solution.

I go back to the proposition, with the greatest respect for my good and able friend, Mr. Mullen over there, I disagree with him on his statement that this question has ever been decided in Virginia. Every single case on this subject was not discussing whether all of the interrogatories and answers had to be physically read to the jury. They were discussing the weight to be given to an answer to a  
 page 1178 } pure bill in chancery when admitted in an action at law. The words "read" and "introduced" are interchangeably used through the cases. For instance, in that same case referred to by Mr. Mullen, in which he read the closing remarks of Judge Carr, the case of *Mc-*

*Farland v. Hunter*, 8 Leigh 489, you will find a concurring opinion there by Judge Cabell. He reviews the whole matter, concurs with Judge Carr, and winds up with a paragraph which clearly indicates that he considers the word "read" and the word "introduced" as being synonymous. He said, and I am quoting now Judge Cabell:

"I am, upon the whole, of opinion, 1st. That neither party is entitled to introduce his own answers in evidence to the jury, though they have been drawn from him by interrogatories; for the defendant to a bill of discovery can never introduce his answer to that bill, as evidence on a trial at law. 2dly. That the plaintiff, after the answers to the interrogatories are filed, may waive introducing them to the jury. And 3dly. That if he does introduce them, they have the effect only of a confession; they must all go together to the jury, who must give them such weight as they think them entitled to, when placed in the scale of the countervailing testimony which the plaintiff is at liberty to give."

If you will read the entire discussion in the *McFarland* case by Judge Carr down to the point where he page 1179 } summarizes his remarks, beginning with "These remarks disclose the whole rationale" and to the end, which Mr. Mullen read, if you go back a little further and read about two pages there, you will find that Judge Carr uses all the way through numerous expressions like this:

"Where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objections to the competency of the testimony of the party making the answer."

"\* \* \* where an answer is given in evidence in a court of the party is entitled to have the whole of the answer read \* \* \* That one part of an answer may be read in this court against a party, without reading the answer throughout \* \* \*"

Here the judge is talking about reading an answer that is filed in an equity case, not reading an answer to a pure bill in chancery that is filed in a law case as a result of filing a bill of discovery.

"\* \* \* where the bill is for discovery only, and the answer is read for that purpose, you read the whole. But when relief is prayed and the plaintiff replies to the answer, putting the whole in issue, he cannot, reading the answer as to the

contract and the consideration, stop at the end of a sentence, but must proceed to the completion of the immediate subject to which the defendant is answering; but that page 1180 } does not apply to distinct matters."

He is still talking about an answer in chancery, one that is filed in a chancery suit.

"The answer to a mere bill of discovery \* \* \* if read at law, it is read as evidence, and the whole answer must be laid before the jury."

He doesn't say "read". He said "laid before the jury."

"Another law, it is true, if an answer is proposed to be read as evidence, the whole answer must be read; though there were declarations of judges \* \* \* that there is no reason for reading the whole."

"With respect to a party whose answer is adduced having a right to insist upon the whole being taken together, provided it is relied on at all, a distinction must be taken \* \* \* between its being a part of the proceedings in the very suit depending, and being merely a matter of evidence in a different cause."

In equity "A bill is filed, an answer is put in, the plaintiff either sets down the cause for hearing upon bill and answer, which is an admission of the truth of the whole, and merely bringing the sufficiency of it into contest; or he replies to the answer, putting the whole in issue generally, whereupon the defendant must substantiate by proof all the facts upon which he means to insist, while the plaintiff may page 1181 } rely upon every fact admitted, which he conceives to be material \* \* \*"

"But when an answer is adduced as evidence in a court of law, no part of it is immediately in issue, neither does it form any direct proceeding in the cause. It is only one among other media for the investigation of the truth. And if one side introduces it at all, the other side may insist on the whole being read \* \* \*"

He is talking about the answer.

"\* \* \* the plaintiff, after the answers to the interrogatories are filed, may waive introducing them to the jury \* \* \*"

If he does introduce them \* \* \* they must all go together to the jury \* \* \*

He is talking about the interrogatories.

Wigmore, who *cofers* everything in the world—there isn't a subject or rule of evidence under the shining sun that Mr. Wigmore doesn't touch and discuss—discusses in his book at length the difference between equity proceeding where answers are filed in an equity cause and the case of a pure bill of discovery where the answer is filed there, and then there is an effort to use the answer at law. Then he discusses the question of statutory interrogatories, and he goes into that and says that some states provide that the statutory interrogatories shall be regarded and used in the same mannner as an answer to a pure bill of discovery when the page 1182 } answer is used at all.

In Volume 4 of his Second Edition he deals with that subject and he winds up with this section, Section 2124:

"Party's answers to Statutory Interrogatories. Keeping in mind the orthodox difference between the use of an answer as a pleading in chancery and its use in a trial at law as evidence \* \* \*, the proper treatment of an opponent's answers to interrogatories or authorized by statute ought not to be difficult to determine.

"If, as in some jurisdictions, the statute authorizes these to be used as an answer to a bill of discovery"—that is what our statute does—"could be used, then the plaintiff who uses any part must put in the whole, and cannot stop with the parts grammatically corrected; in other words, the rule applies for using answers as evidence at law \* \* \*, not the rule for using them as pleadings in chancery."

There is his construction of these various statutes, exactly like ours.

"If, however, the statute does not put such answers on the footing of discovery—we need not discuss that because ours does put it on that.

Then he goes on to say:

"In any event"—regardless of whether the statute puts it on the basis of a discovery at law or whether it page 1183 } deals with interrogatories on the basis of an answer filed in equity. He said "In any event, the decision is of little practical consequence, because not only

may the opponent put in the remainder of the document \* \* \* and no question of admission by pleading is involved, but he may also take the stand on his own behalf if he desires."

Of what importance is this decision to be made here? We say that a lot of these answers are absolutely immaterial. We object to them. We are going to insist upon our objections. Mr. Mullen said we can't object to the relevancy of the interrogatories themselves. Let's concede that for the sake of argument. We thought they were relevant when we asked them. We thought so or we wouldn't have asked them. When we receive the answers they may not be revelant, but if they are, we say they are certainly not admissible. A lot of evidence that is relevant is not admissible. A lot of hearsay evidence is relevant, but hearsay evidence is not always admissible. So there is quite a distinction between evidence that is relevant and evidence that is admissible. The interrogatories may be relevant according to the statute, and Your Honor may have been correct in directing them to answer, but that doesn't mean at all that they are admissible.

There is no rule of law to be found anywhere in the books.

We offer all of these interrogatories in evidence, page 1184 } if you please. We are not offering some to keep them from offering the others. We are not putting upon them the burden of offering the others, but we don't intend, if we can help it, for them to put the burden upon us of reading a whole lot of stuff that we know is not material. We don't mean to cut out reading something that is in their favor. We wouldn't stop at reading interrogatories just because the answer didn't suit us. But we certainly don't intend, unless we are compelled to do so, to burden the jury on our part by reading a lot of immaterial answers. That is about what they want us to do.

Now let us come back to the statute. When Judge Carr rendered that decision—and I have examined the statute in the revised Code of 1919, for I have all those old codes in my library at home—the statute is exactly as Judge Carr says it is here. Here is what he says about the statute in concluding his opinion:

"And if one side introduces it at all, the other may insist on the whole being read, in order that a judgment may be formed upon its entire credit and effect. But though the whole must be read, it does not necessarily follow that it must be wholly admitted as true, or wholly rejected as false \* \* \*."

That isn't the part that I read where he discusses that statute.

The Court: Excuse me just a minute, Mr. page 1185 } Allen.

(Off the record.)

Mr. Allen: If Your Honor please, Judge Carr, who wrote the main opinion in the case of *Fant v. Miller*, in 17 Gratt. 187, was evidently influenced considerably by the particular phraseology of the statute as it existed at that time. You will notice that the only thing in the statute on the subject as the statute exists today is this:

"Answers to such interrogatories may be used as evidence at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery."

The language in the statute when that case was decided, *Fant v. Miller*, was to this effect:

"And to the same purpose and extent, and upon the same conditions in all respects as if they had been procured upon a bill in chancery for discovery, but no further or otherwise."

Judge Carr in his opinion said that these are "words as remarkable for their solicitous and impressive clearness as I have ever seen."

There are no such words in the statute now at all.

Mr. Mullen: Mr. Allen, you spoke of Judge Carr in *Fant v. Miller*. You meant *McFarland v. Hunter*, didn't you?

Mr. Allen: Yes, I meant *McFarland v. Hunter*.

*Fant v. Miller* didn't involve statutory interrogatories. All that *Fant v. Miller* involved was the effect of the answer to a pure bill in chancery when that answer was used in an action at law as evidence.

In the case of *McFarland v. Hunter*, Judge Carr states himself what the question was that was involved in the case, and he says this, and I am quoting now:

"The only point of importance in this cause arises upon exceptions taken to the opinion of the Court declaring that the answers of the plaintiff to the interrogatories of the defendant, so far as they were responsive, were conclusive evidence, not to be contradicted or disproved by any evidence, parol or written."

I repeat—and there can't be any doubt on earth about it if you will examine the cases carefully—that no Virginia case has ever decided nor has there ever been involved in any Virginia case the precise question of whether the plaintiff had to read to the jury all of any interrogatories that he introduced in evidence. I doubt even if the Court would hold that he had to introduce them all under the statutes as they exist now, because the old rule arose, Your Honor, by virtue of the fact that the answer was obtained in a proceeding which was separate and distinct entirely from the proceeding at law which was being tried, and the answer was taken out of the other proceeding, the equity proceeding, one answer, a connected answer, and filed as evidence in the law action. The answer was the same as the man speaking, testifying. If you are going to take any part of an answer like that responsive to a bill in equity, and file it in the action at law, then the whole answer must go in. Some of the cases even doubt whether you have to read it all, but we will concede for the sake of argument, take a short document like that obtained in another case, not a part of the proceeding, that you have to read it all.

The statute has come along and provide for these statutory interrogatories which are filed in the proceeding that is already pending at law to be used in that proceeding. So it is a part of the same proceeding, and by analogy of reasoning it ought to be used in the same sense that an answer in equity is used which is a part of that proceeding.

Replying to Colonel Harris over there about the several different sets, there are 16 separate and distinct sets or series of interrogatories in this case. The only long ones are the first four. I believe they filed interrogatories first. At least the interrogatories in this case numbered one are the interrogatories which they propounded to us. Then interrogatories 2, 3, 4, and so on, are interrogatories we propounded to them. Our interrogatories go up through 16. Some of those interrogatories contain as few as three questions, some of them as few as four, some of them 7 or 8, but the only real long ones are 2, 3, and 4.

Certain it is that the plaintiff would have a right to introduce and read to the jury all of any of those short sets if he saw fit to do so. They were sued out at different times. I believe some of them were sued out—according to the dates, some of them bear the same date, but they are separate and distinct interrogatories, propounding questions on separate and distinct subjects, and some of those short interrogatories came about in this way: Your Honor ruled that certain questions didn't have to be answered un-

less they were reframed. Then separate and distinct interrogatories were prepared reframing those interrogatories, and they were answered as reframed. They are short, only three or four. So I say that certainly common sense and reasoning supports the view that we have a right to introduce and read to the jury, if we see fit, all of those short sets of interrogatories. When it comes to the long ones, I think we have a right and in this day of modernization of rules of pleading and practice I don't think the Court would take a step backward 100 years and require you even to introduce interrogatories that the plaintiff thinks are not material evidence. But conceding that we would introduce them all, any that we don't read that they want to read, as Mr. Wigmore says, they can read them. For all practical purposes we should not spend a day or a half day here arguing and discussing as to who shall get in the witness chair and read the interrogatories. I don't know of any rule by which a court could require me or Mr. Moore or Mr. Robertson here to get in the chair and read all day long when it is for their benefit, when they are insisting upon its being done. Let one of them get in the chair and do some reading.

Mr. Mullen: We are not insisting. The law is insisting.

Mr. Allen: I differ with you on the law.

That is about all I have to say, and Mr. Robertson would like to express himself here.

Mr. Robertson: Judge, I will have to be very brief on what I have to say.

I have studied this thing just as well as I know how, and it seems to me it adds up to this: Up to this time the Court has not ruled finally on anything. It has expressly reserved all final rulings in this trial until after the pattern of the case was set, and the Court I think has said time and again "I can then tell better what is relevant and what is irrelevant and whether or not these interrogatories should be answered." So I think that the entire thing right now is wide open for the Court to rule anyway it wants, to throw all the interrogatories out if it wants to.

At the bottom of page 2 of Mr. Moore's memorandum, it says: "It is further provided in Section 8-321 that interrogatories shall be answered 'when the court in which the case is \* \* \* is satisfied that the interrogatories are relevant.'"

It seems to me, Your Honor, if we offer them all in, all sets—I don't care anything about the sets and I don't care anything about who reads them. I can read them. I seem to have more staying power than anybody here physically. I am weak in other respects. If we offer them all in then it be-

comes the duty of the Court, in my opinion, even if counsel on either side didn't ask for it, to determine which answers to interrogatories are relevant. I think it is just as much the duty of the Court as it is the duty of counsel to keep irrelevant matter away from the jury and out of the trial.

Suppose the Court decides 50 questions are relevant, and suppose that all 50 of them are just perfectly ruinous to this plaintiff, but I called for them and I introduced them, then I think the Court can say, "All right, you called for them and you introduced them, you have to read them, I don't care whether it is fatal to your case."

In other words, we don't for one minute argue here that all we are going to read to the jury or all that must be read to the jury is just what is helpful to us. If we offer them in and the Court determines that they are relevant, it doesn't make any difference in whose favor, then they must all be read to the jury. If the plaintiff gets any help page 1191 } from it, well and good. If the plaintiff gets any hurt from it, that is just too bad. If the defendants get any help from them, they are entitled to it under the rules of law. As far as I am concerned, it doesn't make any difference to me, I am perfectly willing to introduce all 16, and all I am arguing for, I say that I think it is the duty of the Court to determine which of those answers are relevant and then to say those relevant answers must be read to the jury, it doesn't make any difference who they help or who they hurt. I don't think you would do any injustice to the plaintiff if you said "You are offering them now, and you read them all. Everything that is relevant, you read it. I don't care whether it helps you or hurts you, you put them in. I have determined they are relevant, now you get on the stand and read them."

Mr. Moore: There is one point I would like to show the Court, that in the pre-trial conference of November 28, Mr. Mullen has this to say about Virginia statutes requiring interrogatories to be relevant. On page 35 he said, quoting:

"No—laid down the general principle that you can not order such production of papers for the general effort to find something which they can not point out and the Virginia statute says when the Court is satisfied that exhibits page 1192 } are relevant—that is the point, in the cases they have cited in the memorandum they heretofore filed in every one of those cases it is said it must be shown that the evidence called for is material."

Mr. Mullen: That is for the purpose of requiring them to answer the interrogatories, and the statute expressly so

states. The statute we are acting under here is an entirely different section.

Mr. Robertson: I promised I wouldn't say tweedle-dum and tweedle-dee any more, and I am not going to say it.

Mr. Allen: May I ask one question, Mr. Mullen, if you don't mind. Do you contend, if we called for, propound an interrogatory that is relevant and you make an utterly immaterial answer, that we are compelled to accept it and read it to the jury?

Mr. Mullen: That you read the whole interrogatory, exactly what the case says. It says that the party to whom it is propounded may answer against your interest and the answer may be entirely irrelevant.

Mr. Robertson: No. If it is relevant, if it crucifies us, we have got to read it.

Mr. Allen: But if it is immaterial. I am asking you, if it is immaterial.

The Court: Can the plaintiff now say that these questions which they propounded to the defendants are irrelevant?

Mr. Robertson: Yes, because it so turns out page 1193 } the way the case has developed. For instance, I can show you—I won't stop to turn to them—I can show you a whole sequence of them where they said the questions didn't make sense.

Mr. Moore: We asked what is local No. 778A, and so on, and their answer to those is a string of them, "There is no such union"; "there is no such committee"; "there was no such office." Those certainly can't be relevant.

Mr. Mullen: If Your Honor please, we answered directly and responsively. There is not an argument in any of those interrogatories. Theirs is filled with arguments on their side when we addressed interrogatories to them. They fought here day after day that they were relevant and we should be required to answer because they were relevant to get material evidence for them. Now they are coming in here and trying to say that their own questions are not relevant and shouldn't be used. I have never heard of such a thing.

Mr. Robertson: We are not saying the questions are not relevant. We say the answers are not relevant the way the case is set up now.

Mr. Mullen: "... the whole of which is to be read as the testimony of a witness, including not only admissions against the interest of the respondent, but all assertions in his favor, subject, however, to be credited or discredited \* \* \*"

Mr. Allen: That is right. We have no page 1194 } quarrel with that.

Mr. Mullen: Mr. Allen says it is not decided

in Virginia. There is no distinction between interrogatories and bills of discovery in view of the statute that makes interrogatives evidence in the same manner and to the same extent as bills of discovery. It classes them the same. Those cases decide how the answer to a pure bill of discovery can be used in evidence and the words are interchangeable with "interrogatories" as much as the statute can make it so.

Colonel Harris: Judge, I would like to add this. They put us to enormous labor. We worked for weeks preparing answers to questions that they had used the Court's machinery to propound, and it is playing fast and loose with the Court for them to propound questions and keep a half dozen lawyers and four or five men looking up facts, and then come in and say "We will pick out the cherries in this pudding and we are not going to follow the rules of law."

Mr. Allen: Mr. Mullen, I would like to ask you one more question, too. You know, we called for a number of the issues of the Mine Workers Journal, and you filed a stack of them about that thick (indicating).

Mr. Mullen: Exactly what you called for.

Mr. Allen: Of course you know that they page 1195 } were called for for particular articles in them.

Following out your principle you would insist that we read cover to cover everything that is in every issue of the journal, would you?

Mr. Mullen: I am leaving that matter entirely to the Court. They are part of the interrogatories.

Mr. Lowden: Suppose this were a case involving how old somebody was and you called for the family Bible as one of the methods of proving age and on the first page the man's age was shown. Do you mean to say the Court would require us to read the Bible to the jury?

Mr. Mullen: It was called for a special purpose designated in the cause, and You have a different proposition.

The Court: Gentlemen, I have listened atten- page 1196 } tively to the arguments, the very able arguments by counsel for both sides today on this question. I have also considered the matter somewhat before hearing argument today.

I don't think that the Plaintiff can be required to introduce all of the interrogatories, that is, 3, 4, 5, and 6. I think that it can introduce any one or all. Then when it comes to reading the interrogatories, I am of the opinion that the Plaintiff may read any or all interrogatories which the Court finally rules relevant. All other interrogatories and answers which are not read by Plaintiff's counsel may be read by counsel for the Defendants.

I don't think that counsel for the Plaintiff can come in Court today and say that interrogatories which were propounded to the Defendants are not relevant.

Does that sufficiently answer the question?

Mr. Moore: May we raise the objection that they are not responsive and as to the surplus matter in some of the answers?

The Court: That brings up the question that was in my mind about answers not being responsive to the Plaintiff's interrogatories. If the answers are not responsive, I don't think the Court should permit such questions and answers to be read.

Mr. Robertson: Judge, may I ask you a question now to see if I have in mind what the Court has said? The Court is going to determine what questions and answers the Court thinks are relevant. After the Court does that, the Plaintiff may read such of those as it wants to, and the Defendant may read such as it wants to?

The Court: You may attempt to read those that you want to read. These gentlemen may object to them, and the Court may rule then that you may not read such questions and answers, but you cannot object that they are irrelevant, because you asked for them.

Mr. Robertson: All right.

Mr. Mullen: If we sit still and say nothing, he has to read everything there?

The Court: No. They have to read a complete question and a complete answer in the interrogatories, but they don't have to read every question and every answer. You gentlemen may read them, Mr. Mullen.

Mr. Robertson: My purpose in suggesting this conference this afternoon, Your Honor, was that I thought we would tremendously expedite and simplify the matter if we went through it here this afternoon and the Court ruled this afternoon what it considers relevant and irrelevant.

The Court: I think it would be well to do that. It would save considerable time.

Mr. Robertson: As far as I am concerned, I page 1198 } am very anxious to reduce the argument to a minimum. We have argued them before. It is largely qualified by the way the evidence has developed, and I would hope it wouldn't take so long an argument as it has taken heretofore.

Colonel Harris: Will you note our exception before we proceed to something else?

The Court: Certainly.

Colonel Harris: We separately and severally except to that part of the ruling of the Court which holds that as to a particular defendant, if there are four sets of interrogatories to that defendant, like sets 1, 2, 3, and 4, that the Plaintiff can pick out any one set the Plaintiff wishes and not be concerned about the others; in other words that he can introduce any one of the four or part of any one of the four and ignore the other sets

Mr. Robertson: We are perfectly willing to read everything the Court says is relevant.

Mr. Mullen: Wait a minute. We want to get our exception to this. I think this is a very important question and a serious one.

Colonel Harris: We reserve an exception to that ruling of the Court for the reason that interrogatories are a unity, and the statement made a little while ago by Mr. Allen that set No. 2 may be a re-framing of question No. 118 in the first set. If it is re-framing 118, 118 is part of the page 1199 } first set and the re-framing is a part of the first set, and they are one. It relates back, so there is no way, in our opinion, to separate them.

Mr. Robertson: If Your Honor please, we don't want to separate them.

The Court: I believe you are right in that respect, Colonel Harris. If another set is a revision of a particular set, I think that set should be read, that they should be read together.

Mr. Robertson: We will offer them all.

The Court: That is a part of the original set.

Colonel Harris: I am not through noting my exceptions here.

We also except to the ruling of the Court that the Plaintiff can pick out any question and the answer thereto from a set of interrogatories and read it to the jury and leave out of the Plaintiff's task the reading to the jury of any and all other questions and answers in the interrogatory.

Our basis for the exception is not only the argument made, but that it places upon the Defendants an unfair burden before the jury. In this instance the Plaintiff has taken eight days to put on his evidence. Then he gets up, and on something that the Plaintiff himself has done, he reaches out and says, "I will take three questions and take ten minutes, and then I will make it look to this tired and weary page 1200 } jury that the Defendant is consuming all of this time." I don't think it was ever contemplated by the law that the Defendant should be placed to that burden.

In the case that Mr. Allen read he said the defendant may

insist that it all be read. It didn't say the defendant may then read those not read. If he insists on their being read, he insists on the other side reading them. So, we except to that ruling which allows them to pick out one interrogatory or more, or such interrogatories as they please, and read those and the answers to them.

In other words, any ruling contray to the cases cited, that they must read them all, is, in our opinion, placing a burden on the Defendants which the law does not place, and we want to except to each one of those rulings.

The Court: But it is understood the Court has amended its ruling to require the reading of any subsequent interrogatories which relate to the set of interrogatories which have been presented and introduced.

Mr. Mullen: I am not certain yet that I understand exactly what the Court has ruled.

Mr. Allen: I think it is clear.

Mr. Robertson: Judge, I can simplify the matter to this extent. We are perfectly willing right now to offer all the interrogatories, and then the Court can rule that they all go in as a unit, subject to the ruling the Court has made, and the Court can determine now which ones are relevant all the way through the whole set.

Mr. Mullen: You are not shortening what I had to say. What I want to know is this: If the Court does go through and say that certain of them are not pertinent, say that fifty of them are not relevant and fifty are relevant, they have to read those fifty relevant ones, all or none of those fifty?

The Court: I understood that you were going to ask that certain ones be read by the Plaintiff. Then counsel for the Defendant will have an opportunity to object.

Mr. Robertson: Yes, sir.

The Court: And the Court may rule one way or the other.

Mr. Mullen: That is the relevancy of the particular question. I am raising the question that we argued here this afternoon, whether they have to read all of those in the interrogation that the Court says are relevant.

The Court: No, I didn't rule that they had to read them all, but that they could read any portion of them. They cannot read any that the Court rules are not relevant.

Mr. Mullen: I want to make this objection, then: We object to the ruling that if the Plaintiff introduces any of the interrogatories, the interrogatory of any individual defendant, the Plaintiff can read only the portion that it sees fit to read and not the entire interrogatory.

Mr. Robertson: You mean the entire set of interrogatories. Of course we are going to read the complete answer to an interrogatory.

Mr. Mullen: That the Plaintiff does not have to read the entire interrogatory and answer, but can read a portion of it.

The Court: That is true.

Mr. Mullen: We note an exception to that.

Colonel Harris: May I make an inquiry?

The Court: Certainly.

Colonel Harris: I understood Your Honor to state a while ago that it did not lie in the mouth of Plaintiff's counsel, who has propounded interrogatories, now to come in and say that those interrogatories are not relevant.

The Court: That was the Court's ruling.

Mr. Mullen: Suppose no party objects to any of them as being irrelevant.

Mr. Robertson: Then I think the duty is on the Court, and I think the Court has the right to call for the aid of counsel if it wants it.

Mr. Allen: I think we are probably using the term "relevant" improperly. We are using the terms "relevancy" and "materiality" as being synonymous, and they are not at all.

I rather agree with the Court that, so far as the page 1203 } question is concerned, if we asked it we can't come in and say that our own question is irrelevant. The answer is an entirely different thing.

Mr. Robertson: What we mean is whether it is admissible in evidence.

Mr. Allen: That is right, whether the answer is.

Mr. Robertson: Yes.

Mr. Mullen: Do you mean to say that if the answer is directly responsive to the question, you can then say the answer is irrelevant?

Mr. Allen: I don't say that.

Mr. Mullen: That is what you said.

Mr. Allen: The Judge has already ruled, and there is no use to discuss it any more, but when you go back to the object of bills of discovery and the object of interrogatories, it is for the purpose of discovery. A man is never required to introduce everything that is discovered.

The Court: It seems to the Court it would be most unreasonable to require to be read all these journals. It would take three days to read them, and the chances are that there is not much in them that is material or relevant.

Mr. Allen: One whole journal with ten or fifteen pages probably has one paragraph that long (indicating) which is relevant, and the rest has nothing to do with the case.

Mr. Robertson: As Mr. Mullen said here before, page 1204 } fore, and I have read enough of them before to know, if those journals wouldn't inflame the jury I don't know what would.

Mr. Mullen: I don't know, those journals might be treated as exhibits with the answers on a different basis.

The Court: I understand these gentlemen are introducing all the interrogatories.

Mr. Robertson: That is right.

Colonel Harris: Will Your Honor give us time to confer before we proceed to take up the interrogatories?

The Court: Certainly.

(Counsel withdrew for separate conference.)

Mr. Robertson: We could save useless work tomorrow by getting on there tomorrow and reading what we think is relevant, and the Court could rule on them as they came up. Then let them read whatever they want, and the Court rule on them as they came up.

The Court: Do you gentlemen have any observations?

Mr. Mullen: We are not going to make any request that you read some particular part on our account. We simply say that you have to read the whole. We don't know what you propose to do. We don't know that we can take any part in what you propose to do without risking and waiving our objection.

Mr. Robertson: I understand the ruling of page 1205 } the Court to be that we will come forward, that we have now offered all of the interrogatories which we addressed to the Defendants, and tomorrow morning we will be prepared to read such of the relevant ones as we think necessary to read, and the Court will rule whether we can read them or not. Then it will be up to the Defendants to proceed as they deem proper.

The Court: Your plan would be to start reading the interrogatories, and then these gentlemen may object if they care to.

Mr. Robertson: Yes.

The Court: Do you gentlemen care to make any observations on that?

Mr. Mullen: I don't know that there is anything we can say. We made our objection. We made our objection to the interrogatories in the beginning, and we were required to answer. I don't think we can be put in the position of objecting to every one of the questions before the jury. I don't think we can be put in that position before the jury.

Mr. Robertson: We would be perfectly willing for you to make a continuing objection now to the procedure that is going to be followed tomorrow. We haven't objected to your making continuing objections before about everything else in the case.

Mr. Mullen: We object to every question unless you read them all.

page 1206 } Mr. Robertson: I take it if we adopt any such captious course as that, the Court could direct them to have a continuing objection.

Mr. Mullen: There is nothing captious about that. We feel that we have got to do what then is necessary to protect the objection and exceptions we have taken on this question. I think it is a very important question, and I think it is a very serious question. We don't want to do anything that can possibly be construed as waiving that objection.

The Court: The Court understands your position, Mr. Mullen.

Mr. Allen: We accept what you do with good graces, without any criticism of you whatsoever.

The Court: The only thought that occurs to me at the moment is, if you want to press any specific objection to any of these questions and answers that will be read tomorrow, if you would rather meet ahead of time and go over them and object to them, the Court of course will rule one way or the other. Of we can proceed, let counsel start reading, and you could interpose a continuing objection to all of it. The thought occurred to me if we reached a question and answer the Court may rule that it should not be asked or answered.

Colonel Harris: I thought the question of  
page 1207 } relevancy of the questions had been ruled against them, that all the questions are relevant.

The Court: As far as you are concerned, as far as your reading them is concerned. They can't object to your reading all the balance. Did you gentlemen understand the Court's ruling in that respect?

Colonel Harris: If I may ask in your presence, I think it would be better to wait until the morning than to do anything here, and when they offer if you will be advised as to whether we shall object to each one or make the continuing objection.

The Court: In other words, you reserve your right when they read the question to object and give your reasons and the Court will rule right then and there on the bench.

Mr. Mullen: I suppose that without waiving the objections here made to the ruling of the Court that they are not required to read them all, we could then also when they do

read them, object to any specific questions that they do read.

The Court: Yes.

Mr. Mullen: I am concerned about doing nothing to impair in any degree our objection.

The Court: In the event the Court of Appeals holds that my ruling is proper, the thought occurred to me that you still have an objection to the question and answer and page 1208 } and the Court may rule in your favor if you give your reasons therefor.

Colonel Harris: Of course I would rather have two shots with a rifle than to have just one.

The Court: That is true.

Colonel Harris: I am not from Kentucky.

The Court: We will adjourn then until tomorrow morning at ten o'clock with the understanding that counsel for the Plaintiff will start reading, and if you gentlemen care at that time to make any objection to any of the questions and answers read, the Court will be happy to hear you.

Colonel Harris: Or to the general course of procedure.

The Court: Exactly.

Mr. Mullen: We do not have to repeat the objection we have made here this afternoon?

The Court: That is my understanding.

Mr. Mullen: But we have a right to object to the individual question and hold that objection and exception.

The Court: I don't see why that wouldn't hold good, do you, gentlemen?

Mr. Robertson: No, sir.

The Court: I think it would hold good.

If you gentlemen read all the questions and answers then everything will be cured.

Colonel Harris: I am afraid it would.

. . . . .

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. . . . .

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on February 1, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

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PROCEEDINGS.

(Roll call of the jury.)

Mr. Robertson: If Your Honor please, before the trial of this case began, the Plaintiff propounded certain questions to all three Defendants in the form of interrogatories, and there are answers here from the Defendants to those interrogatories. We offer all of the interrogatories in evidence now.

Then I think in order to show the relationship between the three defendants it will be necessary for me to read quite a number of them to the jury. It is going to be tedious. I think it will take several hours. I am sorry, but I think it is necessary. I now offer in evidence—

Colonel Harris: We desire to interpose an objection. He has offered all of them, and I think at this time we should object, if the Court pleases.

We object to the introduction of the interrogatories in that manner, also on the additional ground that it is not the proper and legal way to introduce interrogatories, and on the ground that under the laws and practice of the State of Virginia all the interrogatories and all the answers thereto must be read to the jury by the party who seeks to introduce them in evidence.

Mr. Robertson: The Court has already ruled on that in Chambers. I assume he is doing that for the record.

The Court: For the record. The objection is page 1212 } overruled.

Colonel Harris: We reserve an exception to the rulings of the Court.

Now I want an opportunity as he offers any particular interrogatory to state our objection, and after I have stated it once we will pursue the method suggested by Your Honor or having a continuing one to save time.

The Court: Very well.

Mr. Robertson: The Plaintiff offers in evidence interrogatories addressed to the Defendant United Construction Workers affiliated with the United Mine Workers of America, which were received and filed by the Clerk of this Court on August

25, 1950, and ask that they be marked Plaintiff's Exhibit No. 58, sub 2.

Colonel Harris: We repeat the same objection we just made to Your Honor, if the Court pleases.

The Court: Same ruling.

Colonel Harris: We note an exception.

Mr. Robertson: If Your Honor please, this will take a few minutes but I think we will save time in the end.

(Interrogatories referred to marked Plaintiff's Exhibit 58-2 and received in evidence.)

Mr. Robertson: Those interrogatories are designated Interrogatories (2).

page 1213 } The Plaintiff offers in evidence Interrogatories (3) addressed to the Defendant District 50 United Mine Workers of America, which were received and filed by the Clerk of this Court on August 29, 1950, and ask that those interrogatories be marked Plaintiff's Exhibit 58-3.

Colonel Harris: Each Defendant separately and the Defendants jointly object to that, if the Court pleases, and assign again the same grounds that we have detailed to you.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Interrogatories referred to marked Plaintiff's Exhibit 58-3 and received in evidence.)

Mr. Robertson: The Plaintiff offers in evidence Interrogatories No. (4), addressed to the Defendant United Mine Workers of America, received and filed by the Clerk of this Court on September 13, 1950, and ask that they be marked Plaintiff's Exhibit No. 58-4.

Colonel Harris: The Defendants separately and severally and jointly re-interpose the same objections that we re-interposed when he first offered one of those.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(Interrogatories referred to marked Plaintiff's Exhibit 58-4 and received in evidence.)

page 1214 } Mr. Robertson: The Plaintiff offers in evidence further interrogatories (5) addressed to the United Construction Workers, affiliated with the United Mine Workers of America, received and filed by the Clerk

of this Court on October 2, 1950, and ask that they be marked Plaintiff's Exhibit 58-5.

Colonel Harris: We object to that, if the Court pleases, and repeat and reinterpose the grounds of objection that we interposed a few minutes ago when he offered this first bunch of interrogatories.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(Interrogatories referred to were marked Plaintiff's Exhibit 58-5 and received in evidence.)

Mr. Robertson: The Plaintiff offers in evidence further interrogatories (6) addressed to the Defendant District 50, United Mine Workers of America, which were received and filed by the Clerk of this Court on October 2, 1950, and ask that those interrogatories be marked Plaintiff's Exhibit 58-6.

Colonel Harris: The Defendants severally and jointly object to the introduction of the interrogatories just offered and assign and interpose all the grounds of objection that we have just interposed to the other question, and on the additional ground that interrogatories cannot be page 1215 } offered as an exhibit.

Mr. Robertson: We offer them in evidence, Your Honor, and also as an exhibit. We offer them both ways, either or both, jointly and separately.

Colonel Harris: We repeat our objections, if the Court please.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

(Interrogatories referred to marked Plaintiff's Exhibit 58-6 and received in evidence.)

page 1216 } Mr. Robertson: The Plaintiff offers in evidence further Interrogatories (7) addressed to the Defendant United Mine Workers of America, which were received and filed by the Clerk of this Court on October 2, 1950, and ask that those further interrogatories be marked Plaintiff's Exhibit No. 58-7.

Colonel Harris: May Defendants have the same objection that we have been interposing?

The Court: Yes. The Court rules the same.

Colonel Harris: And an exception.

The Court: Very well.

(The interrogatories referred to were marked Plaintiff's Exhibit No. 58-7 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (8) addressed to the Defendant United Construction Workers, Affiliated with the United Mine Workers of America, which were received and filed by the Clerk of this Court on October 2, 1950, and ask that they be marked Plaintiff's Exhibit 58-8.

Colonel Harris: May we have the same objection?

The Court: The same ruling.

Colonel Harris: Note an exception, please.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-8 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (9) addressed to the Defendant District 50 United Mine Workers of America, which were received page 1217 } and filed by the Clerk of this Court on October 2, 1950, and ask that they be marked Plaintiff's Exhibit No. 58-9.

Colonel Harris: May the Defendants have all the objections that we have been interposing?

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-9 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (10) addressed to the Defendant United Mine Workers of America, which were received and filed by the Clerk of this Court on October 2, 1950, and ask that they be marked Plaintiff's Exhibit 58-10.

Colonel Harris: May we have the same objection, if the Court pleases?

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-10 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (11) addressed to the Defendant United Construction Workers, affiliated with United Mine Workers of America, which were received and filed by the Clerk of this Court on October 12, 1950, and ask that they be marked Plaintiff's Exhibit 58-11.

page 1218 } Colonel Harris: The same objection, if the Court pleases.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-11 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (12) addressed to the Defendant District 50, United Mine Workers of America, which were received and filed by the Clerk of this Court on October 12, 1950, and ask that they be marked Plaintiff's Exhibit No. 58-12.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-12 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (13) addressed to the Defendant United Mine Workers of America, which were received and filed by the Clerk of this Court on October 12, 1950, and ask that they be marked Plaintiff's Exhibit 58-13.

Colonel Harris: The same objection, if the Court please.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

page 1219 } (The interrogatories referred to were marked Plaintiff's Exhibit 58-13 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (14) addressed to the Defendant United Construction Workers, affiliated with the United Mine Workers of America, which were received and filed by the Clerk of this Court on November 2, 1950, and ask that they be marked Plaintiff's Exhibit No. 58-14.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-14 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence further Interrogatories (15) addressed to the Defendant District 50, United

Mine Workers of America, which were received and filed by the Clerk of this Court on November 2, 1950, and ask that they be marked Plaintiff's Exhibit 58-15.

Colonel Harris: The same objection, if the Court please.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-15 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence page 1220 } further Interrogatories (16) addressed to the Defendant United Mine Workers of America, which were received and filed by the Clerk of this Court on November 2, 1950, and ask that they be marked Plaintiff's Exhibit 58-16.

Colonel Harris: The same objection, if the Court please.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The interrogatories referred to were marked Plaintiff's Exhibit 58-16 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence Answer of United Construction Workers, affiliated with United Mine Workers of America, to Summons of the Plaintiff to Answer Interrogatories, which were received and filed by the Clerk of this Court on November 14, 1950, and with that Answer the Plaintiff offers also all accompany's exhibits, and asks that the Answer, with all the accompanying exhibits, be marked Plaintiff's Exhibit No. 59-1.

Colonel Harris: The same objection, if the Court please; and the additional objection that he cannot offer the Answer without offering the Interrogatory also.

Mr. Robertson: We have offered all the interrogatories that were ever asked in this case.

The Court: All the interrogatories have been offered, as the Court understands. The objection is over-page 1221 } ruled.

Colonel Harris: We reserve an exception.

(The documents referred to were marked Plaintiff's Exhibit No. 59-1 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence Answer of District 50, United Mine Workers of America, to Summons of the Plaintiff to Answer Interrogatories, with accompanying

exhibits, which were received and filed by the Clerk of this Court on November 14, 1950, and asks that this Answer, with the accompanying exhibits, be marked Plaintiff's Exhibit No. 59-2.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The documents referred to were marked Plaintiff's Exhibit No. 59-2 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence Answer of United Mine Workers of America to Summons of the Plaintiff to Answer Interrogatories—the numbers herein refer to the numbers of the Interrogatories—which were received with accompanying exhibits, which were received and filed by the Clerk of this Court on November 14, 1950, and ask that it be marked Plaintiff's Exhibit No. 59-3.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

page 1222 } (The documents referred to were marked  
Plaintiff's Exhibit No. 59-3 and received in evidence.)

Mr. Robertson: My attention is called to the fact that Plaintiff's Exhibit 59-1 has bound up with it a paper entitled, "Further Interrogatories Propounded to United Construction Workers, affiliated with United Mine Workers of America, on October 2, 1950." I offer that also in evidence, and ask that it be marked Plaintiff's Exhibit 59-1-A.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-1-A and received in evidence.)

Mr. Robertson: Plaintiff's Exhibit No. 59-2 has bound with it a paper entitled, "Further Interrogatories Propounded to District 50 on October 2, 1950," and I offer that paper in evidence and ask that it be marked Plaintiff's Exhibit No. 59-2-A.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-2-A and received in evidence.)

Mr. Robertson: Plaintiff's Exhibit No. 59-3 has bound with it a paper entitled, "Further Interrogatories propounded to the International Union on October 2, 1950." Plaintiff offers that paper in evidence, and asks that it be marked Plaintiff's Exhibit No. 59-3-A.

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-3-A and received in evidence.)

Mr. Robertson: Plaintiff's Exhibit No. 59-1 has bound with it a paper entitled, "Further Interrogatories Propounded to United Construction Workers, affiliated with United Mine Workers of America, on October 12, 1950," and Plaintiff offers that paper in evidence and asks that it be marked Plaintiff's Exhibit No. 59-1-B.

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-1-B and received in evidence.)

Mr. Robertson: Plaintiff's Exhibit 59-2 has bound with it a paper entitled, "Further Interrogatories Propounded to District 50 on October 12, 1950." Plaintiff offers that paper in evidence and asks that it be marked Plaintiff's Exhibit 59-2-B

Colonel Harris: Same objection.  
page 1224 } The Court: Same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-2-B and received in evidence.)

Mr. Robertson: Plaintiff's Exhibit 59-3 has bound with it a paper entitled "Further Interrogatories Pronounded to the International Union on October 12, 1950." Plaintiff offers that paper in evidence and asks that it be marked Plaintiff's Exhibit No. 59-3-B.

Colonel Harris: The same objection, if the Court please.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 59-3-B and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence an answer entitled, "Answer of United Construction Workers, affiliated with United Mine Workers of America, to Summons of the Plaintiff to Answer Interrogatories," which were received and filed by the Clerk of this Court on December 18, 1950, and asks that that Answer, with accompanying exhibits, be marked Plaintiff's Exhibit No. 59-4.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

page 1225 } (The documents referred to were marked  
Plaintiff's Exhibit No. 59-4 and received in evidence.)

page 1226 } Mr. Robertson: Plaintiff offers in evidence as  
an exhibit papers entitled "Answer of District  
50, United Mine Workers of America to summons of the Plaintiff to answer interrogatories which was received and filed by the Clerk of this Court on December 18, 1950, and asks that it be marked Plaintiff's Exhibit No. 59-5.

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(Documents referred to were marked Plaintiff's Exhibit 59-5 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence paper entitled "Answer of United Mine Workers of America to summons of the Plaintiff to answer Interrogatories," the numbers herein refer to the numbers of the interrogatories, which was received and filed by the Clerk of this Court on December 18, 1950, and ask that it be marked Plaintiff's Exhibit No. 59-6.

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(Documents referred to were marked Plaintiff's Exhibit 59-6 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence a paper entitled "Answer of United Mine Workers of America to page 1227 { question No. 125, Interrogatories No. 4, addressed to the Defendant United Mine Workers of America," with accompanying exhibit, which was received and filed by the Clerk of this Court on January 11, 1951, and ask that it be marked Plaintiff's Exhibit No. 59-7.

Colonel Harris: The same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

(Documents referred to were marked Plaintiff's Exhibit 5917 and received in evidence.)

Mr. Robertson: I want to be sure that we get everything in with the interrogatories and answers, Your Honor.

Plaintiff offers in evidence a booklet entitled "Constitution of the International Union, United Mine Workers of America, Washington, D. C., adopted at Cincinnati, Ohio, on September 19, 1944," with the notation in pen and ink: "UMWA, Ex., answering Int. No. 2," and ask that that be marked.

Mr. Mullen: You already introduced all three of those as your first exhibit.

Mr. Robertson: I don't think it is necessary to mark it any more. I think it would just confuse it.

The Court: My recollection is that all of them were introduced.

Mr. Robertson: I did that, Your Honor, but they have offered them in evidence and I am afraid if I page 1228 { don't get them in now they will claim that we haven't complied with the law because we didn't put in everything with the interrogatories and answers. It will take only a minute. There are not very many of them here.

The Court: All right.

Colonel Harris: We want to add the additional objection that that needlessly encumbers the record since he has already introduced them.

Mr. Robertson: The Plaintiff offers in evidence another copy of the same—

The Court: The objection is overruled and I allow an exception.

Mr. Robertson: The Plaintiff offers in evidence another copy of the same pamphlet, likewise endorsed in pen and ink, "UMW, Ex., answering Int. No. 2."

Colonel Harris: The same objection just made.

The Court: Same Ruling.

Colonel Harris: We reserve an exception.

Mr. Robertson: Plaintiff offers in evidence a paper entitled "United Mine Workers of America exhibit answering Interrogatory No. 85."

Colonel Harris: The same objection just made.

The Court: Same ruling.

Mr. Robertson: Received and filed by the Clerk of this Court on November 14, 1950, and ask that that page 1229 } paper be marked Plaintiff's Exhibit No. 60.

The Court: Same ruling.

Colonel Harris: We reserve an exception to your Honor's ruling.

(Document referred to was marked Plaintiff's Exhibit 60 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence a paper entitled "UMWA Exhibit answering Interrogatory No. 7, with 11 accompanying sheets attached together, and ask that they all collectively be marked Plaintiff's Exhibit No. 61.

Colonel Harris: The same objection.

The Court: The same ruling.

Colonel Harris: We reserve an exception.

Mr. Mullen: It is understood when they actually try to offer that in evidence we have a right to object further to the competency of it at that time.

The Court: That is my understanding.

Mr. Robertson: Yes, but I am offering them all in evidence right now.

(Documents referred to were marked Plaintiff's Exhibit 61 and received in evidence.)

Mr. Allen: You overlooked the exhibits consisting of the Mine Workers Journals that were filed with some of the answers to the interrogatories filed by the Defendants.

Mr. Robertson: Yes. Plaintiff offers in evidence page 1230 } denuce the entire contents of an envelope endorsed

Laburnum Construction Corporation against United Construction Workers, et. al., UMW of America, UMW journal filed with answer to interrogatories of October 12, 1950, Interrogatory No. 6, which were received and filed by the clerk of this Court on November 14, 1950, and asks that the contents of this envelope, in the envelope, be marked on the envelope Plaintiff's Exhibit No. 62.

Colonel Harris: We interpose the same objection, and the additional objection that the contents in the envelope are not sufficiently designated and identified.

The Court: Mr. Robertson, will you identify the contents of the envelope?

Mr. Allen: By the date or volume number.

Mr. Robertson: The United Mine Workers Journal, Volume 52, No. 5, March 1, 1941.

United Mine Workers Journal, Volume 52, No. 7, April, 1941.

United Mine Workers Journal, Volume 52, No. 14, July 15, 1941.

United Mine Workers Journal, Volume 52, No. 15, August 1, 1941.

United Mine Workers Journal, Volume 52, No. 16, August 15, 1941.

United Mine Workers Journal, Volume 52, No. 20, October 15, 1941.

United Mine Workers Journal, Volume 53, No. 6, March 15, 1942.

United Mine Workers Journal, Volume 53, No. 8, April 15, 1942.

United Mine Workers Journal, Volume 53, No. 9, May 1, 1942.

United Mine Workers Journal, Volume 53, No. 10, May 15, 1942.

United Mine Workers Journal, Volume 53, No. 12, June 15, 1942.

United Mine Workers Journal, Volume 53, No. 16, August 15, 1942.

United Mine Workers Journal, Volume 53, No. 20, October 15, 1942.

United Mine Workers Journal, Volume 53, No. 21, November 1, 1942.

United Mine Workers Journal, Volume 53, No. 23, December 1, 1942.

United Mine Workers Journal, Volume 54, No. 6, March 15, 1943.

United Mine Workers Journal, Volume 55, No. 10, May 15, 1944.

United Mine Workers Journal, Volume 55, No. 18, September 15, 1944.

page 1232 } United Mine Workers Journal, Volume 55, No. 19, October 1, 1944.

United Mine Workers Journal, Volume 56, No. 10, May 15, 1945.

United Mine Workers Journal, Volume 57, No. 4, February 15, 1946.

United Mine Workers Journal, Volume 57, No. 5, March 1, 1946.

United Mine Workers Journal, Volume 57, No. 10, October 15, 1946.

United Mine Workers Journal, Volume 57, No. 21, November 1, 1946.

United Mine Workers Journal, Volume 57, No. 22, November 15, 1946.

United Mine Workers Journal, Volume 58, No. 10, May 15, 1947.

United Mine Workers Journal, Volume 58, No. 12, June 15, 1947.

United Mine Workers Journal, Volume 58, No. 21, November 1, 1947.

United Mine Workers Journal, Volume 59, No. 1, January 1, 1948.

United Mine Workers Journal, Volume 59, No. 10, May 15, 1948.

United Mine Workers Journal, Volume 59, page 1233 } No. 15, August 1, 1948.

United Mine Workers Journal, Volume 59, No. 17, September 1, 1948.

United Mine Workers Journal, Volume 59, No. 20, October 15, 1948.

United Mine Workers Journal, Volume 59, No. 21, November 1, 1948.

United Mine Workers Journal, Volume 60, No. 1, Jan. 1, 1949.

United Mine Workers Journal, Volume 61, No. 12, June 15, 1950.

I ask that all those be marked Plaintiff's Exhibit with appropriate numbers.

Colonel Harris: The same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

Mr. Robertson: If I have overlooked introducing any interrogatories or answers or exhibits, I offer them all now.

Colonel Harris: Same objection.

Mr. Robertson: If there are any counsel who know of any I call them now to speak up.

Mr. Mullen: I make the further objection that a news-

paper as a whole is not proper evidence to be introduced, that any specific article to be introduced should be page 1234 } designated so that it may be determined whether it is the proper item to go before the jury. The general news in a newspaper, there may be arguments about the laws in Congress and so forth, and are not proper evidence in this case, and they are not material in the case.

The Court: What is your answer?

Mr. Allen: If Your Honor please, we expect to read certain designated portions of those journals, and we will ask Your Honor to instruct the jury that only so much as we read from those journals will be evidence in this case. Of course we don't want the whole of any journal.

Mr. Mullen: Your Honor, unless they read them beforehand to the jury as evidence, we would have no chance of knowing what it is proposed to read and no chance to object to them.

Mr. Allen: We are going to show you before it is read, Mr. Mullen, exactly what we propose to read.

Mr. Mullen: That is what I want to know.

(Documents referred to were marked Plaintiff's Exhibit 62, sub 1-36 inclusive and received in evidence.)

The Court: Gentlemen, let's take a five-minute recess.

(Brief recess.)

page 1235 } Mr. Allen: If Your Honor please, we are now reading questions from Interrogatories (2) filed by the Plaintiff against the United Construction Workers affiliated with the United Mine Workers of America, hereinafter sometimes called the United Construction Workers, filed in the Clerk's office on the 25th day of August, 1950:

"Question 5. Furnish a copy of the certificate of affiliation granted by the United Mine Workers of America to United Construction Workers, showing when such certificate of affiliation was granted to United Construction Workers."

The Court: Colonel Harris?

Colonel Harris: We object to Plaintiff's counsel singling out an interrogatory and reading it, as being contrary to the laws and practice of the State of Virginia; and on the additional ground that the Plaintiff's counsel themselves propounded all the interrogatories, and thereby put the Defend-

ants and their counsel to enormous labor, and as a result Plaintiff's counsel cannot now say some of the questions asked by them or some of the answers should not be read to the jury; and on the further ground that this method now sought to be used by Plaintiff amounts to a withdrawal of those interrogatories he does not read and the answers thereto which he does not read, and is not permitted under the laws and practice of Virginia, which requires that all interrogatories and all answers be read to the jury; and on the further page 1236 } ground that such a method now sought to be employed by the Plaintiff unduly emphasizes a part of the interrogatories and thereby implies that the unread interrogatories are unimportant and not worthy of consideration by the jury, and the procedure sought to be used would unduly burden and embarrass the Defendants and make it appear that they were the ones taking up the time of the jury on the interrogatories if we followed any method suggested of ourselves reading to the jury the interrogatories, it being the position of the Defendants that the Plaintiff having put the questions, and having put all the questions, must read each question and each answer; and on the additional ground that the method sought to be used takes an answer out of its context, which is contrary to the principle and spirit underlying the propounding of interrogatories and the reading of their answers to the jury.

Mr. Robertson: Are you through?

Colonial Harris: I am through with the objection, but I will have something else to say when the Court rules.

Mr. Robertson: If Your Honor please, everything that Mr. Harris has said is in effect what was said yesterday when Your Honor in chambers overruled his objection, and therefore I think the matter has already been settled in chambers. I assume that he is saying it over here in the presence of the jury to protect the record. I am going to ask the

page 1237 } Court to explain to the jury the ruling the Court has made under which, as Mr. Harris knows, the Court has ruled that anybody can offer any of these things in evidence, and the Court will rule that the Plaintiff cannot object to the relevancy of any question, that we have waived all our objections to any questions or answers, and that the Defendants can read anything they want, subject to a ruling by the Court whether it is relevant or not, and they can get anything before this jury out of those interrogatories and answers that the Court rules is relevant. I am going to ask the Court to explain its ruling to the jury.

Colonel Harris: If the Court please, this is not entirely a

repetition of the objections made yesterday. I have sought to put down separately and severally each legal objection that my mind was able and my vision was able to perceive. It is not a mere repetition for the record, although of course we want to keep the record straight.

The Court: The objection is overruled, Mr. Harris.

Colonel Harris: We reserve an exception.

May I ask of the Court that in order to save time and to speed up the trial, we be given the entire objection that I have just stated in the presence of the jury, to each interrogatory that counsel for the Plaintiff single out and read, and each answer thereto that they single out and read, and that it be a continuing objection which applies to each and page 1238 } every one, and that we be given an exception to each and every one, without having to get up and state it and take up so much time hereafter.

Mr. Allen: That is satisfactory to us.

The Court: It is understood, then, that there is a continuing objection and exception.

Colonel Harris: Thank you, Judge.

Mr. Robertson: Repeat the question, please, Mr. Allen.

Mr. Allen: Will you read it so as to obviate the necessity of Mr. Harris objecting again?

(The question was read by the reporter as follows:)

"Question 5. Furnish a copy of the certificate of affiliation granted by the United Mine Workers of America to United Construction Workers, showing when such certificate of affiliation was granted to United Construction Workers."

Mr. Robertson: "The only certificate of affiliation is the United Construction Workers charter, Exhibit 1, attached hereto."

If Your Honor please, I am going to ask that we pass the original exhibit to the jury, and that I read a copy of it.

Exhibit 1 reads as follows:

"Established January 25, 1890, International Union, United Mine Workers of America, doth grant this page 1239 } charter to A. D. Lewis, Chairman-President, Washington, D. C., Gardner Wales, Comptroller-Treasurer, Washington, D. C., United Construction Workers Division, and their successors in office, to constitute a Local Union to be known as UCWD, District No. 50, for the

purpose of effecting thorough organization of the workers in this industry, and said Local Union being duly organized is hereby authorized and empowered to admit to membership any person in accordance with the provisions of the Constitution of the United Mine Workers of America, and to enact a Code of By-Laws for the government of said Local Union, provided, that the said Local Union shall in all cases conform to the Constitution of the United Mine Workers of America.

"In witness whereof we have hereunto attached our signatures and caused the seal of the United Mine Workers of America to be affixed.

"Done at Washington, D. C., this 6th day of June, 1942.  
(SEAL)

(Signed) JOHN L. LEWIS, President

(Signed) THOMAS KENNEDY, Secretary

"United Construction Workers Exhibit 1."

. . . . .

page 1240 } Mr. Allen: "Question 6. What was the address of the General Offices of United Construction Workers in Washington, D. C., between the dates October 28, 1948, and August 4, 1949, and what has been the address of its General Offices in Washington, D. C., since August 4, 1949?"

Mr. Robertson: "900—15th Street, N. W. Washington, D. C., during all the times inquired about."

Mr. Mullen: "Washington 5, D. C."

Mr. Robertson: I left that out. I beg your pardon. "Washington 5, D. C."

Mr. Allen: "Question 7. Was United Construction Workers operated as a District or Sub-District or Branch or Subordinate Branch of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and if so, during what period or periods; and has it been so operated at any time since August 4, 1949, and if so, during what period or periods?"

Mr. Robertson: "United Construction Workers has at all times inquired about operated as a Division of District 50, United Mine Workers of America."

Mr. Allen: "Question 8. Was United Construction Workers operated as a District or Sub-District or Branch or Subordinate Branch of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and if so, during

what period or periods; and has it been so  
page 1241 } operated at any time since August 4, 1949, and if  
so, during what period or periods?"

Mr. Robertson: "United Construction Workers has at all times inquired about operated as a Division of District 50, United Mine Workers of America."

Mr. Allen: "Question No. 15 as reframed and answered as reframed: "Who are the persons who served as Directors of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what other offices has each Director of Region 58 held between the dates October 28, 1948, and August 4, 1949? When and by whom was each Director appointed a Regional Director or other officer? During what period or periods between the dates October 28, 1948, and August 4, 1949, did each Director of Region 58 serve in that office or in any other office, and what were the locations of their respective offices?"

Mr. Robertson: "Answering the question as modified by direction of the Court, this Defendant says:

"During all the times inquired about, Mr. David Hunter has been Acting Regional Director or Regional Director of Region 58, United Construction Workers, and was appointed by Mr. A. D. Lewis, Director of United Construction Workers."

Mr. Allen: "Question 18. What area was included in Region 58 of United Construction Workers between the dates  
October 28, 1948, and August 4, 1949, and what  
page 1242 } area has been included in Region 58 of United  
Construction Workers since August 4, 1949?"

Mr. Robertson: "Several counties, all adjoining, and situated in the States of Kentucky, Virginia, and West Virginia, one of which counties is Breathitt County, Kentucky."

Mr. Allen: "Question 19. What was the street address in Pikeville, Kentucky, of the Regional Office of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what has been the street address in Pikeville, Kentucky, of said Regional Office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky, at all times inquired about."

Mr. Allen: "Question 20. What was the Post Office Box Number in Pikeville, Kentucky, of the Regional Office of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what has been the Post Office Box Number in Pikeville, Kentucky, of said Regional Office since August 4, 1949?"

Mr. Robertson: "District 50 and the United Construction Workers, as such, do not have a Post Office Box in Pikeville, Kentucky. Post Office Box 50 has been the Post Office Box of District 50, United Mine Workers of America, and Thomas Raney, International Board member, United Mine Workers of

America, for some 17 years, and because of the crowded condition in the Post Office and it being unable to provide a Post Office Box for District 50 and the United Construction Workers, the Post Office employees have been placing the mail of District 50 and the United Construction Workers in Post Office Box 50."

Mr. Allen: "Question 21. When and upon whose authority was the Regional Office of Region 58 of United Construction Workers organized or set up?"

Mr. Robertson: "Upon the authority of the Director of the United Construction Workers, the Regional Office of Region 58 was set up October 25, 1948, with David Hunter designated by the Director of United Construction Workers as Acting Regional Director. Effective June 16, 1949, David Hunter's status was changed from that of Acting Regional Director to Regional Director of Region 58 of United Construction Workers."

Mr. Allen: "Question 25. Furnish a copy of all credentials issued by United Construction Workers or by its National Directors to David Hunter for proper identification and for use by him between the dates October 28, 1948, and August 4, 1949, and furnish a copy of all credentials issued by United Construction Workers or by its National Director to David Hunter for proper identification and for use by him after August 4, 1949."

Mr. Robertson: "Attached hereto and marked page 1244 } Exhibit 3 is the form of credentials issued by United Construction Workers to David Hunter and to all other field staff personnel during all the periods of time inquired about. The attached Exhibit 3 is marked 'void' to prevent any possible improper use of the card."

If Your Honor please, I want the jury to see that. It is on the original. I can find it. I don't have a copy of this, so I would like to read it and then pass it around.

"United Construction Workers, Affiliated with United Mine Workers of America.

"To whom it may concern:

"This is to certify that.....is hereby duly authorized and legally commissioned to act as representative

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of the United Construction Workers, and entitles bearer to do and perform all lawful acts pertaining to his office and to exercise all the authority conferred by the United Construction Workers. This commission to remain in full force until .....unless sooner revoked by the Directors.

.....Director

“D-23-19.”

Mr. Allen: “Question 27. What written report page 1245 } ports on work performed on matters of policy or organizational activities did David Hunter, as an employee or representative of United Construction Workers, submit to United Construction Workers or to its national director between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports.”

Mr. Robertson: “Copies of available reports submitted by Regional Director, David Hunter, are attached hereto and marked Exhibit 4, with sub-numbers 4-1, 4-2, and so forth.”

(Discussion off the record.)

The Court: Are you reading the complete answer to that question from this exhibit?

Mr. Robertson: No, sir. I was just going to read the report for that one day. I think that is all that is relevant.

The Court: I suspect you had better read the whole report.

Mr. Robertson: All right, sir.

“United Construction Workers, affiliated”—

The Court: Unless you gentlemen waive the objection to it.

Colonel Harris: As I understand it, Judge, we have a continuing objection to this method as to each one.

page 1246 } Mr. Robertson: I think we had better read it all, Your Honor.

The Court: The Court's ruling was that for any question you had to read the complete answer.

Mr. Robertson: If the Court thought it was relevant. That is all right. It will just take a little longer.

Mr. Mullen: The question is whether all those reports are a complete answer.

Mr. Robertson: The Court already has ruled on that. The Court has ruled that I could read what relevant parts I

wanted to and that they could read the other parts if they wanted to.

Mr. Allen: May it please Your Honor, may I say here that we called for the reports in a certain period. They furnished what they say are all available reports. I think at least Mr. Robertson should be allowed to state the dates of the various reports.

Mr. Robertson: I am going to do that, Mr. Allen. What I am reading now, in accordance with the Court's direction, is all of Exhibit 4-1.

Mr. Allen: That is right.

The Court: All right.

Mr. Robertson: "United Construction Workers affiliated with United Mine Workers of America. January 23, 1950.

Mr. A. D. Lewis, Chairman of Organizing Committee, District 50, UMWA, and UCW, United Mine Workers, Building, Washington 5, D. C. Weekly report for three weeks ending January 7, 14, 21, 1950.

"Monday and Tuesday, January 2 and 3, 1950. In conference with the arbitration case of Mr. H. Price, member of UCW Local Union No. 778-A. Before we received a decision from the umpire the City cancelled Mr. Garfield Seward's contract. The entire force of 7 employees were laid off. Under the circumstances it seems the city employees will have to be reorganized.

"Wednesday, January 4, 1950. Assisted representative Hutchinson with contract negotiations and grievances in Jenkins, Kentucky.

"Thursday, January 5, 1950. Worked in and from the Pikeville office.

"Friday, January 6, 1950. Met the management of the Maybilt Construction Company in Paintsville, Kentucky relative to checking off dues and initiation fees from our members.

"Saturday, January 7, 1950"—

Mr. Mullen: What report are you reading? I thought you were going to read the report that contained March 18.

The Court: January 12.

Mr. Robertson: January 12.

Mr. Mullen: I thought he was going to read March 23.

Mr. Robertson: I am reading Exhibit 4-1.

page 1248 } The Court: The letter is dated January 23, 1950.

Mr. Robertson: Yes, sir.

Mr. Mullen: Let me confer with my associate a few minutes.

The Court: All right.

(Brief recess.)

Mr. Mullen: Your Honor, our hands are tied by the course this matter has taken to waive the objection to the interrogatories, the manner in which they are introduced. There is nothing we can say. Our hands are tied.

Mr. Robertson: "Saturday, January 7"—

The Court: Mr. Robertson, this exhibit is a part of an answer, is it not, to the question?

Mr. Robertson: Yes, sir.

The Court: We are going to run into this situation later with other exhibits.

Mr. Robertson: If Your Honor please, you will note that that the exhibit is broken down into a number of sub-divisions, 4-1, 4-2, and so forth. I am not going to refer to very many of them. It will not be a great burden to read each one of those exhibits entirely, 4-1 and 4-whatever else I refer to.

The Court: All right.

Mr. Robertson: When I come to the part that page 1249 } I desire to read may I make a comment at that point? Well, I won't do that, Your Honor. I think the jury can follow me if they catch it.

Mr. Allen: Which one are you reading now?

Mr. Robertson: I am reading Exhibit 4-1. I have come to Saturday, January 7, 1950.

Mr. Allen: Wait a minute. Mine is dated January 23.

Mr. Mullen: So is mine.

Mr. Robertson: I am down on that page.

Mr. Allen: I see now. That is right. The date of the letter is the 23rd.

Mr. Robertson: Mr. Moore is there to show you. Show him, Mr. Moore.

"Saturday, January 7, 1950. In Williamson, West Virginia, assisting Representative Brown in straightening out various local unions' monthly reports.

"Monday, January 9, 1950, assisting Representative Robinson, Hazard, Kentucky. It seems to be difficult to get new organizational workers started in this area. However, there is a \$700,000 school building to be built. Work will start some time in February. I have hopes of getting a contract with this contractor when the job begins.

"Tuesday, January 10, 1950. Assisting Representative Brown, Williamson, West Virginia.

page 1250 } "Wednesday, January 11, 1950. Representative Hutchinson and I met with Mr. Charles Cheek, of the Cheek Construction Company, Frankfort, Kentucky. Five of his operators do not want to go along with the UCW. We agreed that if these operators did not go along, Mr. Cheek would lay them off. Mr. Cheek also talked about a state-wide contract and asked for a five-year contract. I agreed to sign him up for as many years as he wished, with certain provisions. He would either write, call or be in in the very near future. At present we have a contract with Mr. Cheek for Region 58, Local Union No. 778-A.

"Thursday, January 12, 1950. I had an appointment in Frankfort, Kentucky, with Mr. John A. Keck, Highway Commissioner, relative to increasing the labor rates from 80 cents to \$1.00 within this area. Mr. Tom Raney, International Board Member, was in Lexington, Kentucky, and went with me to meet Mr. Keck. Due to illness Mr. Keck was home. Therefore we met with the Deputy Commissioner. The Deputy Commissioner felt sure the labor rates would be increased to some extent. Up to date not one of the contractors have filed a complaint against the rates that we have been able to squeeze out of them above the bid-in rate for this area. He also stated that the Highway Department allowed the contractors above the 80-cent bid-in rate set by the Department when work was to be done within this region. I am  
page 1251 } expecting to hear from Commissioner Keck when he returns to his office.

"Friday and Saturday, January 13, 14, 1950. Representative Foster called me, 10 a. m. January 13, this being the first I had heard about him being indicted under the Reed-Mann Act together with four members of UCW Local Union No. 612. When I arrived in Logan, Mr. Mel Tricola, UMW representative had stood the bond for all five to appear for trial January 26. The local union had retained attorney Flannery and attorney Lockhart to represent them. I have informed attorney Cowherd in regard to this matter. Attorney Flannery told me that he did not consider the charge serious. Representative Foster may have become a little lax, as I had discussed with him the possibilities of moving him out of the Logan area the first of the month. I also discovered the AFL had been trying to do a little raiding of our construction locals in this area. However, I do not feel they will gain very much in this attempt.

"Monday, Tuesday and Wednesday, January 16, 17, 18 1950. In bed sick.

"Thursday, January 19, 1950. Met with the Mayor and City Council of Jenkins, Kentucky as the city employees who had not received their wages for several months went on strike. The Council agreed to pay them one-half of what the city owed them by Saturday, January 21. This page 1252 } was agreeable, and the employees returned to work.

"Friday, January 20, 1950. Met with the management of the Eagle Five and Ten Cent Store, Jenkins, Kentucky. The management would not recognize the UCW, so the employees came out on strike. We could not reach an agreement, therefore the store is still closed.

"Saturday, January 21, 1950, worked in and from the office. Also attended the funeral of Representative William O. Hart's father-in-law at Neon, Kentucky.

"Organizational: Representative Robinson serviced local unions and checked on several construction jobs. Representative Hart serviced local unions. Representative Hutchinson gained UCW recognition for the employees of the Coca-Cola Bottling Company, Pikeville, Kentucky. Representative Brown serviced Local unions.

"Faternally yours, David Hunter, Acting Director, Region 58."

If Your Honor please, I am turning to Exhibit 4-6. That is dated March 1, 1950. That is a little longer, but there are not very many of them.

The Court: Do you propose to read it all?

Mr. Robertson: I don't want to read it all, Your Honor; the only part I think is relevant is the final paragraph of it right over his signature. I think that is all that is relevant.

The Court: All right. Go ahead and read the page 1253 } final paragraph.

Mr. Robertson: Just to identify it, A. D. Lewis, Director, A. B. Allen, Comptroller, United Construction Workers affiliated with United Mine Workers of America, address reply to Pikeville Regional office, P. O. Box 50, Pikeville, Kentucky, Phone 1310, March 1, 1950. Mr. A. D. Lewis, Chairman of Organizing Committee District 50, UMWA, and UCW, United Mine Workers Building, Washington 5, D. C.

The final paragraph reads:

"I am endeavoring to bring all construction jobs within Region 58 under contract with the UCW. There are several contracts being let by the State Highway Department to contractors who are not already under contract within this region. These jobs will be starting in the near future, and I antici-

pate a minimum amount of trouble in signing up these contractors. Fraternally yours, David Hunter, Acting Director, Region 58."

The Court: All right.

Mr. Robertson: If Your Honor please, I come to Exhibit 4-8.

Mr. Mullen: If Your Honor please, may we take further exception that these reports being read relate to periods after the suit was brought and relate to subsequent happenings.

page 1254 } The Court: That is one thing I wanted to talk to you gentlemen about. Let's recess and go in Chambers for a few minutes.

(The following proceedings were had in Chambers.)

Mr. Robertson: Judge, I would like to read the only part of that report that I think is relevant. It is the report for Saturday—

The Court: Getting back to the objection. You are going to take that objection up?

Mr. Robertson: I was going to meet it right now.

The Court: All right, go ahead.

Mr. Robertson: The report is for Saturday, March 18, 1950. Bear in mind that it is from David Hunter, acting regional director, Region 58, to A. D. Lewis, the boss of both the United Construction Workers and District 50. He says this: "Checking the four construction jobs we have under contract and also the road into Breathitt County, Kentucky, which Representative Hart informed me was impassable. I found the road in fair condition and had no difficulty in getting through.

"I have reasons to believe representative Hart has lied on several occasions. Therefore, I wanted to know definitely if the road was passable or not. At times his actions show he resents taking orders and in order to not carry them out will make some excuse such as: the roads are  
page 1255 } impassable.

"I have requested Representative Hart to be in this office Wednesday, 10 a. m., March 22 "

We think it is relevant for two purposes: One, as showing the man and the pattern to organize that entire Region 58 both before and after the occurrences in Breathitt County, that that was just one episode in the over-all master plan,

and also to show what the character of this man Hart is who led these men into the Breathitt County job site.

The Court: Mr. Allen, do you have anything to say?

Mr. Allen: If Your Honor please, the testimony is relevant in view of the issues that have been drawn here. What went on before and what went on afterwards shows the scheme or plan or program or policy as it has been referred to here. There are some other things which we will reach in these reports which they may object to particularly. For instance, there is one there in which I believe it was Hunter—Hunter or Hart, but I think it was Hunter—who in one of his reports said that if certain contractors didn't sign up with him he intended to close the job down. They are the kind of things that we think we are entitled to show, showing that from start to finish they are conforming to a pattern and a scheme to get all of the workers for these contractors in their organizations by any means they can, violence or otherwise. Furthermore, these notes show that page 1256 } Hart and Hunter and Raney and Robinson and one or two others that were representatives of the several unions, Raney being the Representative of the International Union, were all conferring together and going around together at different places in reference to this organizational work. The whole thing shows exactly what we have got to meet here, that when Hart went there with this crowd of men he went there in accordance with a plan or scheme designed by his superiors and that he was ordered by his superiors to do it.

It is exactly the same principle that you have in criminal cases where intent is involved, where plan is involved, where scheme is involved. It is exactly the same principle that you have in slander cases where slanders both before and after are permitted in evidence, but with directions that you can't recover on those that took place after the beginning of the suit.

These reports are admissible for another reason. We don't care to read everything in them. If they want to read it or insist that we read it, that is all right. It is in evidence that these men made regular reports of everything they did every day. You will find some of these reports reporting incidents where they met with counsel for the unions. Mr. Pollard and Mr. Cowherd, and they interviewed witnesses and all that. We don't care about reading those except to show that they did make a daily memorandum and they reported to headquarters in Washington not only what they had done but what they were going to do.

Mr. Robertson: We have eliminated anything about reading any conferences with lawyers.

Mr. Allen: We don't care to read any of that at all. But what I am coming to is this: We want to show that it was the custom or practice to make daily reports. Then we want to show that every report referring to this incident is missing, every one. When the time comes to ask for instructions and the time comes to argue to the jury, we want to be able to argue that we called for the reports for a period of almost a year prior to the beginning of this trouble, and then shortly after the beginning of this trouble, and there isn't a report there for months before the trouble began and there isn't a report there for several months after the trouble began. Under the authorities, that is evidence, not only a presumption. It doesn't give rise to a mere presumption, but it gives rise to evidence that those reports were made and that they had them. Mr. Bryan says he saw them in Mr. Hunter's possession.

We want to show the number of reports that were here, the dates, of them. We don't care about reading them all. Very few of them we will want to read. There is very little we will want to read from, but it is for the purpose and importance of showing that we called for all of the reports  
page 1258 } and they didn't furnish, say, but 25 or 30, and the dates of those that they furnished, and show enough of them to show the detail that they went into as to what they reported.

Mr. Robertson: And to show also, Your Honor, that the reports that David Hunter made to the United Construction Workers and District 50 were identical. One was a carbon copy of the other.

Mr. Mullen: If Your Honor please, I think counsel have gone rather far afield. They are getting down to the question of presumptions. They had an answer filed with the reports that they were regularly destroyed every six months. There is no reason for accumulating these reports. If they were destroying the reports in order for them not to get them, don't you think we have destroyed these reports also?

What they are reading there gives no presumption.

What I was objecting to was that these reports relate to matters occurring long after this suit was brought, and that the mere fact that they refer to other cases and all doesn't make them evidence. Every union in this country is trying to organize all the workmen. All of them are trying to do it. There is nothing wrong about that. They keep talking about a pattern. They haven't shown any pattern any different from any other union. All unions when they cannot get

recognition or settlement, strike, and other people on the job  
 are affected. We had that situation here on Grace  
 page 1259 } Street a year or so ago where they couldn't  
 complete a building. An A. F. of L. union, trying  
 to organize common laborers not organized under the A. F.  
 of L., struck and tied up everything else.

Their argument that they want to show that there is a motive to destroy and break up business merely by showing that in the organization of workers there have been strikes where recognition has been refused is entirely different from any question like in criminal law where you show motive. Yes, in libel where you have to show motive, and you libel the same person before and after, you can show it, but you can't show that they have libeled some third person. The motive question in the sense that it is used in the cases doesn't arise here. You can show other happenings. For example, if a man comes and pays me a debt with three notes and it later turns out that they are all forged, in that one transaction, in trying him for forgery, they can show that that series in that one particular transaction were all forged. They can show that one received was forged and another one was forged and the third one was forged. That is where you come to motive and showing intent.

By saying that the work was closed down at Wheelwright and showing the circumstances, they can't show that they were engaged in breaking up jobs all around. If that were brought in, that is a collateral matter, and we  
 page 1260 } would have a right to introduce evidence to show what were the facts there, to show whether our people were liable. We would have a right to bring in 100 different cases where we organized and there was no strike, no violence or strike of any kind.

The Court would get into the trial of an endless number of cases.

In a case of this kind they don't show any plan or design. They have no plan to put anybody out of business. They don't want to put those people out of business. They are seeking to organize workers who are unorganized and to get them jobs.

I don't think that these reports that cover every kind of matter, which have nothing possibly to do with this case, are proper to be introduced or are relevant testimony.

Mr. Allen: Let me read you one page, if Your Honor please, from the most authoritative work I know put out by the American Law Institute. They call it restatement of the law. In addition to those 12 or 15 volumes, they have put out the American Law Institute's Model Code of Evidence,

and here is what that says in Rule 311. I am reading from page 196:

“Subject to Rule 306, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime page 1261 } or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

“Comment: The law is often assumed to be otherwise than as stated in this Rule. Nothing is more common than to find the unqualified assertion that if a party is charged with having committed a specified crime or civil wrong, no evidence of the commission by him of another crime or wrong is receivable against him. This is true where the series of inferences on which the relevance of the evidence depends is from the commission of the other wrong to a disposition to commit such a wrong or to commit crimes or torts generally, thence to the commission of the particular wrong. The cases are *lgion*, however, which admit such evidence when offered to prove motive, intent, preparation, plan or identity. A careful examination, of the pertinent cases in England and in the United States will reveal that the great majority of them reflect the doctrine expressed in this Rule.”

All the way through this case we have directed our attention to plan, policy, intent, scheme. This was Dixon testified that it was the policy—he used the very word—policy of the United Construction Workers to run people off their jobs, to raid them, as he called it.

He cited four instances in which they had page 1262 } actually executed that policy. And other witnesses have testified to the same extent.

I say that anything which tends to show this plan or policy, whether it happened before or after this incident, that is, if it is within a reasonable time of the incident, is relevant and material to prove the issues involved in this case.

The Court: I will overrule the motion and allow it for what it is worth.

Mr. Mullen: Note an exception.

page 1263 } (The following proceedings were had in open court:)

Mr. Robertson: If Your Honor please, in order to get the

context, I will have to read who it is to and who signs it, and they read the pertinent part.

The Court: Very well.

Mr. Robertson: "A. D. Lewis, Director, O. B. Allen, Comptroller, United Construction Workers, affiliated with United Mine Workers of America; Address reply to: Pikeville Regional Office, P. O. Box 50, Pikeville, Kentucky. Phone 1031.

" March 23, 1950

"Mr. A. D. Lewis,  
Chairman of Organizing Committee,  
District 50, UMWA and UCW,  
United Mine Workers Building  
Washington 5, D. C.

"Weekly Report for the two weeks  
ending March 11-18, 1950.

"Friday, March 17, 1950. Worked in and from the Pikeville office.

"Saturday, March 18, 1950. Checking the four construction jobs we have under contract, and also the road into Breathitt County, Kentucky, which Representative Hart informed me was impassable. I found the road in fair condition, and had no difficulty in getting through. I have reasons to believe Representative Hart has lied on several occasions.

Therefore, I wanted to know definitely if the page 1264 } road was passable or not. At times his actions show he resents taking orders, and in order not to carry them out will make some excuse, such as: 'The roads are impassable.' I have requested Representative Hart to be in this office Wednesday, 10 a. m., March 22.

"Fraternally yours,

DAVID HUNTER,  
Acting Directors,  
Region 58."

If Your Honor please, I come to Exhibit 4-9:

"A. D. Lewis, Director  
O. B. Allen, Comptroller,  
United Construction Workers, affiliated  
with United Mine Workers of America"

It is to Mr. A. D. Lewis. I won't read all that.

"Weekly Report for two weeks ending  
March 25 and April 1, 1950.

"Saturday, March 25, 1950. In Hazard, Kentucky, with International Board Member Tom Raney. We met Mr. Ed Reynolds in charge of the Mine Workers office in Hazard. We explained to him the program I have worked out relative to organizing the unorganized in that area. He pledged his fullest cooperation in the future. We are not asking the Mine Workers to do our work for us. However, when we ask for a push here and there, we are not getting it. Mr. Raney is of the belief that Mr. Reynolds in the future will cooperate.

page 1265 }

Fraternally yours,

DAVID HUNTER,  
Acting Director,  
Region 58."

I come now to Exhibit 4-17, dated June 27, 1950:

"Mr. A. D. Lewis,  
Chairman of Organizing Committee,  
District 50, UMWA and UCW  
United Mine Workers Building  
Washington 5, D. C.

"Weekly Report for week ending  
June 24, 1950.

"Friday, June 23, 1950. At the request of Mr. Tom Raney, I was in Lexington, Kentucky, for the purpose of meeting with President Sam Caddy, District 30, UMWA, to obtain the support from the Hazard, Kentucky, office in organizing a large construction job at Toner, Kentucky. However, Mr. Caddy was ill and could not attend. Also, Mr. Raney was late in arriving and had to leave early the next morning for Hiddlesboro, Kentucky.

Fraternally yours,

DAVID HUNTER,  
Acting Director,  
Region 58."

Mr. Allen, the next one is 32, Interrogatories (2), Question 32.

Mr. Allen: "Question 32. In what capacity or capacities was H. G. Robinson employed by United Construction Workers between the dates October 28, 1948, and August page 1266 } 4, 1949, and in what capacity or capacities has he been employed by United Construction Workers since August 4, 1949? For what period or periods was he employed in each capacity?"

Mr. Robertson: "During the periods of time inquired about, Mr. H. G. Robinson (true name Harvey J. Robinson) was employed by the Director of the United Construction Workers as a Field Representative and assigned to work in Region 58 of United Construction Workers."

Mr. Allen: "Question 33. Furnish a copy of all credentials issued by United Construction Workers or by its National Director to H. G. Robinson for proper identification and for use by him between the dates October 28, 1948, and August 4, 1949, and furnish a copy of all credentials issued by United Construction Workers or by its National Director to H. G. Robinson for proper identification and for use by him after August 4, 1949."

Mr. Robertson: "Mr. Robinson has been furnished credentials of the form set forth in Exhibit 3."

That is the one we showed Your Honor.

Mr. Allen: "Question 35. What written reports on work performed on matters of policy or on organizational activities did H. G. Robinson, as an employee or representative of United Construction Workers, submit to United Construction Workers or to its National Director between the dates October 28, 1948, and August 4, 1949, and also after page 1267 } August 4, 1949. Furnish a copy of all such reports."

Mr. Robertson: "Copies of written reports submitted by Mr. Harvey J. Robinson on work performed are attached hereto and marked Exhibit 5, with sub-numbers 5-1, 5-2, and so forth."

I refer to Exhibit 5-16, entitled "Field Representative's Weekly Report, Region No. 58; Organization, United Construction Workers. Weekly Report of Harvey J. Robinson, Representative, Address P. O. Box 23, Paintsville, Kentucky. Telephone No. 872-M. For the week ending October 14, 1950.

"Pikeville, Kentucky. Attended mass meeting District 30, United Mine Workers of America, concerning policy of national office and UCW District 50."

That was Sunday.

The following Saturday:

"Matewan, West Virginia; Attended regular meeting Mine Workers L. U. Williamson, West Virginia; attended regular meeting L. U. 787, Scot Nickels Bus Company."

The next one is 36.

Mr. Allen: "Question 36. In what capacity or capacities was Thomas Davis employed by United Construction Workers between the dates October 28, 1948, and August 4, 1949, and in what capacity or capacities has he been employed by United Construction Workers since August 4, 1949? For what period or periods was he employed in each capacity?"

page 1268 } Mr. Robertson: "During all the times inquired about, Mr. Thomas Davis was employed by the United Construction Workers by its Director, and assigned as Regional Director of Region 31 of the United Construction Workers and District 50 United Mine Workers of America, and was assigned also as Assistant to the Chairman of the Organizing Committee of District 50, United Mine Workers of America, and Assistant to the Director of the United Construction Workers."

Mr. Allen: "Question 37. Furnish a copy of all credentials issued by United Construction Workers or by its National Director to Thomas Davis for proper identification and for use by him between the dates October 28, 1948, and August 4, 1949. Furnish a copy of all credentials issued by United Construction Workers or by its National Director to Thomas Davis for proper identification and for use by him after August 4, 1949."

Mr. Robertson: "Mr. Davis has been furnished credentials of the form set forth in Exhibit 3."

Mr. Allen: "Question 44. Was Thomas Raney a member of the International Executive Board of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and if so, during what period or periods; and has he been a member of said International Executive Board at any time since August 4, 1949, and if so, during what period or periods?"

page 1269 } Mr. Robertson: "Mr. Thomas Raney is a duly constituted member of the International Execu-

tive Board, United Mine Workers of America, and has been at all times inquired about, but at no time during that period has Mr. Raney been employed by the United Construction Workers."

Mr. Allen: "Question 47. What was the location in Pikeville, Kentucky, of the office of Thomas Raney as an employee or representative of the United Construction Workers or District 50 or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the location in Pikeville, Kentucky, at said office since August 4, 1949?"

Mr. Robertson: "Mr. Raney has never been an employee or representative of the United Construction Workers. His address as International Board Member of the International Union is Seward Building, Pikeville, Kentucky."

Mr. Allen: "Question 48. What was the location in Pikeville, Kentucky, of the office of David Hunter as an employee or representative of the United Construction Workers or District 50 or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the location in Pikeville, Kentucky, of said office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky."

page 1270 } Mr. Allen: "Question 56. When and upon whose authority did United Construction Workers Local Union 778-A decide to take strike action against the Plaintiff in connection with the Plaintiff's work in Breathitt County, Kentucky, and was the so-called strike against the Plaintiff which took place in Breathitt County, Kentucky, on July 26, 1949, sanctioned by the National Director of the United Construction Workers or his designated representative; and if so, when and by whom was such sanction given?"

Mr. Robertson: "No formal strike action was ever taken by Local Union 778-A, and consequently there was no occasion for nor was any request made to sanction any strike action."

Mr. Allen: "Question 57. Who were the members of United Construction Workers Local Union 778-A on July 14, 1949, and when was each of those persons initiated to membership in United Construction Workers; and what persons became members of said Local Union 778-A between the dates July 14, 1949, and August 4, 1949, and when was each of those persons initiated to membership in said union, said United Construction Workers?"

Mr. Robertson: "The records of membership were supposed to be kept and it is assumed that they were kept at the headquarters of Local Union 778-A. This Defendant has

written, requesting the information sought in  
page 1271 } this question, and same will be attached hereto  
and marked as Exhibit 7, if and when received."

Mr. Allen: "Question 58—"

Mr. Mullen: One minute, if Your Honor please. I don't think that is complete, because it was received later and filed.

Mr. Robertson: We are going to put it in when we get to it. We are taking it in chronological sequence.

The Court: Go ahead.

Mr. Allen: "Question 58. Did the rules of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the organization known as United Construction Workers should be subject to the constitution of the International Union, that is, United Mine Workers of America, and if so, during what period or periods; and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 59. Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the administrative officers of United Construction Workers, operating under the certificate of affiliation granted by United Mine  
page 1272 } Workers of America, should be composed of a  
National Director who should have general supervision over the organizational, financial, legislative and internal affairs of the organization, and a Financial Comptroller who should keep the books and records and act as custodian of the funds and property of the National organization, and if so, during what period or periods; and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 60. Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the administrative officers of United Construction Workers should be subject to and conform with the constitution and policies of the International Union, that is, United Mine Workers of America, and if so, during what period or periods; and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 61. Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the administrative officers of the United Construction Workers page 1273 } should have authority to issue charters to groups of not less than 10 eligible members and upon receipt of a \$25.00 charter fee; and if so, during what period or periods; and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

page 1274 } Mr. Allen: "Question 82: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the charters of local unions of United Construction Workers might be suspended or revoked by the administrative officers of United Construction Workers because of violations of or failure to comply with any of the rules and policies, or major objectives of United Construction Workers, and if so, during what period or periods and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 63: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the National Director of United Construction Workers should have authority to designate a national representative to administer the affairs of any local union of the United Construction Workers where it should be found to be the best interests of the membership to do so, and if so, during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 84: Did the rules of page 1275 } United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provided that the National Director of United Construction Workers should be authorized to appoint regional directors who should have the supervision of local unions within the region assigned to them and who should report directly to said National Director on all matters of policy and or-

ganizational activities and who also should be charged with the duty, among other things, of supervising organizing activities within their region, and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 65: Did the rules of United Construction Workers at any time between dates October 28, 1948, and August 4, 1949, provide that regional directorships might be established or abolished at the discretion of the National Director of United Construction Workers, and if so during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 66: Did the rules of page 1276 { United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that the National Director of United Construction Workers should have authority to appoint representatives to assist and cooperate with one or more local union in organizing, negotiating wage agreements, and other union activities, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 67: Did the rules of United Construction Workers at any time between the dates October 28, 1948 and August 4, 1949, provide that the national director of United Construction Workers at his discretion might at any time assign a representative to act as local union representative for a local union, and that the local union should thereupon recognize the representative as the local union representative 'to carry out the duties as herein before set forth', that is, to assist in the organizing, negotiating and similar activities on behalf of the local union and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

page 1277 { Mr. Allen: "Question 68: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949 provide

that the local union should be recognized as having the initial local authority on all matters concerning strikes or grievances and that no strike action should be taken until it should be approved by a majority of the workers involved, but that no strike should take place without first obtaining sanction therefor in the National Director of United Construction Workers, or his designated representative, and if so during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 69: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, provide that under the direction of the National Director of United Construction Workers there should be published at least twice monthly an official paper to be known as *The News*, and that this publication should reflect the activity and progress of organization throughout the nation, and should convey information about the program of United Mine Workers of America and other news and editorial matter having a bearing upon the economic and general welfare of the membership, and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question No. 71: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949 provide that all local unions should have the right to make rules or adopt procedures to govern themselves, provided that they should not be in conflict with the rules and policies of the organization, and provided that they should first be approved by the National Director of United Construction Workers, and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 72: Did the rules of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949 provide that local unions should comply with all instructions that might be issued with regard to the use of forms and maintenance of financial and other records and interpretation of the rules made by the National Director of the United Construction Workers, and if so during

what period or periods, and have said rules at page 1279 } any time since August 4, 1949 so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 73: With respect to charges against and trials and appeals of officers and members of a local union, did the rules of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949 provide that the decision of the local union should be final unless loss of membership of the accused should be involved, in which event an appeal might be taken to the International Executive Board of the United Mine Workers of America within five days after the decision, and that pending such appeal the decision of the local union should be enforced unless temporarily stayed by the National Director of the United Construction Workers, or said National Executive Board, and if so during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 74: Did the rules of United Construction Workers at any time between the date October 28, 1948 and August 4, 1949 provide that they, said rules, should govern all local unions and representatives and page 1280 } employees of local unions and of the national organization, but that local unions might make rules or adopt procedures to govern themselves provided they should not be in conflict with the rules and policies of United Construction Workers, and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 75: Did the rules of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949 provide that the National Director of the United Construction Workers should have the authority to interpret said rules, and that he should render a decision on all points of law or grievance submitted to him by the local union and that his decision and interpretation should be final unless changed by the International Executive Board of the United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 76: Did the rules of United Construction Workers at any time between the dates October 28, 1948 and August 4, 1949, provide that when the page 1281 } National Director of United Construction Workers should make a decision or order a local union to observe rulings and policies, and the local union should refuse to abide by the decision or to carry out the order, the local union should be subject to suspension or revocation of the charter, and if so during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen: "Question 77: Did the rules of United Construction Workers at any time during the period from October 28, 1948, to August 4, 1949 provide that all policies pertaining to the administration and government of the United Construction Workers should be determined by the National Director of the United Construction Workers and that his ruling should be binding unless changed by the International Executive Board of the United Mine Workers of America, and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, substantially at all times inquired about."

Mr. Allen, at 82, when you read the question about each person, let me read the answer to each person, please.

page 1282 } Mr. Allen: Yes.

"Question 82: Did United Construction Workers or its National Director at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or remove or to cause to be suspended or removed from office Thomas Rancy?"—

Mr. Robertson: "As to Thomas Rancy, no."

Mr. Mullen, on one of these there is a correction in here and I am not sure whether it was at this point or some other point.

Mr. Mullen: No, that was 83.

Mr. Allen: "Thomas Davis?"—

Mr. Robertson: "As to Thomas Davis, yes."

Mr. Allen: "David Hunter?"—

Mr. Robertson: "As to David Hunter, no."

Mr. Allen: "William O. Hart"—

Mr. Robertson: "As to William O. Hart, no."

Mr. Allen: "H. G. Robinson"—

Mr. Robertson: "As to Harvey J. Robinson, yes."

Go to A, B, C, D.

Mr. Allen: "(a) Who had such right?"

Mr. Robertson: "The director of United *Construction Construction Workers*."

Mr. Allen: "As to whom could such right have been exercised?"

Mr. Robertson: Answered.

page 1283 } Mr. Allen: "(c) During what period or periods could such right have been exercised?"

Mr. Robertson: "During all periods inquired about."

Mr. Allen: "(d) What cause or causes, if any, were necessary for the exercise of such right?"

Mr. Robertson: "No set rules to govern. It is a matter of administrative practice."

Mr. Allen: "Question 83"—

Mr. Mullen: 83 was the one that contained a typographical error and it was amended.

Mr. Robertson: You correct it when we get to it. Or if you will tell me which it is we can do it now.

Mr. Allen: Suppose you give us the correction.

The Court: Read it as corrected.

Mr. Allen: Do you have it as corrected, Mr. Mullen?

Mr. Mullen: I have it somewhere. Yes, I think there is one lying on my desk down in the office.

Mr. Robertson: We can correct it afterwards. Go ahead and read 83.

The Court: Do you have a corrected copy?

Mr. Mullen: There is one in the Court papers.

Here, I have it.

(Counsel conferring.)

Mr. Robertson: 83, Mr. Allen.

page 1284 } Mr. Allen: "Question 83: Did District 50 or its administrative officer at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or remove or cause to be suspended or removed from office the National Director of the United Construction Workers?"—

Mr. Robertson: "As to the National Director, no."

Mr. Allen: "The National Comptroller of the United Construction Workers"—

Mr. Robertson: "As to the National Comptroller, no."

Mr. Allen: "Or Thomas Raney"—

Mr. Robertson: "As to Thomas Raney, no."

Mr. Allen: "Thomas Davis"—

Mr. Robertson: "As to Thomas Davis, no."

Mr. Allen: "David Hunter"—

Mr. Robertson: "As to David Hunter, yes."

Mr. Allen: "William O. Hart"—

Mr. Robertson: "As to William O. Hart, yes."

Mr. Allen: "H. G. Robinson"—

Mr. Robertson: "As to Harvey J. Robinson, no."

Mr. Allen: "(a) Who had such right?"

Mr. Robertson: "Chairman of the Organizing Committee of District 50, United Mine Workers of America."

Mr. Allen: "(b) As to whom could such right have been exercised?"

page 1285 } Mr. Robertson: Answered.

Mr. Allen: "(c) During what period or periods could such right have been exercised?"

Mr. Robertson: "During all periods of time inquired about."

Mr. Allen: "(d) What cause or causes if any were necessary for the exercise of such right?"

Mr. Robertson: "No set rules to govern. It is a matter of administrative practice."

Now we go to Interrogatories (3), Your Honor.

The Court: It is time for the luncheon recess. The Court will recess, Sheriff, until 2:15.

(Whereupon, at 12:50 o'clock p. m. the Court was recessed until 2:15 o'clock p. m. the same day.)

page 1286 } AFTERNOON SESSION.

2:15 p. m.

Mr. Allen: These are answers, if Your Honor please, to Interrogatories (3), propounded to District 50, United Mine Workers of America, hereinafter sometimes called District 50. We propose to read the interrogatories and answers as follows:

"Question 5," on page 2—

The Court: Let me find the questions, please.

(Discussion off the record.)

Mr. Allen: "Question 5. What was the address of the General Offices of District 50 in Washington, D. C., between the dates October 28, 1948, and August 4, 1949, and what has been the address of its General Offices in Washington, D. C., since August 4, 1949?"

Mr. Robertson: "900—15th Street, N. W., Washington 5, D. C., at all times inquired about."

Mr. Allen: "Question 6. Was District 50 operated as a District or sub-district or branch or subordinate branch of United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and if so, during what period or periods; and has it been so operated at any time since August 4, 1949, and if so, during what period or periods?"

Mr. Robertson: "District 50 is and was a District of United Mine Workers of America at all times inquired about."

Mr. Allen: "Question 14. (As reframed) page 1287 } Who are the persons who served as Directors of Region 58 of District 50 between October 28, 1948, and August 4, 1949, and what other offices has each Director of Region 58 held between the dates October 28, 1948, and August 4, 1949, and when and by whom was each such person appointed Regional Director or other officer? During what period or periods between the dates October 28, 1948, and August 4, 1949, did each serve as Regional Director or other officer, and what were the locations of their respective offices?"

Mr. Robertson: Answering the question as modified by orders of the Court, the Defendant says: "During all the time inquired about, Mr. David Hunter has been Acting Regional Director or Regional Director of Region 58, District 50, and was appointed by Mr. A. D. Lewis, Chairman of the Organizing Committee of District 50."

Mr. Allen: "Question 17. What area was included in Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what area has been included in Region 58 of District 50 since August 4, 1949?"

Mr. Robertson: "Several counties, all adjoining, and situated in the States of Kentucky, Virginia, and West Virginia, one of which counties is Breathitt County, Kentucky."

Mr. Allen: "Question 18. What was the street address in Pikeville, Kentucky, of Regional Office of Region 58 of Dis-

trict 50 between the dates October 28, 1948, and page 1288 } August 4, 1949, and what has been the street address in Pikeville, Kentucky, of said Regional Office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky, at all times inquired about."

Mr. Allen: "Question 19. What was the Post Office Box Number in Pikeville, Kentucky, of the Regional Office of Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what has been the Post Office Box Number in Pikeville, Kentucky, of said Regional Office since August 4, 1949?"

Mr. Robertson: "District 50 and the United Construction Workers, as such, do not have a post office box in Pikeville, Kentucky. Post Office Box 50 has been the post office box of District 30, United Mine Workers of America, and Thomas Rancy, International Board member, United Mine Workers of America, for some 17 years, and because of the crowded condition in the Post Office and it being unable to provide a post office box for District 50 and the United Construction Workers, the Post Office employees have been placing the mail of District 50 and the United Construction Workers in Post Office Box 50."

Mr. Allen: "Question 20. When and upon whose authority was Regional Office of Region 58 of District 50 organized or set up?"

Mr. Robertson: "Upon the authority of the page 1289 } Chairman of the Organizing Committee of District 50. The Regional Office of Region 58 was set up October 25, 1948, with David Hunter designated by the Chairman of the Organizing Committee of District 50, as Acting Regional Director. Effective June 16, 1949, David Hunter's status was changed from that of Acting Regional Director to Regional Director of Region 58 of District 50."

Mr. Allen: "Question 24. Furnish a copy of all credentials issued by District 50 or by its administrative officer to David Hunter for proper identification and for use by him between the dates October 28, 1948, and August 4, 1949; and furnish a copy of all credentials issued by District 50 or by its administrative officer to David Hunter for proper identification and for use by him after August 4, 1949."

Mr. Robertson: "Attached hereto and marked Exhibit 3 is the form of credentials issued by District 50 to David Hunter and to all other field staff personnel during all the periods of time inquired about. The attached Exhibit 3 is marked 'void' to prevent any possible improper use of the card."

May I show that to the jury please, Your Honor?

"District 50, United Mine Workers of America.

"This is to certify that ..... is hereby duly authorized and legally commissioned to act as representative of District 50, United Mine Workers of America. This commission is issued by virtue of the authority vested in me by the International Union, and entitles the bearer to do and perform all lawful acts pertaining to his office. This commission shall expire ..... unless sooner revoked by the Chairman of the Organizing Committee.

.....  
Chairman, Organizing Committee  
District 50, UMWA

.....  
Signature of Representative

Form 498," and what appears to be a seal, "United Mine Workers of America."

I can't read the balance of it.

(Card exhibited to the jury.)

Mr. Allen: "Question 26. What written reports on work performed on matters of policy or organizational activities did David Hunter, as an employee or representative of District 50, submit to District 50 or to its administrative officer between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949? Furnish a copy of all such reports."

Mr. Robertson: "Unless excused by the Chairman of the Organizing Committee from so reporting, weekly reports on the progress and activities of the region are required from each Regional Director. These reports, being of page 1291 } no permanent use or value to the organization, are required to be preserved for a minimum period of three months. Copies of available reports of Regional Director Hunter are attached hereto and marked Exhibit 4, with sub-numbers 4-1, 4-2, and so forth."

If Your Honor please, I call attention to the fact that the reports of David Hunter to District 50 are identical to his reports to the United Construction Workers. They are carbon copies of the same thing.

I refer now to Exhibit 4-1:

“United Construction Workers, Affiliated  
with United Mine Workers of America

“January 23, 1950

“Mr. A. D. Lewis,  
Chairman of Organizing Committee  
District 50, UMWA and UCW,  
United Mine Workers Building  
Washington 5, D. C.

“Weekly Report for 3 weeks ending  
January 7, 14, and 21, 1950.”

I read the report for Thursday, January 12, 1950:

“I had an appointment in Frankfort, Kentucky, with Mr. John A. Kech, Highway Commissioner, relative to increasing the labor rates from 80 cents to \$1.00 within this area. Mr. Tom Raney, International Board member, was in Lexington, Kentucky, and went with me to meet Mr. Kech. Due to illness, Mr. Kech was home. Therefore, we met with the  
page 1292 } Deputy Commissioner. The Deputy Commissioner felt sure the labor rates would be increased to some extent. Up to date, not one of the contractors have filed a complaint against the rates that we have been able to squeeze out of them above the bid-in rate for this area.

“He also stated that the Highway Department allowed the contractors above the 90-cent bid-in rate set by the Department when work was to be done within this region. I am expecting to hear from Commissioner Kech when he returns to his office.”

I refer now to Exhibit 4-6:

“A. D. Lewis, Director  
O. B. Allen, Comptroller  
United Construction Workers  
Affiliated with United Mine  
Workers of America

“Address Reply to: Pikeville  
Regional Office, P. O. Box 50,  
Pikeville, Kentucky

“Phone 1031

"March 1, 1950

"Mr. A. D. Lewis,  
Chairman of Organizing Committee  
District 50, UMWA and UCW,  
United Mine Workers Building  
Washington 5, D. C.

"Weekly Report for the weeks ending  
February 18 and 25, 1950."

I refer to the last paragraph of the report, entitled "Organizational."

page 1293 } "I am endeavoring to bring all construction  
jobs within Region 58 under contract with the  
UCW. There are several contracts being let by the State  
Highway Department to contractors who are not already under  
contract within this region. These jobs will be starting  
in the near future, and I anticipate a minimum amount of  
trouble in signing up these contractors."

Mr. Mullen: What were you reading from there, please;  
4-6?

Mr. Robertson: Exhibit 4-6.

Mr. Mullen: The date is what?

Mr. Robertson: Dated March 1, 1950, the final paragraph  
immediately above the signature:

"Fraternally yours,

DAVID HUNTER, Acting Director,  
Region 58."

Mr. Mullen: All right, I have it.

Mr. Robertson: I read now from Exhibit 4-8, the same  
letterhead, addressed to:

"Mr. A. D. Lewis,  
Chairman of the Organizing Committee  
District 50, UMWA and UCW,  
United Mine Workers Building  
Washington, D. C.

"March 23, 1950

"Weekly Report for the weeks ending  
March 11 and 18, 1950."

page 1294 } I read the report for Saturday, March 18,  
1950:

"Checking the four construction jobs we have under contract, and also the road into Breathitt County, Kentucky, which Representative Hart informed me was impassable. I found the road in fair condition, and had no difficulty in getting through. I have reasons to believe Representative Hart has lied on several occasions. Therefore, I wanted to know definitely if the road was passable or not. At times his actions show he resents taking orders, and in order not to carry them out will make some excuse, such as 'The roads are impassable.'

"I have requested Representative Hart to be in this office Wednesday, 10 a. m., March 22."

I refer now to Exhibit 4-17, the same letterhead, dated June 27, 1950, addressed to:

"Mr. A. D. Lewis,  
Chairman of Organizing Committee  
District 50, UMWA and UCW,  
United Mine Workers Building  
Washington 5, D. C.

"Weekly Report for week ending  
June 24, 1950."

I read the report for Friday, June 23, 1950:

"At the request of Mr. Tom Raney, I was in Lexington, Kentucky, for the purpose of meeting with President Sam Caddy, District 30, UMWA, to obtain the support from the Hazard, Kentucky, office in organizing a large  
page 1295 } construction job at Toner, Kentucky. However, Mr. Caddy was ill and could not attend.

"Also, Mr. Raney was late in arriving, and had to leave early the next morning for Middlesboro, Kentucky."

Mr. Mullen: Is that the full report for that day?

Mr. Robertson: I don't think I read it before. I will read it this time for both times:

"Had I not been invited to attend a dinner in honor of Mr. Val Hitch, who is being transferred from District 30 to the Washington office, my trip would have been a total loss. With the exception of Mr. Sam Caddy, Mr. Tom Raney, and

Mr. Joe Davis, the entire staff of District 30 was present at the dinner."

I refer now to Exhibit 4-28, on the same letterhead, dated September 14, 1950, addressed to Mr. A. D. Lewis, Chairman of Organizing Committee, District 50, UMWA, UCW, United Mine Workers Building, Washington 5, D. C.

"Weekly Report for Week Ending  
September 9, 1950."

I read the report of Thursday, September 7, 1950:

"Met with Mr. Page"—I had marked that one out. I don't think it is relevant.

I read the part of the report under "Organizational," the final paragraph above the signature:

"Paintsville, Kentucky, area. Representative page 1296 { Robinson has been unable to make any progress in organizing the Paintsville area. Inasmuch as he has been run off a couple of jobs, I believe he has lost his nerve and is afraid to work alone. Therefore, I have temporarily assigned him to work with Representative Gilbert in the Williamson area. I am hoping that a few weeks' work with another representative will help him regain his lost confidence. Otherwise, I am of the opinion Representative Robinson will have to be replaced.

"This matter has been discussed with Representative Robinson, and I certainly hope he can overcome the fear he has developed.

"Fraternally yours,

DAVID HUNTER, Acting Director  
Region 58."

I refer now to Exhibit 5-1, which is Field Representative's Weekly Report, Region No. 22; Organization, District 50, United Mine Workers of America.

"Weekly Report of William Hart, Representative; Address: 411 Prunty Bldg., Clarksburg, West Virginia. For the week ending July 1, 1950, all reports of Hart prior to that date having been destroyed."

page 1297 } Mr. Allen: Mr. Robertson, I suggest you look at 4-28 under date of September 7 and see if you want to read that.

Mr. Mullen: That is what he said he did not read because he didn't think it was relevant.

Mr. Robertson: I am perfectly willing to read it if you want it. Would you object to it?

Mr. Mullen: I am not asking for anything.

Mr. Robertson: All right, I will read it:

"Thursday, September 7, 1950. Met with Mr. Page, President of the Associated Construction Company. This company operates from Marian, Virginia, and is erecting a large school building at Jeff, Kentucky. Mr. Page's only obligation to signing a contract was the fact that his subcontractors are all A. F. of L., and he felt they may refuse to go along with or sign a contract. I gave Mr. Page a week to think it over, as I intend to close the job at Jeff, Kentucky."

Mr. Allen: "Question 27: In what capacity or capacities was William O. Hart employed by District 50 between the dates October 28, 1948, and August 4, 1949, and in what capacity or capacities has he been employed by District 50 since August 4, 1949, who employed him in each capacity, for what period or periods was he employed in each capacity?"

Mr. Robertson: "Effective March 24, 1949, page 1298 } Mr. William O. Hart was employed by District 50 as a field representative and has been employed in that capacity to date. All employment on behalf of District 50 is done by the Chairman of the Organizing Committee, who employed Mr. Hart in this case."

Mr. Allen: "Question 28: Furnish a copy of all credentials issued by District 50 or by its administrative officers to William O. Hart for proper identification and for use by him between the dates October 28, 1948, and August 4, 1949, and furnish a copy of all credentials issued by District 50 or by its administrative officers to William O. Hart for proper identification and for use by him after August 4, 1949."

Mr. Robertson: "Mr. Hart has been furnished credentials of the form set forth in Exhibit 3."

That is the one I showed the jury, Your Honor.

Mr. Allen: "Question 35: In what capacity or capacities was Thomas Davis employed by District 50 between the dates October 28, 1948, and August 4, 1949, and in what capacities has he been employed by District 50 since August 4, 1949, who employed him in each capacity, for what period or periods was he employed in each capacity?"

Mr. Robertson: "During all the times inquired about. Mr. Thomas Davis was employed by the United Construction Workers by its director and assigned as regional page 1299 } director of Region 31 of the United Construction Workers and District 50, United Mine Workers of America, and was assigned also as assistant to the Chairman of the Organizing Committee of District 50, United Mine Workers of America, and assistant to the Director of the United Construction Workers."

Mr. Allen: "Question 43: Was Thomas Raney a member of the International Executive Board of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and if so during what period or periods, and has he been a member of said International Executive Board at any time since August 4, 1949, and if so during what period or periods?"

Mr. Robertson: "Mr. Thomas Raney is a duly constituted member of the International Executive Board, United Mine Workers of America, and has been at all times inquired about, but at no time during that time has Mr. Raney been employed by the United Construction Workers or District 50. With respect to his employment by the United Mine Workers of America, his employment is derived and performed under the constitution of the International Union. Mr. Raney was appointed by the President of the International Union with the approval of the International Executive Board in conformity with and in the manner provided by the International Constitution."

Mr. Allen: "Question 46: What was the location in Pikeville, Kentucky, of the office of Thomas Raney as an employee or representative of District 50 or United Construction Workers or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the location in Pikeville, Kentucky of said office since August 4, 1949?"

Mr. Robertson: "Mr. Raney has never been an employee or representative of District 50 of the United Construction Workers. His address, as International Board Member of the International Union, is Seward Building, Pikeville, Kentucky."

Mr. Allen: "Question 47: What was the location in Pikeville, Kentucky of the office of David Hunter as an employee or representative of District 50 or the United Construction Workers or United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the location in Pikeville, Kentucky of the said office since August 4, 1949?"

Mr. Allen: "Seward Building, Main Street, Pikeville, Kentucky."

Mr. Allen: "Question 49: What were the duties of the Regional Director of Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what has been the duties of the Regional Director of said Region 58 since August 4, 1949?"

Mr. Robertson: "The duties of the Regional page 1301  $\frac{1}{2}$  Director are set out by the rules of District 50 attached as Exhibit 2 to these answers, and in particular by Article 5, Section 1 thereof, appearing on page 18, and in addition such other duties as may be assigned from time to time by the officers of District 50 and more particularly by the appointment letter, a copy of which is hereto attached and marked Exhibit 6."

I read Exhibit 6:

"October 25, 1948.

"Mr. David Hunter, Acting Regional Director, District 50, UMWA and UCW, Hopewell, Virginia.

"Dear Sir and Brother:

"Effective immediately but for record purposes effective November 1, a new Region is being created to be known as Region 58, comprising the following counties in Kentucky, Virginia, and West Virginia: Mingo and Logan Counties, West Virginia. Buchanan and Dickinson Counties, Virginia. And the following Counties in Kentucky: Letcher, Pike, Martin, Lawrence, Johnson, Floyd, Knott, Magoffin, Morgan and Elliott. I am attaching hereto a list of local unions being transferred from Region 24 to Region 58 and a list of local unions being transferred from Region 56 to Region 58.

"After investigation, if there are any local unions which page 1302  $\frac{1}{2}$  are not included on the attached list either of the *of the* Regional Directors affected, advise this office in order that we may effect a formal transfer to your region.

"Your duties will be to service the existing local unions, organize new local unions, and carry on the work of the Regional Office. All correspondence between the National Office and your Region will be addressed to you, and full information pertaining to any local union under your direction will be given at any time upon request.

"It will be necessary for you to approve all bills, expense accounts of the field staff, direct the staff members in their

work in the interest of organization, and keep the National Office continually and completely informed of all the activities pertaining to the organization in your region.

"Permanently assigned to your Region will be the following representatives: Albert Walk, UCW, Williamson, West Virginia. Orville Foster, UCW, Logan, West Virginia, and J. H. Hatfield, District 50, Williamson, West Virginia. Mr. J. B. Boggs, UCW Representative of Jenkins, Kentucky, will be assigned to your Region temporarily.

"I am enclosing herewith copies of letters I have today addressed each of these field representatives which are self-explanatory.

"You are authorized to set up an office in Pikeville, Kentucky comprising two sizeable rooms. Before page 1303 } definitely leasing the office space you are to advise this office by telephone of the amount of the rent to be paid. After receiving authority by telephone to do so, you may have the lease drawn up and forwarded to Mr. Allen for execution. You are also authorized to obtain prices on office equipment necessary to equip the two-room office in Pikeville, with the exception of a typewriter and mimeograph machine, which will be ordered by Mr. Allen. When the office is ready and arrangements have been completed to open the office and install office equipment, you will be authorized to employ the services of a stenographer at a salary of not to exceed \$150 per month.

"I am also enclosing copies of letters I have today addressed to regional directors Box Duty. You will note I have requested each of them to address a communication to each of the local unions being transferred advising of your appointment as acting Regional Director of Region 58 and requesting their cooperation with you. You will also note that I have requested regional director Box and Duty to transfer to your office when completed all the permanent records of the local unions involved in the transfer. Wishing you success in your new position I am, Yours Truly, A. D. Lewis, Chairman, Organizing Committee."

I state that the enclosures with that letter are not included with that exhibit.

page 1304 } Mr. Allen: "Question 57: Did the rules of District 50 at any time between the dates of October 28, 1948, and August 4, 1949, provide that the organization known as District 50 should work under and be subject to the constitution of the International Union, that is, the United Mine Workers of America, as provided in Article 20 thereof, and if so during what period or periods, and have said rules

at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 58: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that the administrative officer operating under the authority of Article 20 of the constitution of the International Union, that is United Mine Workers of America, should have general and complete supervision over and administration of the affairs of District 50, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 59: Did the rules of District 50 at any time between October 28, 1948, and August 4, 1949, provide that the secretary-treasurer under the direction of the administrative officer should, among other things, page 1305 } have custody of all books, documents and papers of District 50, have charge of the seal of District 50, and pay all bills and current expenses unless otherwise directed by the administrative officer of District 50, or the International Executive Board of United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 60: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that the secretary-treasurer and all aids and assistants who handle funds of District 50 should give bond for the faithful performance of their respective duties in such sums as might be fixed by the International Executive Board of the United Mine Workers of America, and if so, during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: Yes, at all times inquired about."

Mr. Allen: "Question 61: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that the administrative officer and the secretary-treasurer, their aids and assistants should in all respects be subject to and conform with the constitution page 1306 } and policies of the International Union, that is, United Mine Workers of America, and if so during what period or periods, and have said rules at any time

since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 62: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that all local unions must be chartered by and should be under the jurisdiction of and subject to the laws of the International Union, that is United Mine Workers of America, and that the administrative officer of District 50 should have authority to designate a representative to administer the affairs of any local union where it should be found to be in the best interests of the membership to do so, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 63: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that charters might be issued to local unions and fees therefor charged in accordance with the provisions of the constitution of the International Union, United Mine Workers of America, and that charters might be issued only by authority of the administrative officer of District 50, and if so during what period or periods, and have said rules at any time since August 4, 1949, provided, and if so during what period or what periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 64: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that local unions should be composed of 10 or more members engaged in Occupations within the jurisdiction of District 50 and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 65: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provided that any member except the membership in the National Chamber of Commerce or the Ku-Klux-Klan or the Communist Party or certain other organizations should be expelled from United Mine Workers of America and be permanently debarred from holding office in the United Mine Workers of America, and that any member of United Mine Workers who should accept office in any dual organization should be permanently expelled from United Mine Workers of America unless reinstated by the International Executive

Board of United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during page 1308 } what period or periods?"

Mr. Robertson: "Yes, at all times inquired about. However, the question refers to only certain parts of the text which reads in full as follows: 'Any member accepting membership in the Industrial Workers of the World, the Working Class Union, the One Big Union or any other dual organization or membership in the National Chamber of Commerce or the Ku-Klux Klan or the Communist Party or Fascist, Nazi, or Bund organizations, shall be expelled from the United Mine Workers of America, and is permanently debarred from holding office in the United Mine Workers of America, and no member of any such organization shall be permitted to have any membership in our union unless they forfeit their membership in the dual organization immediately upon securing membership in the United Mine Workers of America. Any member of the United Mine Workers of America who accepts office in any dual organization shall be permanently expelled from the United Mine Workers of America, unless reinstated by the International Executive Board.'"

Mr. Allen: "Question 66: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that if a local union for any cause should attempt to dissolve, disband, or surrender its charter, or if its charter should be revoked, the charter and all moneys and supplies and property, including real estate, page 1309 } should be taken over by the International Union, that is the United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about. The answer to this question is found in the rules of District 50 as revised March 15, 1949, Article 4, Section 12, beginning on page 13 thereof which reads as follows: 'Should the local union for any cause attempt to dissolve, disband, or surrender its charter, or should its charter be revoked, the charter and all moneys, supplies, and property, including real estate, shall be taken over by the International Union, provided that any remaining member in good standing of such local union shall be given transfer cards. No local union shall be allowed for any reason or purpose to divide its funds among its members. Any local union using its funds for other than legitimate purposes shall be fined double the amount so used

pursuant to the International Constitution. Any member receiving money from a local union for other than a legitimate purpose shall be suspended until double the amount that he received is returned. It shall be illegal to contribute funds for the promotion of the candidacy of any candidate for office within the organization."

Mr. Allen: "Question 67: Did the rules of page 1310 } District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that any local union using its funds for other than legitimate purposes should be fined double the amount so used pursuant to the International Constitution of the United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about. The answer to this question is found in the rules of District 50 as revised March 15, 1949, Article 4, Section 12, beginning on page 13 thereof, which reads as follows: 'Should the local union for any cause attempt to dissolve, disband or surrender its charter, or should its charter be revoked, the charter and all moneys, supplies and property, including real estate, shall be taken over by the International Union, provided that any remaining member in good standing of such local union shall be given transfer cards. No local union shall be allowed for any reason or purpose to divide its funds among its members. Any local using its funds for other than legitimate purposes shall be fined double the amount so used pursuant to the International Constitution. Any member receiving money from a local union for other than a legitimate purpose shall be suspended until double the amount received is returned.

It shall be illegal to contribute for the promotion page 1311 } of the candidacy of any candidate for office within the organization.'"

Mr. Allen: "Question 68: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that local union by-laws should not conflict with the laws or rulings of the International Union, that is, United Mine Workers of America, or the rules of District 50, or the collective bargaining agreement of the local union, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question No. 69: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that all local officers entrusted with the

finances of the organization must give bond to insure the faithful performance of their duty, the bond to be secured and the amount thereof to be determined by the administrative officer of District 50, and that any local union refusing to bond its officers as required in said rules might be subject to the penalties provided in the constitution of the International Union, that is, United Mine Workers of America, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided, and if so, during what period or periods?"

Mr. Robertson: "Yes, at all times inquired page 1312  $\frac{1}{2}$  about. The answer to this question is contained in the rules of District 50 as revised March 15, 1949, Article 4, Section 15, appearing on page 17 thereof, which reads as follows: 'All local officers entrusted with the finances of the organization must give bond to insure the faithful performance of their duty. The bond to be secured and the amount thereof to be determined by the administrative officer of the district. Any local union refusing to bond its officers as required herein may be subject to the penalties provided in the International Constitution.'

The Court: Gentlemen, let's recess for five minutes.

Mr. Allen: "Question 70: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949, provide that the books and records of each local union should be turned over for examination and audit upon the request of any authorized representative of District 50 or the International union, that is the United Mine Workers of America, and if so, during what period or periods, and have said rules at any time since August 4, 1949 so provided and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about. The answer to the question is contained in the rules of District 50 as revised March 15, 1949, Article 4, Section 16, appearing on page 18 thereof, which reads as follows: 'The page 1313  $\frac{1}{2}$  books and records of each local union shall be turned over for examination and audit upon the request of any authorized representative of the district or the International Union.'

Mr. Allen: "Question 77: Did the rules of District 50 at any time between the dates October 28, 1948, and August 4, 1949 provide that no strike action should be taken which should not comply with existing laws and before it should have been approved by a majority of the workers involved, and that no strike should take place without first obtaining approval thereof from the administrative officer of District 50, and if so

during what period or periods, and have said rules at any time since August 4, 1949 so provided, and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 78: With respect to charges against and trials and appeals of officers and members of a local union, did the rules of District 50 at any time between the dates October 28, 1948 and August 4, 1949 provide that the decision of the local union should close the case so far as that tribunal was concerned, the accused or the accuser have the right of appeal to the district but that this should not prevent individuals whose membership should be at stake from appealing to the International Executive Board of the United Mine Workers of America, which body's decision should be final and binding until reversed by the International Convention of the *United Mine Workers of America*, and if so during what period or periods, and have said rules at any time since August 4, 1949, so provided and if so during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about. The answer to this question is contained in the rules of District 50 as revised March 15, 1949, Article 7, Section 1, appearing on page 21 thereof, which reads as follows:

"When any local officer or any member not an officer is accused of violating any of the organization laws or any transgression against the organization or any of its officers or members, except where the charge is fomenting, leading or encouraging a dual union or a dual movement within the organization, the charge must be first lodged with and prosecuted before the local union, of which the alleged offender is a member, and the decision of the local union shall close the case so far as that tribunal is concerned, but should the accused or the accuser be dissatisfied with the decision of the tribunal first trying the case, either shall have the right of appeal to the District. This shall not prevent individuals whose membership is at stake from appealing to the International Executive Board, which body's decision shall be final and binding until reversed by the International Convention. When any officer or member is charged with fomenting, leading or encouraging a dual union or a dual movement within the organization, upon charges being filed with the International Executive Board, notice to such accused person or persons of not less than five days of the time and place of hearing shall be given, and the hearing of such charges shall be had. If the accused shall be

found guilty by the International Executive Board, it may order his suspension or removal from office or membership, and an appeal may be taken by the accused to the next International Convention. In all such cases the decision of the International Executive Board shall be effective unless reversed by the International Convention.' "

Mr. Allen: "Question 79: Did the rules of District 50 at any time between the dates October 28, 1948 and August 4, 1949 provide that under the direction of the administrative officer of District 50 there should be published at least twice monthly an official paper to be known as the News, and that this publication should be edited with a view to promoting the welfare of the entire membership and should reflect the activity and the progress of the organization throughout the nation and should convey information about the program of the United Mine Workers of America and other news and editorial matter having a bearing upon the economic and general welfare of the membership, and if so during what period or periods; and have said rules at any time since August 4, 1949, so provided and if so during what page 1316 } period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "Question 84 (as reframed under direction of the Court): What written instructions, statements, reports, memoranda, letters, and other papers pertaining to Region 58 of District 50 or to Region 58 of United Construction Workers were submitted by United Mine Workers of America or by the International Executive Board or the President or any other International officer of United Mine Workers of America to District 50 or to the administrative officer or secretary-treasurer or comptroller of District 50, between the dates October 28, 1948, and August 4, 1949, and also since August 4, 1949. Furnish a copy of all such instructions, statements, reports, memoranda, letters and other papers."

Mr. Robertson: "Answering the question as modified by direction of the court, this defendant attaches hereto Exhibit 8."

I read Exhibit 8:

Under the heading "United Mine Workers of America, Thomas Kennedy, Vice-President, telephone Metropolitan 0530, United Mine Workers of America seal, United Mine Workers Building, Washington 5, D. C., September 29, 1950.

"To all District Presidents, United Mine Workers of America.

page 1317 } "Dear Sirs and Brothers:

"The International Executive Board at its recent meeting held in Washington during the week of September 12 appointed a committee and authorized this committee to define a national policy with respect to construction work in and around the coal mining industry, and especially to the relationship that members of District 50 and the United Construction Workers might play in such policy.

"District 50 and the United Construction Workers are a part of the UMWA and as such are entitled to the cooperation of all members of the UMWA, all District officers and field representatives of both the national organization and all districts in the conduct of work in their efforts to organize the unorganized in the vicinity adjacent to and in the neighborhood of coal mining operations.

"The policy adopted at several conventions by the UMWA was to endorse the activities and the work of District 50 and UMW to the end that all workers, many of whom are sons, daughters and members of families of the UMWA adjacent to and in the area where coal mines are located, would have an opportunity to belong to the organization that had done so much for their people.

"After careful consideration of the subject matter, the attached declaration of policy was adopted and becomes the policy of the International Union and is applicable to all districts in the United Mine Workers of America. As President of your district you are therefore required to apply this policy hereafter in handling the subject matter. I earnestly urge your sincere support and cooperation in this policy because I firmly believe it will redound to the best interests of our membership and organization.

"On behalf of the committee, very truly yours, Thomas Kennedy, Vice-President."

"This paper union made by District 50, UMWA."

Then the thing with that is this: Entitled "National policy, in re: District 50:

"Construction work in or around coal mines or in connection with the production or the preparation of coal or coke, or in the sinking of shafts or slopes, or the driving of tunnels,

including repairs and maintenance work on company houses, plants and buildings, shall be under the jurisdiction of the United Mine Workers of America, the prevailing wage rates to apply and govern in such work.

"Where some of this work is done in such coal mining areas by members of District 50, UMWA and the United Construction Workers they shall deposit transfer cards in the local union of the parent organization having jurisdiction over the work, and such cards shall be accepted in lieu of initiation fees. Upon completion of the work in question said members of

District 50 and the UCW shall be issued transfer page 1319  $\frac{1}{2}$  cards to permit them to return to local unions in District 50.

"Employees of company stores, truck drivers hauling coal from the mine not under the bituminous or anthracite agreements and who are not paid by the coal companies, timber haulers and cutters, coke plants located separate and apart from coal mines, and fabricating plants of contractors who do constructing work in and around the mines shall remain under the jurisdiction of District 50.

"With respect to contractors presently under contract with District 50 and UCW, representatives of District 50 and UCW will cooperate with the district organizations in supplying the district officers with information relative to the names and locations of these contractors who do work in and around the mines, and will cooperate in every way possible to amend the present existing contracts for this work and will surrender jurisdiction to district organizations of the parent organization and assist, if necessary, in attempting to write an agreement between the contractors in the district organizations covering work performed by these contractors in and around the mines.

"District 50 and UCW will attempt in all instances where existing wage contracts are in effect or new contracts written with new contractors to incorporate a clause therein surrendering all work done by the contractor in and page 1320  $\frac{1}{2}$  around the mines to the jurisdiction of the parent organization."

Mr. Allen: "Question 85: Did District 50 or its administrative officer at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or remove or cause to be suspended or removed from office the National Director of United Construction Workers—"

Mr. Robertson: Wait a minute: "As to the National Director of United Construction Workers, no."

Mr. Mullen: That is the one that was amended. Here is the amendment.

(Counsel conferring.)

Mr. Robertson: Would you read that again, please?

Mr. Allen: "Did District 50 or its administrative officer at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or remove or cause to be suspended or removed from office the National Director of the United Construction Workers—"

Mr. Robertson: "As to the National Director of United Construction Workers, no."

Mr. Allen: "The National Comptroller of United Construction Workers?"

Mr. Robertson: "As to the National Comptroller of United Construction Workers, no."

page 1321 } Mr. Allen: "Or Thomas Raney?"

Mr. Robertson: "As to Thomas Raney, no."

Mr. Allen: "Thomas Davis?"

Mr. Robertson: "As to Thomas Davis, no."

Mr. Allen: "David Hunter?"

Mr. Robertson: "As to David Hunter, yes."

Mr. Allen: "William O. Hart?"

Mr. Robertson: "As to William O. Hart, yes."

Mr. Allen: "H. G. Robinson."

Mr. Robertson: "H. J. Robinson, no."

Mr. Allen: "And if so state the following: (a) Who had such right?"

Mr. Robertson: "Chairman of the Organizing Committee, District 50, United Mine Workers of America."

Mr. Allen: "(b) As to whom could such right have been exercised?"

Mr. Robertson: Answered.

Mr. Allen: "(c) During what period or periods could such right have been exercised?"

Mr. Robertson: "During all periods inquired about."

Mr. Allen: "(d) What cause or causes if any were necessary for the exercise of such right?"

Mr. Robertson: No set rules to govern. It is a matter of administrative practice."

Mr. Allen: "Question 86: Did United Mine  
page 1322 } Workers of America or its International Executive Board or its President at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or remove or cause

to be suspended or removed from office the administrative officer of District 50"—

Do you want to break that up?

Mr. Robertson: I think you had better go ahead.

Mr. Allen: "—the Secretary-treasurer of District 50, the comptroller of District 50, the National Direction of United Construction Workers, the National Comptroller of United Construction Workers, or Thomas Raney, Thomas Davis, David Hunter, William O. Hart, or H. G. Robinson, and if so state the following: Who had such right, as to whom could such right have been exercised, during what period or periods could such right have been exercised, what cause or causes if any were necessary for the exercise of such rights?"

Mr. Robertson: "This is the same question as the question numbered 116 in the interrogatories propounded to Defendant United Mine Workers of America, and the answer of that Defendant is hereby adopted as the answer of this Defendant, said answer reading as follows: 'Thomas Davis, David Hunter, William O. Hart, and H. G. Robinson (correct name Harvey J. Robinson) are employees of District 50 or the United Construction Workers and are not international officers or appointed employees of the International page 1323 } union. As to Thomas Raney, the International Constitution, United Mine Workers of America, Article 9, Section 3, reads as follows: He may suspend or remove any international officer or appointed employee for insubordination or just and sufficient cause.'"

I think that refers to the President of the Union.

"the word 'he' refers to the President of the International Union as set out in Section 1 of Article 9."

'Such administrative acts as may be taken by the International President under section 3 above quoted are each and all subject to review by the International Executive Board or by the International Convention under the terms and in the manner provided by Article 18 of the International Constitution. As to the Administrative Officer of District 50, the secretary-treasurer of District 50, the Comptroller of District 50, the National Director of the United Construction Workers and the National Comptroller of the United Construction Workers, they and each of them are subject to the direction and control as provided by Article 20 of the International Constitution of the officers of District 50 and the United Construction Workers respectively. There is no instance in which the President of the International Union sought to

cause the removal or suspension from office of the Administrative Officer of District 50, the Secretary-treasurer of District 50, the Comptroller of District 50, the National Director of the United Construction *Woer*kers, the National page 1324 } Comptroller of the United Construction Workers, or Thomas Raney, Thomas Davis, David Hunter, William O. Hart, or H. G. Robinson. Presumably if the International president sought to cause such removal, his position would give him influence, but in all cases if there were a suspension or removal the person suspended or removed has the recourse against such suspension or removal approved by the Constitution of the International Union in Article 18."

Mr. Allen: "Question 87: Did United Mine Workers of America or its International Executive Board or its president at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, have the right to suspend or revoke or to cause to be suspended or revoked the charter or certificate of affiliation granted by United Mine Workers of America to district 50, or to United Construction Workers, and if so state the following: Who had such right, as to which organization could such right have been exercised, during what period or periods could such right have been exercised, what cause or causes if any were necessary for the exercise of such right?"

Mr. Robertson: "This Defendant is not competent to answer with respect to this question. However, this Defendant is advised that the Defendant United Mine Workers of America in response to interrogatories to it numbered 117 has made the following reply: 'Yes, but only upon page 1325 } the conditions and in the manner provided for in the International Constitution and subject to review in the manner provided in International Constitution.'"

Mr. Allen: "Question 89 (as reframed): Were charter fees, initiation fees and dues paid to district 50 by its local unions and members between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and was any portion of such fees and dues paid by District 50 to United Construction Workers or the United Mine Workers of America, and if so, why?"

Mr. Robertson: "Answering the question as modified by direction of the Court, this defendant says: Yes, on all except United Construction Workers."

Mr. Mullen: Wait a minute.

Mr. Robertson: Wait a minute. I read the wrong one.

Mr. Mullen: You read the wrong answer.

Mr. Robertson: Excuse me. I read the wrong one.

89 is what I should have read: "Answering the question as modified by direction of the Court, this defendant says: Yes, on all except United Construction Workers."

Mr. Allen: "Question No. 90: State the following for the years 1948 and 1949 each: (a) Were funds advanced or paid by District 50 to or for the account of United page 1326 } Construction Workers or United Mine Workers of America, and if so, why? (b) Were funds advanced or paid by United Construction Workers or United Mine Workers of America to or for the account of District 50, and if so why?"

Mr. Robertson: "Answering the question as modified by the Court this Defendant says: From time to time District 50 United Mine Workers of America makes operational advances to United Construction Workers as a direct loan, all of which is required to be repaid. There are no such advances made by District 50 to the United Mine Workers of America.

"(b) From time to time the International Union has made operational advances to District 50, United Mine Workers of America, as a direct loan, all of which is required to be repaid. There have been no such advances by United Construction Workers."

Mr. Allen: Interrogatories to the United Mine Workers of America, Interrogatories (4), filed September 13, 1950.

"Question 6: Furnish a copy of the charter or certificate of affiliation granted by the United Mine Workers of America to District 50 showing when such charter or certificate of affiliation was granted to District 50."

Mr. Robertson: "Copy of the charter of District 50 is attached hereto."

page 1327 } Mr. Robertson: I will read it to the jury, if I may, Your Honor:

"U. M. W. A. Exhibit  
Answering Interrogatory #6

"CHARTER  
THE  
UNITED MINE WORKERS OF  
AMERICA

hereby establishes a provisional District No. 50, under the conditions herein set forth, to be known as

Gas and By-Product Coke Workers

and to have jurisdiction over workmen employed in and about plants processing coal within the United States and Canada; and for the establishment of such conditional district, this charter is issued to

JAMES NELSON

President.

JAMES NELSON (Acting)

Secretary-Treasurer.

their successors in office and associates in membership.

"The said district, and all sub-districts and local unions established therein, shall be subject to the jurisdiction of the International Organization United Mine Workers of America, and may adopt constitutions and by-laws not in conflict with the constitution of the United Mine Workers of page 1328 } America and this charter of affiliation.

"Said district, its members and subordinate divisions, shall acquire no rights in the funds, or to participate in the election or conventions of the United Mine Workers of America, but shall have their own autonomy with respect to their elections, conventions and wage negotiations.

"The district and its members shall pay the International Organization United Mine Workers of America dues and assessments, as provided in the International Constitution, and shall receive the support and guidance of the International Organization in matters of policy, administration, organization and wage negotiations, as its International Executive Board may approve.

"All controversies or questions of interpretation arising under this charter shall be determined by the tribunals set up in the constitution of the United Mine Workers of America, and this charter of affiliation shall be submitted for approval to the next regular constitutional convention of the United Mine Workers of America.

"By order of the International Executive Board.

"Dated this 1st day of September, 1936

(Signed) JOHN L. LEWIS

President,

United Mine Workers of America

(Signed) THOMAS KENNEDY

Secretary-Treasurer,

United Mine Workers of America"

page 1329 } the Charter or Certificate of Affiliation granted  
by United Mine Workers of America to United  
Construction Workers, showing when such charter or certificate of affiliation was granted to the United Construction Workers."

Mr. Robertson: "Copy of Charter of United Construction Workers is hereto attached."

"U. M. W. A. Exhibit  
Answering Interrogatory #7

"ESTABLISHED JANUARY 25th 1890

INTERNATIONAL UNION

UNITED MINE WORKERS OF AMERICA

DOTH GRANT THIS CHARTER TO

A. D. Lewis, Chairman  
Washington, D. C.

Gardner Wales, Comptroller  
Washington, D. C.

United Construction Workers Division  
And Their Successors in Office

To Constitute a Local Union to be known as U. C. W. D. District No. 50, for the purpose of effecting thorough organization of the workers in this Industry. And said Local Union being duly organized is hereby authorized and empowered to admit to membership any person in accordance with the provisions of the constitution of the United Mine Workers of America and to enact a code of By-Laws for the government of said Local Union provided that the said Local  
page 1330 } Union shall in all cases conform to the constitution of the United Mine Workers of America.

"In Witness Whereof we have hereunto attached our signatures and caused the Seal of the United Mine Workers of America to be affixed.

Done at Washington, D. C. this 6th day of June, 1942.

(Signed) JOHN L. LEWIS, President.

(Signed) THOMAS KENNEDY, Secretary."

Mr. Mullen: Will you let him read that back? I think you made some errors in it.

(Discussion off the record.)

Mr. Allen: "Question 9: Did the constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that among other objects it was an object of the United Mine Workers of America to do the following:

"1. To unite in one organization, regardless of creed, color or nationality, all workers eligible for membership employed in and around coal mines, coal washeries, coal processing plants, coke ovens, and in such other industries as may be designated and approved by the International Executive Board, on the American Continent; and if so, state the following:

"(a) During what period or periods did said  
page 1331 } constitution so provide?

"(b) —"

Mr. Robertson: Wait a minute.

"Yes, during all the times inquired about."

Mr. Allen: "(b) With respect to the one organization mentioned in the language quoted above, were the members of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, a part of this one organization; and if so, during what period or periods?"

Mr. Robertson: "At all times inquired about, members of District 50 were part of the United Mine Workers of America, but retained their identity, membership rights and privileges at all times as members of District 50, all as provided in the Charter of District 50 and Article 20 of the Constitution of the United Mine Workers of America."

Mr. Allen: "(c) With respect to the one organization mentioned in the language quoted above, were the members of United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, a part of this one organization; and if so during what period or periods?"

Mr. Robertson: "Yes at all times inquired about, the members of the United Construction Workers were part of the  
page 1332 } United Mine Workers of America, but retained  
their identity, membership rights and privileges  
at all times as members of the United Construc-

Charter of the United Construction Workers, its rules, and the rules of District 50, and Article 20 of the Constitution of the United Mine Workers of America."

Mr. Allen: "(d) With respect to the one organization mentioned in the language quoted above, were the members of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, a part of this one organization; and if so, during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "With respect to such other industries as may be designated and approved by the International Executive Board mentioned in the language quoted above, what were the designated and approved 'other industries' between the dates October 28, 1948, and August 4, 1949, and what have been the designated and approved 'other industries' since August 4, 1949?"

Mr. Robertson: "Since October 28, 1948, there have been no designations or approvals of other industries."

Mr. Allen: "Question 10: What was the address of the General Offices of United Mine Workers of America in Washington, D. C., between the dates October 28, 1948, and August 4, 1949, and what has been the address of its page 1333 } General Offices in Washington D. C., since August 4, 1949?"

Mr. Robertson: "900—15th Street, N. W., Washington, D. C., at all times inquired about."

Mr. Allen: "Question 11: What was the address of the General Offices of District 50 in Washington, D. C., between the dates October 28, 1948, and August 4, 1949, and what has been the address of its General Offices in Washington, D. C., since August 4, 1949?"

Mr. Robertson: "900—15th Street, N. W., Washington, D. C., at all times inquired about."

Mr. Allen: "Question 12: What was the address of the General Offices of United Construction Workers in Washington, D. C., between the dates October 28, 1948, and August 4, 1949, and what has been the address of its General Offices in Washington, D. C., since August 4, 1949?"

Mr. Robertson: "900—15th Street, N. W., Washington, D. C., at all times inquired about."

Mr. Allen: "Question 13"—

Mr. Robertson: You have to read the other parts to get the whole thing.

Mr. Allen: That is right.

"Question 13: Did the Constitution of the United Mine

Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that among other objects it was an object of the United Mine Workers of America to do the following:”—

Mr. Robertson: (a), not changed.

Mr. Allen: —“and if so, state the following:

“(a) During what period or periods did said Constitution so provide?”

Mr. Robertson: “Yes, during all the times inquired about.”

Mr. Allen: “(b) Was the above quoted object of the United Mine Workers of America also an object of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and if so, during what period or periods?”

Mr. Robertson: “Yes, at all times inquired about.”

Mr. Allen: “(c) Was the above quoted object of the United Mine Workers of America also an object of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and if so, during what period or periods?”

Mr. Robertson: “Yes, at all times inquired about.”

Mr. Allen: “(d) As used in the language quoted above, what is meant by the words ‘joint agreement’?”

Mr. Robertson: “As used in the language quoted, the words ‘joint agreement’ mean the collective bargaining agreements entered into between an employer and the union representing his employees as members of the union. It has no relation whatever to any agreement between the three Defendants.”

Mr. Allen: I believe I omitted something that belongs in that question. I will read it over:

“Question 13: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide that among other objects it was an object of the United Mine Workers of America to do the following:

“2. To increase the wages and improve the conditions of employment of our members by legislation conciliation, joint agreements, or strikes; and if so, state the following:

"(a) During what period or periods did said Constitution so provide?"

Mr. Robertson: "Yes, during all the times inquired about."

Mr. Allen: "(b) Was the above quoted object of the United Mine Workers of America also an object of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and if so, during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "(c) Was the above quoted object of the United Mine Workers of America also an object page 1336 } of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949; and if so, during what period or periods?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "As used in the language quoted above, what is meant by the words 'joint agreement'?"

Mr. Robertson: "As used in the language quoted, the words 'joint agreement' mean the collective bargaining agreements entered into between the employer and the union representing his employees as members of the union. It has no relation whatever to any agreement between the three Defendants."

Mr. Allen: "Question 14: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows:

"The International Union shall be composed of workers eligible for membership in the United Mine Workers of America and may be divided into Districts, sub-districts, and Local Unions; and if so, state the following:

"During what period or periods did said Constitution so provide?"

Mr. Robertson: Are you reading (a)? Give (a) and (b) so I can answer.

Mr. Allen: Do you want to answer that before I read (b)?

Mr. Robertson: Yes.

Mr. Allen: All right.

"(a) During what period or periods did said Constitution so provide?"

Mr. Robertson: "Yes, during all the periods of time inquired about."

Mr. Allen: "(b) As used in the language quoted above, do the words 'International Union' mean the United Mine Workers of America and its districts, sub-districts, branches, and subordinate branches, including District 50, and the United Construction Workers; and if not, what do they mean?"

Mr. Robertson: "Yes, during all the periods of time inquired about."

. . . . .

Mr. Allen: "(c) Was District 50 at any time between the dates October 28, 1948, and August 4, 1949, operated as a District or sub-district or branch or subordinate branch of the United Mine Workers of America, and has it been so operated at any time since August 4, 1949; and if so, for page 1338 } what period or periods was it operated in each way?"

Mr. Robertson: "Yes, it operated as a District at all times inquired about."

Mr. Allen: "(d) Was United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, operated as a district or sub-district or branch or subordinate branch of the United Mine Workers of America, and has it been so operated at any time since August 4, 1949; and if so, for what period or periods was it operated in each way?"

Mr. Robertson: "Yes, it was at all times during the periods of time inquired about operated as a division of District 50."

Mr. Allen: "(e) Was United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, operated as a district or sub-district or branch or subordinate branch of District 50, and has it been so operated at any time since August 4, 1949; and if so, for what period or periods was it operated in each way?"

Mr. Robertson: "Yes, it was at all times during the periods of time inquired about operated as a division of District 50."

. . . . .

Mr. Lowden: "Question 15: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'The International Union shall have supreme executive, legislative, and judicial authority over all members and subordinate branches and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and the subordinate branches shall be referred to for adjustment.' And if so, state the following:

"(a) During what period or periods did such Constitution so provide?

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(b) As used in the language quoted above do the words 'International Union' mean the United Mine Workers of America and its districts, subdistricts, branches, and subordinate branches, including District 50 and United Construction Workers, and if not, what do they mean?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(c) Under and by virtue of the language quoted above, did the United Mine Workers within the organization of said International Union have supreme executive, legislative, and judicial authority over District 50 and over the members of District 50 at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and if so, during what period or periods?"

Mr. Robertson: "Yes, in the manner and to the extent and under the rules prescribed by the Constitution of the United Mine Workers of America."

Mr. Lowden: "(d) Under and by virtue of the language quoted above, did United Mine Workers of America within the organization of said International Union have supreme legislative, executive, and judicial authority over United Construction Workers and over the members of the United Construction Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, and if so, during what period or periods?"

Mr. Robertson: "Yes, in the manner and to the extent and under the rules prescribed by the Constitution of the United Mine Workers of America and the rules of District 50."

Mr. Lowden: "Question 16: Did the Constitution of the United Mine Workers of America at any time between the

dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'Between International Conventions the supreme executive and judicial power of the International Union shall be vested in its executive officers and the Executive Board in accordance with and subject to the provisions of this Constitution.' And if so, state the following:

"(a) During what period or periods did such Constitution so provide?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(b) As used in the language quoted above, do the words 'International Convention' mean the International Conventions of the United Mine Workers of America, and if not, what do they mean?"

Mr. Robertson: "Yes."

Mr. Lowden: "(c) As used in the language quoted above, do the words 'International Union' mean the United Mine Workers of America and its districts, subdistricts, branches, subordinate branches, including District 50 and United Construction Workers, and if not, what do they mean?"

Mr. Robertson: "Yes."

Mr. Lowden: "(d) As used in the language quoted above, do the words 'executive officers' mean the executive officers of the United Mine Workers of America, and if not, what do they mean?"

Mr. Robertson: "Yes."

Mr. Lowden: "(e) As used in the language quoted above do the words 'Executive Board, mean the International Executive Board of the United Mine Workers of America, and if not, what do they mean?"

Mr. Robertson: "Yes."

page 1342 } Mr. Lowden: "Question 22: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'All districts, subdistricts, and local unions must be chartered by and shall be under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board.' And if so, state the following:

"(a) During what period or periods did the Constitution so provide?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(b) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, was District 50 under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board, all as provided in the language quoted above?"

Mr. Robertson: "During all the times inquired about."

Mr. Lowden: "(c) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, was United Construction Workers under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board, all as provided in the above quoted language?"

page 1343 } Mr. Robertson: At all times inquired about, subject to the Constitution of the United Mine Workers of America and the charter and rules of District 50."

Mr. Lowden: "(d) As used in the above quoted language, do the words 'International Union' mean the United Mine Workers of America and its districts, subdistricts, branches, and subordinate branches, including District 50 and United Construction Workers; and do the words 'International Executive Board' mean the International Executive Board of the United Mine Workers of America, and if not, what do those words mean?"

Mr. Robertson: "Yes, at all times inquired about, yes."

Mr. Lowden: "Question 26: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'The International Executive Board shall have authority to change the boundaries of districts as conditions may require, but the boundaries of self-supporting districts shall not be changed except by vote of the membership affected as determined by the district, a referendum to be taken by the officers of the United Mine Workers of America at any time between the district affected and representatives of the International Union.' And if so, state the following:

"(a) During what period or periods did such  
page 1344 } Constitution so provide?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(b) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did said International Executive Board have authority to change the boundaries of District 50 in accord-

ance with and subject to the provisions of the language quoted above?"

Mr. Robertson: "During all of the times inquired about."

Mr. Lowden: "(c) During what period or periods between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did such International Executive Board have authority to change the boundaries of United Construction Workers in accordance with and subject to the provisions of the language quoted above?"

Mr. Robertson: "Yes, during all the times inquired about, and in the manner and to the extent provided in the Constitution and the rules of District 50."

Mr. Lowden: "(d) As used in the language quoted above, do the words 'International Executive Board, mean the International Executive Board of the United Mine Workers of America, and if not, what do they mean?"

Mr. Robertson: "Yes."

Mr. Lowden: "Question 41: With respect to page 1345 } the privileges, powers, and duties of the International Executive Board of the United Mine Workers of America, did the Constitution of the United Mine Workers at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'The International Executive Board shall execute the instructions of International Conventions, and between Conventions shall have full powers to direct the workings of the organization.' And if so, state the following:

"(a) During what period or periods did such Constitution so provide?"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Lowden: "(b) As used in the language quoted above, does the word 'organization' mean United Mine Workers of America and its districts, subdistricts, branches, and subordinate branches, including District 50 and United Construction Workers, and if not, what does that word mean?"

Mr. Robertson: "Yes."

Mr. Lowden: "Question 44: With respect to the International Executive Board of the United Mine Workers of America, did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'When the Board is not page 1346 } in session the individual members thereof shall be subject to the direction of the President.' And if so, state the following:

“(a) During what period or periods did the Constitution so provide?”

Mr. Robertson: “Yes, during the periods of time inquired about.”

Mr. Lowden: “(b) During what period or periods between dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, was Thomas Raney, as a member of the International Executive Board of the United Mine Workers of America, subject to the direction of the President of the United Mine Workers of America?”

Mr. Robertson: “Yes, during all the periods inquired about.”

Mr. Lowden: “Question 46: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: ‘With respect to members in Canada and District 50 the International Executive Board is empowered to modify dues and initiation fee payments with due regard to existing conditions.’ And if so, state the following:

“(a) During what period or periods did such Constitution so provide?”

Mr. Robertson: “Yes, during the periods inquired about.”

Mr. Lowden: “(b) During the periods between page 1347 } tween the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, did the International Executive Board of the United Mine Workers of America have the power with respect to the United Construction Workers to modify dues and initiation fee payments with due regard to existing conditions?”

Mr. Robertson: “Yes, during the period inquired about.”

Mr. Lowden: “Question 47: Did the Constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: ‘The publication and management of our official journal shall be left with the International Executive Board, which body shall have full power to decide all questions concerning the publication and business management policies thereof.’ And if so, state the following:

“(a) During what period or periods did said Constitution so provide?”

Mr. Robertson: "Yes, during the periods inquired about."

Mr. Lowden: "(b) During the period between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, was this official paper known as The United Mine Workers Journal?"

page 1348 } Mr. Robertson: "Yes."

Mr. Lowden: "(c) Furnish a copy of the issue of The United Mine Workers Journal published next prior to July 26, 1949."

Mr. Robertson: "Copy of The United Mine Workers Journal for July 15, 1949, being the publication next prior to July 26, 1949, is hereto attached."

I am reading that, Your Honor, only to make a complete answer to the question.

Mr. Lowden: "Question 69: What was the street address in Pikeville, Kentucky, of the regional office of Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what has been the street address in Pikeville, Kentucky, of said regional office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky, at all times inquired about."

Mr. Lowden: "Question 70: What was the street address in Pikeville, Kentucky, of the regional office of Region 58 of the United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what has been the street address in Pikeville, Kentucky, of such regional office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky, at all times inquired about."

page 1349 } Mr. Lowden: "Question 71: What was the street address in Pikeville, Kentucky, of the office of Thomas Raney, as a member of the International Executive Board of the United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the street address in Pikeville, Kentucky, of that office since August 4, 1949?"

Mr. Robertson: "Seward Building, Main Street, Pikeville, Kentucky, at all times inquired about."

Mr. Lowden: "Question 72: What was the post office box number in Pikeville, Kentucky, of the regional office of Region 58 of District 50 between the dates October 28, 1948, and August 4, 1949, and what has been the post office box number in Pikeville, Kentucky, of said regional office since August 4, 1949?"

Mr. Robertson: "District 50 and the United Construction Workers as such do not have a post office box in Pikeville, Kentucky. Post office box 50 has been the post office box

of District 30, United Mine Workers of America, and Thomas Raney, International Board member, United Mine Workers of America, for some seventeen years, and because of the crowded condition in the post office and it being unable to provide a post office box for District 50 and the United Construction Workers, the post office employees have been placing the mail of District 50 and the United Construction Workers in post office box 50."

page 1350 } Mr. Lowden: "Question 73: What was the post office box number in Pikeville, Kentucky, of the regional office of Region 58 of United Construction Workers between the dates October 28, 1948, and August 4, 1949, and what has been the post office box number in Pikeville, Kentucky, of said regional office since August 4, 1949?"

Mr. Robertson: "District 50 and the United Construction Workers as such do not have a post office box in Pikeville, Kentucky. Post office box 50 has been the post office box of District 30, United Mine Workers of America, and Thomas Raney, International Board member, United Mine Workers of America, for some seventeen years, and because of the crowded conditions in the post office and it being unable to provide a post office box for District 50 and the United Construction Workers, the post office employees have been placing the mail of District 50 and the United Construction Workers in post office box 50."

Mr. Lowden: "Question 74: What was the post office box number in Pikeville, Kentucky, of Thomas Raney, as a member of the International Executive Board of the United Mine Workers of America, between the dates October 28, 1948, and August 4, 1949, and what has been the post office box number in Pikeville, Kentucky, of said Thomas Raney as a member of said International Executive Board since August 4, 1949?"

page 1351 } Mr. Robertson: "District 50 and the United Construction Workers as such do not have a post office box in Pikeville, Kentucky. Post office box 50 has been the post office box of District 30, United Mine Workers of America, and Thomas Raney, International Board member, United Mine Workers of America, for some seventeen years, and because of the crowded condition in the post office and it being unable to provide a post office box for District 50 and the United Construction Workers, the post office employees have been placing the mail of District 50 and the United Construction Workers in post office box 50."

Mr. Lowden: "Question 76: In what capacity or capacities was A. D. Lewis employed by the United Mine Workers of America or District 50 or United Construction Workers

between the dates October 28, 1948, and August 4, 1949, and in what capacity or capacities has he been employed by United Mine Workers of America or District 50 or the United Construction Workers since August 4, 1949? Who employed him in each capacity? For what period or periods of time was he employed in each capacity?"

Mr. Robertson: "Mr. A. D. Lewis during all the times inquired about was employed by the United Mine Workers of America as special representative and among his duties as such was designated as and directed to perform the duties of

Chairman of the Organizing Committee, District  
page 1352 } 50, United Mine Workers of America, and Director of the United Construction Workers Division of District 50, United Mine Workers of America, and was appointed by the International President with the approval of the International Executive Board."

Mr. Lowden: "Question 82: In what capacity or capacities was William O. Hart employed by United Mine Workers of America or District 50 or United Construction Workers between the dates October 28, 1948, and August 4, 1949, and in what capacity or capacities has he been employed by United Mine Workers of America or District 50 or United Construction Workers since August 4, 1949? Who employed him in each capacity? For what period or periods of time was he employed in each capacity?"

Mr. Robertson: "At no time during the times inquired about was William O. Hart an employee of the United Mine Workers of America or United Construction Workers. From March 21, 1949, to May, 1950, Mr. Hart was an employee of District 50, the United Mine Workers of America, employed and assigned by the Chairman of the Organizing Committee of District 50 and assigned to work under the Regional Director of Region 58 in the capacity of field representative. In that capacity he served both District 50, United Mine Workers of America, and the United Construction Workers. Since the middle of May, 1950, Mr. Hart has been assigned to and is  
working in Region 22, District 50, United Mine  
page 1353 } Workers of America, and United Construction Workers. The office of Region 22 is located at Clarksburg, West Virginia."

Mr. Lowden: "Question 83: In what capacity or capacities was H. G. Robinson employed by United Mine Workers of America or District 50 or United Construction Workers between the dates October 28, 1948, and August 4, 1949, and in what capacity or capacities has he been employed by United Mine Workers of America or District 50 or United Construction Workers since August 4, 1949? Who employed him in

each capacity? For what period or periods of time was he employed in each capacity?"

Mr. Robertson: "During the times inquired about Mr. H. G. Robinson (correct name, Harvey J. Robinson) was never an employee of the United Mine Workers of America or District 50. During those times Mr. Harvey J. Robinson was employed by the Director of the United Construction Workers as a field representative and assigned to work in Region 58. In that capacity and as such he was required to serve both United Construction Workers and District 50, United Mine Workers of America, organizations and membership."

. . . . .

Mr. Lowden: This is Further Interrogatories to the Defendant United Construction Workers, interrogatories that we have marked (5).

page 1354 } "Question 4: Approximately how many persons were members of the United Construction Workers on August 1, 1949?"

Mr. Robertson: "Approximately 46,000."

Mr. Lowden: Reading from Further Interrogatories to the Defendant District 50, which we have marked (6):

"Question 4: Approximately how many persons were members of District 50 on August 1, 1949?"

Mr. Robertson: "Approximately 112,000."

Mr. Lowden: Reading from Further Interrogatories to the Defendant United Mine Workers of America, which we have marked (7):

"Question 4: Approximately how many persons were members of the United Mine Workers of America on August 1, 1949?"

Mr. Robertson: "There is no absolute or currently complete individual list of members of the United Mine Workers of America as of August 1, 1949. As of that date, however, there were approximately 650,000 members of the United Mine Workers of America, of which approximately 30,000 members are located in the Dominion of Canada."

Mr. Lowden: Reading from Further Interrogatories addressed to the Defendant United Construction Workers, which we have marked (11):

"Question 5: With respect to the work which is being performed by Link-Belt Company of Chicago, Illinois, for Inland Steel Company at Price, Kentucky, or Wheelwright, Kentucky, during the year 1949, did Thomas Raney, as an official of the United Mine Workers of America or in any other capacity, attend certain meetings held between representatives of the United Construction Workers or representatives of District 50, United Mine Workers of America, hereinafter sometimes called District 50, and representatives of Link-Belt Company during the months of May, June, or July, 1949, for the purpose of negotiating an agreement by which Link-Belt Company would recognize United Construction Workers or District 50 as the collective bargaining agent for some or all of the employees of Link-Belt Company on said work at Price, Kentucky, or Wheelwright, Kentucky; and in this connection did Thomas Raney, as an official of United Mine Workers of America or in any other capacity, participate in any manner in negotiations with Link-Belt Company; what meetings between representatives of United Construction Workers or District 50 and representatives of Link-Belt Company did Thomas Raney attend; and to what extent did he participate in negotiations carried on with the Link-Belt Company?"

Mr. Robertson: "Mr. Thomas Raney took no part in the negotiations inquired about, except that he arranged the meeting between the negotiators at the request of the general superintendent of the Inland Steel Company for a meeting. The negotiations went on without his presence or participation at some other place."

If Your Honor please, there was an answer here giving the membership of Local Union 778-A which Mr. Mullen stated this morning he wanted me to read.

Mr. Mullen: I didn't state I wanted you to read it.

Mr. Robertson: I won't read it, then. I am through, then.

I will read it anyway just to make sure. Mr. Moore, will you come here and help me find it?

(Off the record.)

The Court: The Court desires to state to counsel for the Defendants that they may read any interrogatories not read by counsel for the Plaintiff, and also the answers, provided the answers are responsive to the question.

Colonel Harris: If the Court please, counsel for the Defendants feel that, to get the full benefit of the objections they made to the procedure followed, we should not waive

them in any way and that we should have to follow what we conceive to be the law on the subject, respectfully reserving the point.

The Court: The Court understands your position.

Mr. Robertson: As far as we are concerned, Your Honor, they can reserve all the rights that they have under those objections and read anything they want, too.

page 1357 } The Court: Gentlemen, are we ready to proceed at ten o'clock, or do we have to have any conferences in the morning?

Mr. Robertson: I think, Your Honor, that we may need a conference. I don't think it will be very long. I think maybe counsel and the Court could get rid of it very shortly this afternoon.

The Court: No, we can't do it this afternoon. There is just so much you can take in one day.

Mr. Allen: If Your Honor please, we would not like to have it understood that we will be foreclosed from reading maybe a few little additional interrogatories tomorrow morning or reading some of the exhibits filed with some of the interrogatories that haven't been read yet. Of course a lot of exhibits were filed with them.

The Court: You wish to reserve that right.

Mr. Allen: Yes.

The Court: Can you gentlemen give me any idea how much time it will take to discuss the other matter that you have in mind?

Mr. Robertson: I would hope less than half an hour.

Mr. Allen: I think half an hour.

Mr. Robertson: I will tell Your Honor that it is how we are going to prove the photostats we are going to put in. It is covered in our trial brief. I don't think it is open to argument.

page 1358 } The Court: Will you gentlemen meet me at nine-thirty tomorrow morning?

Mr. Allen: Yes, sir.

The Court: The Court will meet with counsel at nine-thirty tomorrow morning. Sheriff, you may adjourn Court for the jury until ten o'clock tomorrow morning.

(Whereupon, at 4:45 o'clock p. m. a recess was taken until 9:30 o'clock a. m., Friday, February 2, 1951.)

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Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a special Jury, on February 2, 1951.

**Appearances:** Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

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### PROCEEDINGS.

(The following proceedings were had in Chambers:)

**Mr. Robertson:** Judge, the matter that we had to take up this morning is the introduction in evidence of various photostats from the official publications of these unions and also some of the proceedings from the International Conventions as reported in the Journals. Some of the things that we want to put in, as I understand it, instead of using the photostats we will go right to the Journals which are already in evidence in that big envelope full of copies that we introduced in evidence yesterday.

I would like just to read to the Court the part that we have here in our trial brief—

**Mr. Mullen:** Suppose you state what you want to do first. There might not be any argument.

**Mr. Robertson:** All right. State what you have there.

**Mr. Mullen:** What you want to do and how you want to introduce them.

**Mr. Allen:** There are numerous copies of the Journal with speeches by Mr. Lewis and resolutions and what-not concerning the subject of autonomy, district and so forth. We would like to point out particular portions of the Journal that we want actually to go to the jury. We wouldn't  
page 1361 } like, Your Honor, for a whole Journal to go to the jury unless they want it because we think there is material in those Journals that would probably inflame the jury, rabid speeches about some people, about capitalism, this, that and the other—

**Mr. Mullen:** Attacks on the Taft-Hartley Act, and so forth.

**Mr. Allen:** Yes, things like that that we don't think ought

to go before the jury. We would like to read to the jury from the Journals the particular passages.

It might be better to introduce the photostatic copies so there wouldn't be any question about their going before the jury. We also have photostatic copies. Then there are photostatic copies of articles, passages and resolutions and so forth in the Journal that are not in the particular issues that are on file. We would want to introduce them. We will prove them under the rule about compared or examined copies, and we are prepared to show that they were photostated under the supervision of Mr. Bryan, that Mr. Bryan read the originals and he has read the photostats and he can testify that they are correct photostatic copies of the originals. That is in accordance with the rule which is in force in Virginia and was applied in a number of Virginia cases. In other words, these documents were found in a public office, to-wit, the Department of Labor of the United States Government. The statute

page 1362 } says those articles and documents may be proven by certified copies to avoid the trouble of a witness taking the witness stand and proving them by examined copies, but the cases say that the statute is simply an additional method of proof and that it does not do away with the old common law method of proof by examined or compared copies.

We of course shall be glad to show to these gentlemen before we offer anything in evidence, exactly what we are going to offer. Whether they would like to see them in advance of offering and look at them and read them over rather than delay the trial by reading them each time is a question that they would have to answer for themselves. According to the report of the pre-trial conference we had some discussion about that and they expressed the opinion—I don't mean to say they are bound by any opinion they expressed there, nor are we—they expressed an opinion it would be satisfactory to them if we could show them to them in advance of the trial. Mr. Bryan some three days before the trial began, four days before the trial, we will say approximately a week before the trial began did send them a great mass of photostatic copies, and they sent them back because they said they did not have time at that late stage to examine them. They may be correct in that. I don't have any—

Mr. Robertson: The number has been greatly reduced.

Mr. Allen: It comes down to the verified page 1363 } copies, whether we showed them to them or did not, we have a right to introduce them even of

we just hand them to them at this moment before offering them in evidence.

Mr. Robertson: It is relatively a very small number there.

Mr. Allen: If you use the Journal itself there will be nothing like as many photostatic copies because there are just numbers of volumes of the Journal and a great many of our photostats are in the Journals which have been filed, and we can use them unless there is some fear that the whole Journal may get before the jury. We want it distinctly shown in the evidence that the jury is not permitted to see all that inflammatory stuff that we have just mentioned.

Colonel Harris: How do you propose to do that, to read to the jury while you introduce the photostats?

Mr. Allen: I thought we would put Mr. Bryan on the stand and hand him the Journal after showing to you the particular part that we want to read, and have him read to the jury the part that we want the jury to get.

Mr. Mullen: I see a difficulty there. So far as the law is concerned, I think for once these gentlemen have stated it all correctly as to proof—

Mr. Allen: What is that?

page 1364 } Mr. Mullen: I say for once I think you all have stated the law correctly, that they can be proven by certification of a witness that he has compared them with the originals and the source from which they came and has compared them. I think that is the correct law.

The difficulty is going to be that there were somewhere between 300 and 500 documents sent to us. The first I understand were sent on Saturday the 13th. Then there were others sent on Monday, Tuesday and Wednesday, and it was a physical impossibility to read them at that date. We had only three days before the trial then.

Mr. Allen: We don't expect to introduce anything like 300 to 500.

Mr. Mullen: Of course anything like that that they are going to introduce we ought to read them and see whether they are open to objection as being relevant or not relevant. It is going to take a lot of time if anything like you all had there is to be introduced or if you are going to introduce portions of the proceedings of the National Conventions, some of that may be and some may not be. The Journals attack not only the Taft-Hartley Act but various other acts of Congress, and we don't have in issue in this case what is the unions policy as to law, and so forth, and it is going to be difficult to weed it out. The full Journals should not go to

the jury, of course. All of them have a cartoon page 1365 } on the front page. I showed you one, Your Honor, criticizing Byrd and Smith and so forth. Those things would be highly inflammatory. How to weed them out, any official pronouncements in those papers I suppose are competent evidence.

Mr. Robertson: I don't think there will be any difficulty.

The Court: I wonder if you gentlemen couldn't agree to clip the portion that you propose to introduce into evidence from the copies.

Mr. Mullen: That is what I thought was going to be done away back when we were talking about it.

The Court: And not let the jury see the whole Journal.

Mr. Robertson: As I understood it that is exactly what we propose to do. For instance, when I introduced those things yesterday, I was very careful to stand so that the jury could not see those cartoons or what was in there. Any of those that are already in evidence, where the journal is in evidence, if there is anything relevant to this particular case, my understanding is that we will turn and read that to the jury and then we could put a photostat of what was read in as an exhibit in the case but not let the whole thing go to the jury. I agree with Mr. Mullen completely.

Mr. Mullen: Do you have a photostat in each page 1366 } case of what you want to put in?

Mr. Allen: Yes.

The Court: If you gentlemen would agree to that that would simplify matters.

Mr. Robertson: I think it would be reversible error to let all that go to the jury.

Mr. Bryan: The front sheet is usually the sheet that has the volume number and issue number and the date. Without that, there is no way to identify the articles as being from any particular issue.

The Court: You could put on photostatic copy, Volume 10, so and so.

Mr. Allen: Why couldn't you do this, Judge: For instance, if we are going to introduce them through Mr. Bryan, let him state the volume and the number and the date and then say the article can be found on page so and so and then offer a photostat.

Mr. Robertson: And identify the photostat as the Court said.

Mr. Mullen: In that way the reporter will have it identified in the report. I am not trying to prevent them from introducing anything that is proper, but I was just appalled at the

mass of it, and I could see us sitting here for a week or so longer while they were trying to get that in. I was just trying to see what could be done.

page 1367 } The Court: How many of these copies do you propose to introduce?

Mr. Allen: I can't tell, Your Honor. It will be nothing like what we delivered to Mr. Mullen. I will say that that was the very best we could do then under the circumstances. We had promised to deliver them to him. In the preparation of this case, we have had to divide the work to a certain extent, and it has been impossible for us at times to get with Mr. Bryan and go over and weed out these photostats that we didn't want to introduce. We had not had time to do it up to that time and the best we could do was just to let him deliver the whole to Mr. Mullen. We regret that we had to do that, but we just had not had the time at that time to weed them out. Now we have. It will not take a great length of time, and we can point out to counsel on the other side exactly what we are going to offer and the particular article and the particular part of it. If they object to a part of the article without all of it, we will not raise any question, we will say let it all go in. It will be up to them to say whether they want all of a particular article or not. We can decide then before it is even offered before the jury. If they say we want all of this article and not just a paragraph of it, we will say all right, let it go in.

Colonel Harris: As I understand it, we are discussing the sufficiency of the predicate and not the inherent page 1368 } admissibility of any particular article.

Mr. Robertson: That is right. As I understand, no point is raised that these are correct copies, but you reserve all rights to object to the introduction of any of them.

Mr. Mullen: I don't know whether it is stated exactly right. We are not objecting to that method of proving, on other words, by Mr. Bryan. We are not saying right now that it ought to go in yet.

Mr. Robertson: I say you reserve every right to try to keep them all out.

Mr. Mullen: What we will not object to is the method of proof that they are proposing. I don't know, they might not even offer some items that I saw in there that I certainly would object to. You may not offer them, I don't know. I didn't glance at more than half a dozen. I was working on this case in some other phases at that time.

I suppose the only thing is to let them offer them one by one. It is going to take time. We will have to read them.

Mr. Allen: Would it be better, Your Honor, to do that in

the absence of the jury so that when we come to the jury then we can go right along? It may be that some of them they will object to, we may think we have it somewhere else in the record and we may agree not to introduce them.  
page 1369 } We are not definitely committed yet to insist finally on a certain number, but there are certain of them that we shall insist upon. Others, if objected to, we may waive our right to introduce them.

Mr. Mullen: Have you any idea how many?

Mr. Allen: We may offer them anyway for the record in the Court of Appeals but if the Court rules them out, we will let you initial them under the rules and they will be part of the record in the Court of Appeals. I don't think we are going to have any great trouble in getting together on exactly what is going to be introduced because we have a specific object in mind in introducing these photostats from the Journal and from the constitutional conventions, and so forth.

The Court: We have the jury coming back at ten o'clock this morning.

Mr. Robertson: Why don't we start that way and see how we get along. If it looks like we would get along better a different way, we can change.

Mr. Mullen: Do you know a better way of trying it?

Colonel Harris: I don't know another way.

Mr. Mullen: All right.

Now let me ask concerning one or two matters. We asked Mr. Bryan to give a list of his laborers on the Hopewell job at—what was the year, '47 or '48?

page 1370 } Mr. Bryan: Mr. Harris asked me how many laborers we had, and I told him I didn't know. Since that time I have looked and it was about 35 or 36 at that time. He also asked whether or not there had been an increase in the wage rate at about that time, and I find that the wage rate for laborers was increased in June, 1948, from 75 cents an hour to 90 cents an hour, and that there hasn't been any change in that rate since June, 1948, until the last week or so.

Mr. Mullen: Was it '47 or '48 the year we were talking about?

Mr. Bryan: '48. I talked to Mr. Fold. In October or the first of November, 1948, there was no question of wages on that. He asked how many laborers we had and it was impossible for me to say then.

Mr. Mullen: I thought there would be something in your payroll.

Mr. Bryan: I told him I would have to look at the payroll to find out how many there were, and since that time I have done it.

Mr. Mullen: Another thing, the CPA that we have, Mr. Holt. As a special favor to me, they took him off a job Friday, Saturday and Sunday. We had him ready to go Friday. On Saturday he went, and the result of that has already been stated in the Court. The only time we can get him is Sunday.

Will somebody be there Sunday?

page 1371 } Mr. Bryan: We will have somebody down there, Mr. Mullen.

Mr. Mullen: CPA's are hard birds to get.

page 1372 } The Court: They are working on income taxes now.

Mr. Mullen: They are working on income tax, annual reports, and so forth.

Mr. Allen: One other word about these photostats, Your Honor. Mr. Moore and myself the other night spent several hours going over those photostats with Mr. Bryan. We concluded that there are quite a number of photostats there that we would want in the record for purposes of the record, that we don't care to read to the jury. I am wondering if we might not offer them in evidence, and then say we do not care at this time to read them; the record will show they were never read. We want them in there for certain purposes of law if the case gets to the Court of Appeals.

Colonel Harris: At first blush, it seems to me that that is running a double case: one case to the jury, and a different case off in another channel for the Court of Appeals. It seems to me it is just one case.

The Court: It strikes me that you must offer them or not. This Court is entitled to all the information that it can properly get, in order to determine the issues involved, and I don't think you can by-pass this Court.

Mr. Allen: This Court would have it before it on purely legal questions. Some of them, I take it, the jury wouldn't have anything to do with. They involve questions of law.

Let me illustrate this, which is certainly im-  
page 1373 } portant. It shows exactly what we contend.

Some years ago one of the unions out here, one of the local unions, brought a suit against the Mine Workers, the International Union, to prohibit the International Union from revoking the local union's charter without a hearing, and the Court—I think the case is reported in 158 or 258, called the Fishwick case. It is reported in that volume of the Illinois Reports. The Court held that under the Mine Workers' charter as it existed at that time, they couldn't do that.

To meet that decision they amended their charter so as to

give the Mine Workers, the International President or International Board or the main union, the right to revoke those charters; gave them much more power over the local unions than they had before that.

Then another case came up later on, with the constitution amended, and they held they did have complete power over the union to revoke the charter, as they had not before.

The jury has not a thing in the world to do with that, and Your Honor could use it on a motion to set aside a verdict or a motion for instructions, and the like. All that is in those journals, and it shows the purpose of the amendment.

The Court: If it is before this Court, can't the Supreme Court consider it also?

Mr. Allen: Certainly it can do it. That is page 1374 } why I say we want it before this Court. We can't get it before this Court without offering it. It certainly is not a proper matter to go before the jury; but in our arguments on instructions and certainly on motions to set aside a verdict before Your Honor, we would want that in the record. Even if Your Honor rejects it, under the law as it stands now you initial it, and it would still be a part of the record.

Colonel Harris: Judge, we are unfamiliar with any two-lane highways for the trial of litigated cases. There is one road that you follow.

The Supreme Court could very well say, if you followed their plan, "that is a moot question; it did not go before the jury." I don't think they can attempt to educate the Court in an off-the-record, out-of-court proceeding. We are in one trial here, and everything that happens here is reviewable.

I haven't had a chance to confer with Mr. Mullen, but personally, I am not willing to start splitting the case up and say, "Here is a part for somebody to use on appeal, and here is a part to use on appealing to the jury."

Mr. Mullen: What do you propose to put in on that point?

Mr. Allen: I will show you. And if they object to, Your Honor, and Your Honor sustains the objection, page 1375 } we will just take an exception. That will satisfy the record for our purposes. It will be before Your Honor then, and in the record for the Court of Appeals, too.

Mr. Mullen: Do you propose to put in the decision of the Illinois Court?

Mr. Allen: No, we don't propose to do that. What we propose to show is the difference in the constitution when those cases were decided, and the difference in the constitu-

tion when the Coronado case was decided, and at this time. It appears clearly in the Journals, and the purpose for which the amendment was made.

Mr. Mullen: You are acting under the present constitution.

Mr. Allen: That is right.

Mr. Mullen: I question whether those earlier constitutions are competent or relevant evidence.

Mr. Allen: They are not competent evidence before the jury, but they are certainly competent evidence in our arguments before the Judge and in arguments before the Court of Appeals. How are we going to get the earlier constitutions in evidence so we can argue before His Honor here and argue before the Court of Appeals, unless they are introduced?

The Court: Do you propose to introduce that evidence in the absence of the jury?

Mr. Allen: Yes, that is right. That is *ex-page 1376* } actly what it would amount to.

Mr. Mullen: Yet you argued here earlier that everything—of course, you are doing that to show agency—that everything that shows anything indicating agency will properly go before the jury.

Mr. Allen: The present constitution has been introduced in evidence; the Rules of District 50 have been introduced in evidence, but as yet none of it has been read. We probably will read some sections from it. So it comes right back to the same thing. His Honor struck the nail on the head when he said it would be introduced before His Honor in the absence of the jury. We want it in the record because we feel it is very material on certain questions of law; and if we don't have the facts somewhere in the record, facts that are really not proper to go before the jury but are proper to be considered in connection with the law of the case—

The Court: Let's discuss that point further and give these gentlemen a chance to think it over. We will all think it over.

Mr. Mullen: I think it a very novel proposition.

Colonel Harris: It seems to me that what they are attempting to do is to make their legal arguments a part of the record, and I personally do not see how we could ever consent to have something introduced in evidence and not go before the jury. If it is in evidence, the purpose of *page 1377* } putting it in evidence is for the jury.

Mr. Robertson: Judge, haven't you already hit the nail on the head there? Isn't the way to expedite matters now to go ahead and introduce what we are going to introduce before the jury, and hold your ruling on the other in abeyance until everybody has thought it over?

The Court: That is a point that we should all give consideration to. You don't propose to offer any evidence in that respect in the immediate future, do you, today?

Mr. Allen: Yes. We were going to try to conclude our case today with that sort of evidence.

The Court: Yes, but I mean not this morning.

Mr. Allen: No, sir. We were going to read these photostats from the Journal and a few more interrogatories that we omitted yesterday, and that sort of thing.

The strict legal situation with reference to the practice is this; It doesn't make any difference what we offer, if they think it is objectionable they object to it; and if Your Honor sustains their motion, which I take it you would in reference to some of this because it is not proper for the jury, then we would take an exception, you would initial it, and it thereby, under the rules, becomes a part of the record for use by Your Honor and for use by the Federal Court.

Mr. Robertson: The way you could hit that page 1378 } promptly is to offer it during the course of the proceedings, and the Court would look through it enough to see that it was irrelevant and throw it out, and we take our exception. I don't see any mystery about how we are going to proceed. You offer whatever you want to offer, and the Court rules it out, and there is the end of it for jury purposes. It looks to me like we are talking all over the lot, to no purpose.

Mr. Mullen: Mr. Allen, you are arguing now the point that if I ask a question of the witness and an objection is sustained to it, then I can have the jury go out and have the answer go in the record.

Mr. Allen: Yes, but I wouldn't want to put you in that position of continually objecting and the Judge—

Mr. Robertson: Why couldn't we do it this way? All I want is to try to expedite the thing. Let me make my suggestion, because I think there is a very good chance to finish our case-in-chief today. Suppose that Mr. Allen offered this thing and you glanced through it, and don't have any argument or anything. Then you say it is objected to, and I ask the Court to mark it Plaintiff's Exhibit No. so-and-so (Excluded), and it is laid aside, and we go on to the next one.

Mr. Allen: Then it is in the record.

Mr. Robertson: I don't think even the Court has a right to stop us from that. I think it is the way to go page 1379 } fastest with least friction.

Mr. Mullen: All right. We will try it that way. We want to expedite it as much as we can, because if Your Honor is going to adjourn the jury on Monday, we don't

*Alexander Hamilton Bryan.*

want to go beyond that and use the one day we were promised.

Mr. Robertson: You have one day, under our agreement, whenever it is.

The Court: These gentlemen are going to try to cooperate with the Court as much as they can, as they have in the past. If they don't need that day, I am sure they won't ask for it.

Mr. Mullen: If they finish today, we will certainly take it.

page 1380 } (The following proceedings were had in open court:)

(Roll call of the Jury.)

The Court: Mr. Robertson, would you and Colonel Harris, or one representative from the other group, mind coming around behind the bench just a second!

(Conference at the bench out of hearing of the Jury.)

Mr. Allen: Mr. Mullen, we shall offer that first. (Exhibiting photostat to Defendants' counsel.)

Mr. Mullen: Do you offer this?

Mr. Allen: We are going to offer that first.

Mr. Mullen: We are going to object. Go ahead and make your offer, and we are going to object.

Whereupon,

**ALEXANDER HAMILTON BRYAN**

recalled as a witness for Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

**DIRECT EXAMINATION.**

By Mr. Allen:

Q. Mr. Bryan, have you a photostatic copy showing the geographical extent of the United Mine Workers and District 50?

A. Yes, sir.

Q. Where did you get it from?

A. Pages 4 and 5 of the District 50 News, page 1381 } United Mine Workers of America, Volume 1, Issue No. 19, dated August 15, 1942. The original is on file at the U. S. Department of Labor Library in Washington.

*Alexander Hamilton Bryan.*

Q. I hand you what purports to be a photostatic copy. Before offering it in evidence, I will ask you if you know whether or not it is a photostatic copy?

A. Yes, sir, the photostat was made under my supervision, and I compared it.

Q. You examined the original and the photostatic copy, both?

A. Yes, sir.

Q. You know that it is a correct copy?

A. Yes, sir, it is a correct copy. It was examined either by me or under my direct supervision.

Mr. Allen: Suppose, Your Honor, we pass it up and let Your Honor see it so you will know what it is.

Mr. Mullen: If Your Honor please, we object to the introduction of it. It uselessly encumbers the record, it is too remote from any issue in this case, and it is prejudicial.

The Court: What is your reply to that, Mr. Allen?

Mr. Allen: The importance and materiality of that, Your Honor, is this: It shows that District 50 is different from the ordinary District, in that both geographically and jurisdictionally, so far as area is concerned, District 50 is co-extensive with the United Mine Workers of America. page 1382 } It shows that there isn't a spot or area covered by the United Mine Workers of America that isn't covered by District 50. We think it is material and important in that respect.

Mr. Mullen: There already has been testimony as to that, Your Honor. This is just useless encumbrance of the record.

In addition to that, that has a lot of explanations, and so forth, on it that are not proper.

Mr. Robertson: If Your Honor please, that is a graphic illustration of the evidence, which we think is most helpful to the jury. When you are not printing any exhibits, if you ever have to go anywhere else, it is not encumbering the record.

Mr. Allen: I want to see if there is anything objectionable on it, since Mr. Mullen has called attention to something. Will you point out specifically what you think is objectionable, Mr. Mullen?

(Discussion off the record.)

The Court: Do you gentlemen have any further observations to make?

*Alexander Hamilton Bryan.*

Mr. Allen: About this exhibit?

The Court: The first exhibit offered.

Mr. Allen: No, sir. We think it is material and relevant, and would like to have it go before the jury.

The Court: The objection is overruled. Note page 1383 } an exception.

Mr. Robertson: We ask that the Reporter mark it Plaintiff's Exhibit No. 63.

(The document referred to was marked Plaintiff's Exhibit No. 63 and received in evidence.)

Mr. Allen: We think, if Your Honor please, we would save time by a short adjournment to get together exactly what we want to offer, in precise form, and show it to these gentlemen; and then if they have objections, let them state them, and then we can go right along in a hurry.

My associates here seem to concur in that view, and we believe we would save time.

The Court: Do you want to recess a few minutes?

Mr. Allen: Recess a few minutes, and get it together and show it to these gentlemen so that we can get right along.

The Court: All right, let's recess for a few minutes.

(Brief recess.)

The Court: Gentlemen, it is apparent to the Court that I am going to have to do considerable reading in connection with the photostatic copies which will be offered in evidence, and in order to save you some time and to keep you from waiting around, the Court will recess until 2:15. I will meet with counsel in Chambers and try to be ready by then.

(Whereupon, at 11:00 o'clock a. m., the jury was excused until 2:15 o'clock p. m. of the same day.)

page 1384 } (The following proceedings were had in Chambers:)

(Discussion off the record.)

The Court: What do you gentlemen want to say on this? What do you want to put in the record?

Mr. Allen: We offer the article headed "Charter of District 14 is suspended by President Lewis," taken from page 7,

*Alexander Hamilton Bryan.*

Volume 32, No. 20, issue October 15, 1921, of the United Mine Workers' Journal.

The Court: Are you through, Mr. Allen?

Mr. Allen: Yes.

The Court: Mr. Mullen?

Mr. Mullen: We object to the introduction of the item in evidence on the ground that it relates back to 1921 and was action taken under a constitution then in effect different from the constitution in effect at the time of the happening which is the basis of this suit. For that reason it is not relevant evidence.

Mr. Robertson: The Plaintiff wishes the record to show that this entire line of testimony is offered as being relevant and admissible upon the theory that the existence of the power of the International Union over District 50 and United Construction Workers appears from the constitution of the International Union already introduced in evidence. The Plaintiff is now showing the exercise of that power by the International

Union through its president, International Executive Board, and International Convention. page 1385 }

Such authority having been exercised in increasing measure, continuously, uniformly, repeatedly from 1921 down to the present time in increasing measure to such effect that it shows a pattern, design, plan, and practice of despotic control, and wherever during the intervening years the power of that control has been questioned, the constitution has been amended to increase the despotic control, and this entire line of evidence is one phase of such proof.

The Court: Do you want to add anything to the record, Colonel Harris?

Colonel Harris: I understand that the objector has the opening and the closing of the argument on his objections, and not the offerer of the testimony. I make that statement in view of the statement made by Counsel a while ago that they thought they had the last say, and that may become important.

If the Court pleases, there is necessarily a limit on the area covered by a trial. As we see it, it cannot possibly be relevant or material to enter into everything that has happened in the history of the United Mine Workers of America since the day the union was organized. The constitution that was in effect is in evidence. The existence of the power is the question. We have not denied the existence of the power.

*Alexander Hamilton Bryan.*

Th exercise of a different power under a different constitution we submit would not throw any light on the question now before this Court and needlessly encumbers the record.

The Court: The objection is overruled.

Colonel Harris: We note an exception.

. . . . .

The Court: Let the record show that the Defendants may have their objection and exception without having to repeat the same before the jury.

Mr. Robertson: I think you have a right to repeat it before the jury because I don't think it is fair to you to sit silent in the presence of the jury.

Mr. Mullen: When the article is offered in evidence before the jury, counsel for Defendant will object, stating that they object for the reasons heretofore stated and of record in this case. Neither one will argue reasons for doing the thing.

Colonel Harris: And that we be given an exception to each ruling without the necessity of saying every time before the jury we note an exception.

Mr. Robertson: No, I think if you are going to get the benefit I think you ought to take the burden. If page 1387 } you want to repeat your objection you ought also to repeat your exception.

Colonel Harris: We will do it then.

Mr. Mullen: I don't think there will be any trouble doing that.

(The document referred to was marked Plaintiff's Exhibit 64 and received in evidence.)

(Discussion off the record.)

Mr. Allen: We offer in evidence from the Secretary-treasurer's report in the United Mine Workers Journal, Volume 25, No. 37, January 20, 1916, article entitled "What we owe, to whom we are in debt, and why."

Mr. Mullen: If Your Honor please, we object to this item now offered, "What we owe, to whom we are in debt, and why," which is a record in 1916 before either District 50 or UCW were ever organized or were in existence. It certainly can't have any bearing on the control or the actions of the International Union with reference to something that didn't

*Alexander Hamilton Bryan.*

exist at the time. It is simply an article about having to borrow money and having to get it from their subordinate unions for defense work and so forth which they had to do. We submit that it relates to unions that were not even in existence at the time and can have no relevancy here.

The Court: All right, gentlemen?

Colonel Harris: May I add also on the ground page 1388 } of immateriality and on the further ground that

Your Honor has heretofore ruled that questions of financial condition should not be taken up. This is an effort to show that they were in debt 35 years ago for the purpose of making some comparison later on in the case.

Mr. Allen: All we desire to read here, if Your Honor please, is this:

"All these loans, however, were secured from subordinate branches of our organization, from districts that had builded up defense funds and who cannot doubt that the money spent in Colorado and eastern Ohio has been used in defense of the institutions we all profess to uphold. We are in debt, then, to ourselves. True, the burden has for the time being fallen on only those who in the past have laid by for a rainy day and in time these debts will be paid by all the members of our organization collectively."

The only purpose of that is to show that they regard all of the unions as one big union. "We are in debt, then, to ourselves."

Colonel Harris: We call the Court's attention to the highly prejudicial reference to "Colorado".

Mr. Robertson: We withdraw it.

The Court: It is withdrawn.

(Discussion off the record.)

Mr. Allen: We offer the following paragraphs page 1389 } from page 11 of the United Mine Workers Journal dated November 1, 1922, Volume 33, No. 21, headed "Executive Board Restores Autonomy of District 14 and Orders an Election."

"The international executive board at its meeting at headquarters voted to restore the autonomy of District 14 and ordered a district convention held. The convention call was

sent out by the provisional officers of the district to meet on October 25 at Pittsburg, Kan."

\* \* \* "Just who will be candidates for district officers remains to be seen. Neither George L. Peck, provisional president, nor Thomas Harvey, provisional secretary will be candidates, they have announced. President Peck will continue to act as provisional president until January 1, when the new officers to be elected on December 12, take their seats."

Mr. Mullen: Your Honor, we object to that on the ground, in the first place, that it is so remote in time that it has no bearing on the present controversy or conditions existing at the present time, and it is merely two detached paragraphs out of a whole article. It is not relevant here. It relates to District 14, which is one of the coal mining districts. At that time neither one of the other unions was in existence, and the power that it has over the coal miners is different from what it has over District 50 and UCW. It is all governed by the constitution and rules that have page 1390 } been put in evidence. I can't see that this is material, and relevant.

Mr. Harris: And all the grounds stated by both Mr. Mullen and myself to their first offer, which were overruled, and also the grounds stated to their second offer, which they withdrew.

Mr. Robertson: If Your Honor please, I will be very brief, and I think this may save some time here.

That is exactly the same objection that they made before, and we offer it for exactly the same purpose as stated before. One additional purpose is to show the Godlike quality of John L. Lewis. The Lord giveth and the Lord taketh away. The other time he destroyed autonomy. This time he gives it back again. Blessed be the name of the Lord.

Mr. Mullen: The article is headed "Executive Board Restores Autonomy \* \* \*," not John L. Lewis.

The Court: What does the second paragraph have to do with it, which reads: "Just who will be candidates for district officers remains to be seen \* \* \*."

Mr. Robertson: I don't think it has anything to do with it.

The Court: Neither do I.

Mr. Allen: They were permitted to elect their own officers at that time and the provisional officers wouldn't be candidates, that is all. It shows they were given the page 1391 } right to elect their own officers, a right which District 50 hasn't got.

The Court: The Court will grant the motion as to the first paragraph and overrule the motion as far as the second

paragraph is concerned, which is marked with red crayon.

Colonel Harris: We note an exception to the adverse part of the ruling.

Mr. Mullen: You are not offering anything more in that one?

Mr. Moore: No, sir.

(Discussion off the record.)

(The document referred to was marked Plaintiff's Exhibit 65 and received in evidence.)

Mr. Allen: We also offer in evidence from United Mine Workers Journal Volume 33, No. 21, dated November 1, 1922, page 13, the following: "Autonomy of District No. 19 Suspended by Executive Board."

"The international executive board in session at Indianapolis on October 20, adopted a report of the committee on organization, suspending the autonomy of District 19.

"President Lewis was directed to suspend the autonomy in conformity with the board's action and sent the following communication to the officers and members of the district:

"To The Officers and Members of District 19, page 1392 } United Mine Workers of America.

"Greeting:

"You are hereby officially advised that the International Executive Board in session at Indianapolis, Indiana, on October 20th, adopted the report of the Committee on Organization with respect to District 19, reading as follows:

" "The affairs of District 19 are in a chaotic condition due to serious internal differences and also to the evils resulting from the economic depression. It is more than apparent from the evidence adduced and in possession of your Committee that a more definite policy should be followed in that district and that its administrative affairs should be placed on a more stable basis. Your committee, therefore, recommends that effective November 1, 1922, the autonomy of District 19 be suspended and the district placed under the authority of provisional officers responsible to the International Union. The International President is directed to apply this policy."

"In consideration of the foregoing action, the autonomy of District 19 is suspended and all offices within the district declared vacant effective November 1, 1922. The International Union exercising its constitutional authority, will create a provisional district to take complete charge of the affairs, property and funds of District 19, effective from the date of the suspension of autonomy \* \* \*."

Mr. Mullen: We object to that, Your Honor, page 1393 } on the same grounds as stated with regard to the item already read from this issue of the paper. I don't think it necessary to repeat them.

Mr. Moore: They give it away in one and take it away in the other.

The Court: The objection is overruled.

Mr. Mullen: Exception is noted.

(The document referred to was marked Plaintiff's Exhibit 66 and received in evidence.)

Mr. Allen: We now offer in evidence from pages 3 and 4 of the United Mine Workers Journal, Volume XXXIV, No. 15, article headed "President Lewis Revokes Charter of District 26 and Orders Striking Miners Back to Work."

"President Livingstone defies order of international union, whereupon he is summarily removed from office with other district officials. Reports show big percentage of men returned to work after autonomy of district was suspended.

"President John L. Lewis, in a telegram to Daniel Livingstone, president of District 26, Nova Scotia, revoked the charter of the district and denounced Livingstone for his defiance and violation of the constitution and authority of the international union.

\* \* \* \* \*

"Under the order issued by Mr. Lewis the page 1394 } autonomy of the district was suspended and the authority taken over by a provisional government."

And on page 4, from a telegram signed by Mr. Lewis:

"By virtue of the authority vested in me by the constitution of the United Mine Workers of America, of which I am President, and in consideration of the further authority granted in the premises by the International Executive Board, I, herewith, advise that the charter of District 26,

United Mine Workers of America, stands revoked, effective this date. Under this action District 26 ceases to be an entity and you are automatically deprived of your office as President thereof. Alexander McIntyre, Vice-President, and J. B. McLachlan, as Secretary-Treasurer, likewise have their offices vacated through this same precise action. All members of the Executive Board of District 26, including any and all other officers of said District are in like manner automatically removed from office and can no longer undertake to represent in any capacity the United Mine Workers of America. This applies with equal force to Alexander Stewart, Member of the International Executive Board. Under separate order I am today creating a Provisional District to function within the jurisdiction of former District 26, under the direct authority and control of the International Union. International Representative Silby Barrett, of Glace Bay, Nova Scotia, has been designated as Provisional President thereof  
page 1395 } with sweeping authority to function in every capacity."

Mr. Mullen: Are you offering that?

Mr. Allen: Yes.

Mr. Mullen: If Your Honor please, I object to that. It is disjointed extracts from—has Your Honor seen it?

The Court: No, I haven't.

Mr. Mullen: It is disjointed extracts from an account of a proceeding which was taken pursuant to action of the International Executive Board, and it sets out throughout what the controversy was, which shows the basis and justification for this action.

The telegraphic order sent to President Livingstone by President Lewis, he picks out simply one part of one paragraph in that. I think that, cut up like that, it doesn't show the whole picture, and it again is a matter going back prior to the existence of either United Construction Workers or District 50. It was under a different constitution, and it is not proper to be admitted here and is not relevant testimony.

Colonel Harris: And all the other grounds of objection that we interposed.

Mr. Mullen: Yes.

Mr. Robertson: I think that is the same objection, in what Mr. Mullen has said there. The only thing new goes to the weight of it rather than the admissibility of it.  
page 1396 } The Court: Do you gentlemen have anything further you want to say?

Mr. Allen: It uses the term "provisional," and shows what is meant by the term "provisional district."

Mr. Mullen: I think, Your Honor, it doesn't make sense to cut an article up like that, which is all on one subject, just to select a sentence here and a sentence there.

Mr. Allen: Do you want the rest of it?

Mr. Mullen: I am not asking for anything. I am objecting to it in the form it is.

Mr. Robertson: We offer it in the form it is, and if they want it they can offer the rest of it, and let the record show that.

The Court: The Court will overrule the objection and allow it for what it is worth.

Mr. Mullen: We note an exception.

(The document referred to was marked Plaintiff's Exhibit No. 67 and received in evidence.)

\* \* \* \* \*

Mr. Allen: We now offer in evidence the following headlines and extract from page 4 of the United Mine Workers Journal, Volume XXXV, No. 24, December 15, 1924: Headline reading, "Charters of 10 Insubordinate page 1397 } Local Unions Revoked by President Lewis in District 1."

"Charters of ten local unions of the United Mine Workers of America in the Pittston district, District 1, were revoked by President Lewis, following the refusal of the men to return to work pending the settlement of grievances held against the Pennsylvania and Hillsdale Coal & Iron Company."

Mr. Mullen: We object to it for the same reasons heretofore stated.

Mr. Robertson: We offer it for the same purpose.

The Court: The objection is overruled.

Mr. Mullen: Exception noted.

(The document referred to was marked Plaintiff's Exhibit No. 68 and received in evidence.)

Mr. Allen: We now offer in evidence from page 8, United Mine Workers Journal, Volume XI, No. 12, June 15, 1929, article headed, "President Lewis Revokes Charter of Sub-District No. 9 of District No. 12 for Insubordination of Officials."

We offer so much of that article as I shall now read:

"President John L. Lewis of the United Mine Workers of America, has revoked the charter of Sub-District 9, District 12, which is the local organization of the United Mine Workers of America in Franklin county, Illinois.

page 1398 } "This action was taken because of the insubordination of the officers of this sub-district to the laws of the United Mine Workers of America and the rulings of the international executive board. The action of the president's office dissolves the sub-district organization, as such, and creates in lieu thereof a provisional sub-district organization, of which John T. Jones, of West Frankfort, Illinois, is named president; John Belcher, of Zeigler, Illinois, vice president, and John Brown, of West Frankfort, Illinois, secretary-treasurer.

"President Lewis addressed the following communication to the retiring officers of the sub-district:

"Indianapolis, Ind., June 8, 1929.

"Mr. D. B. Cobb, president: Mr. Heza Hindman, vice president; Mr. Ed Loden, secretary-treasurer; Mr. Ed Rich, Mr. Glenn Malone, Mr. Luther Elliott, Mr. W. F. James, Mr. Luke Corley, members executive board; Sub-District 9, District 12, United Mine Workers of America, West Frankfort, Illinois.

"Dear Sirs and Brothers:

"The officers of Sub-District 9, District 12, United Mine Workers of America, are insubordinate to the laws of the United Mine Workers of America and the rulings of the international executive board. Pursuant, therefore, to the authority vested in me by the constitution of the United Mine Workers of America, I hereby revoke the charter of Sub-District 9, District 12, United Mine Workers of America, effective this date. This action dissolves the Sub-District, as such, and vacates all offices appertaining thereto, either elective, appointive, secret or otherwise.

"A provisional sub-district has been created and this office is designating Mr. John T. Jones, of West Frankfort, Illinois; Mr. John Belcher, of Zeigler, Illinois, and Mr. John Brown, of West Frankfort, Illinois, as the provisional officers of Provisional Sub-District 9 District 12."

Colonel Harris: Will the Court permit us to add as an additional ground of objection to all objections made this morning in the absence of the jury, two more:

First, that you cannot prove the power of an agent by the declaration of the agent.

Second, you cannot prove the power and authority of an agent or agency by either the declarations or the conduct of the agent or agency.

Mr. Robertson: We are taking this out of their official Journal, of course. It goes along with the other facts and circumstances in the case to determine whether he is authorized to act.

The Court: You may be permitted to add those objections, Colonel Harris.

Colonel Harris: Thank you.

page 1400 } Mr. Mullen: They will be added to the previous objections, and will apply to the article now offered. And again, we want to emphasize that they are unrelated extracts from a total article.

Mr. Robertson: We wish the record to show that we invite the Defendants to read the entire article, and have no objection to any part of it that they choose so to read.

Colonel Harris: And we decline the invitation, for the reason that if we conceive evidence to be inadmissible, we can't be put in the position of offering still more inadmissible evidence.

The Court: The Court overrules the objection.

Mr. Mullen: We reserve an exception.

(The document referred to was marked Plaintiff's Exhibit No. 69 and received in evidence.)

Mr. Allen: We now offer in evidence what I shall presently read from Volume XL, No. 20, of United Mine Workers Journal, under date of October 15, 1929, page 3:

"Charter of District 12 Revoked and Provisional District Organization Takes Charge of Affairs.

\* \* \* \* \*

"Mr. Harry Fishwick, President, and  
All Members of the Executive Board,  
District 12, United Mine Workers of America,  
Springfield, Illinois.

"Gentlemen:

page 1401 } "The Executive Board of District 12 is insubordinate to the laws of the United Mine Work-

ers of America and the rulings of the International Executive Board."

Page 4:

"The undersigned, acting by grant of authority vested in this office by the Constitution of the United Mine Workers of America, hereby revokes the charter of District 12, United Mine Workers of America, effective upon the date above given.

"This action vacates all of the elective offices of District 12, all of the appointive offices of said District, and all agents and appointees of said District, secret or otherwise.

"This order revoking the charter of District 12 does not, in any manner, affect the charter or the status of the officers of the various Sub-District organizations now functioning within District 12, nor in any way affect the charters of the Local Unions of Mine Workers in District 12. Said Sub-Districts and Local Unions will continue to function in their usual manner and retain, as usual, in their own possession, all monies, real estate and other valuable property heretofore accumulated and in their possession.

"Concurrently with the revocation of the District charter, the International Union is setting up a Provisional District organization and appointing officers of said Provisional District to take over the business of District 12, assume the obligations of the joint wage agreement and its protection, and carry on, in every particular, the beneficent activities of a District Union."

That is signed "John L. Lewis."

Mr. Mullen: We object, Your Honor, for the same reasons heretofore stated, which need not be repeated here.

The Court: The objection is overruled.

Mr. Mullen: Exception noted.

(The document referred to was marked Plaintiff's Exhibit No. 70 and received in evidence.)

Mr. Allen: We now offer in evidence the portions which I shall presently read from page 4 of the United Mine Workers Journal, Volume XII, No. 7, dated April 1, 1930: Heading, "President Lewis Revokes Charter of District No. 14."

"Acting under instructions from the international convention, International President John L. Lewis revoked the charter of District No. 14, on March 26. He then set up a pro-

visional district government to function in District No. 14 and administer the affairs of the union until the charter is restored.

"President Lewis appointed Henry Allai, of Arma, as provisional district president, and Joseph E. Hromek, of Arma, as provisional secretary-treasurer. He announced that a provisional vice president and two provisional  
page 1403 } board members at large would be appointed later."

"We also offer in evidence the amendments to the International Constitution adopted after the Fishwick case, found on page 18 of the same issue of the Journal, headed: "Amendments to the International Constitution Afford Better Method for Handling Union's Affairs."

"The international convention made numerous changes in the international constitution. All of these changes were for the purpose of affording a better and more effective method for conducting the affairs of the union and handling emergency situations that may arise in the future. The following are the sections affected as they now stand since being amended."

Mr. Mullen: Are you going to read all those?

Mr. Allen: No. We are offering the amendments in evidence. I don't see any necessity of reading them here now. There they are on that page.

Mr. Robertson: Some of them refer to the power of the president.

Mr. Allen: The headline, or rather, the heading states exactly what the purpose of the amendments is.

Mr. Mullen: If Your Honor please, we object to this because of the fact that it is back in 1929, not shown to be part of the present constitution, and for such of the other reasons heretofore stated as are applicable to this par-  
page 1404 } ticular case.

Mr. Robertson: We are going to show that those provisions of the constitution relating to the powers of John L. Lewis set out in those amendments have been in effect ever since and are now in effect.

Colonel Harris: We want all the additional grounds that we have been interposing this morning.

The Court: Very well.

The objection is overruled.

Mr. Mullen: Exception.

(The document referred to was marked Plaintiff's Exhibit No. 71 and received in evidence.)

Mr. Allen: We now offer in evidence from page 1405 } Volume 44, No. 1, of the United Mine Workers Journal dated January 1, 1933, page 8: "Why Charter of Local Union 303, Orient Mine, Was Revoked by the International Union."

"The charter of Local Union No. 303, Orient mine, West Frankfort, Ill., has been revoked by President Lewis and a provisional government set up in the local."

Mr. Mullen: Is that all of that?

Mr. Allen: That is all of it.

Mr. Mullen: The same objection, Your Honor.

The Court: The same ruling and exception noted for defendants.

(The document referred to was marked Plaintiff's Exhibit 72 and received in evidence.)

Mr. Allen: We now offer in evidence from United Mine Workers Journal Volume 44, No. 6, March 15, 1933, page 13, the following headline: "International Board Names New Officers to Carry on the Business of District No. 12."

"District No. 12, United Mine Workers of America, is now functioning under the direction of the international union.

"Following the action of the district executive board, which petitioned the international to take over the affairs of the district, President Lewis and the international executive board designated representatives to assume page 1406 } charge of the district and direct the workings of the organization, the old officials being automatically replaced by the appointees of the international union under the laws of the organization.

"William J. Snead, Herrin, a former state senator, and long active in the affairs of the union, was designated as provisional president, succeeding John H. Walker."

Mr. Mullen: The same objection.

The Court: The same ruling.

Mr. Mullen: Exception noted.

(Document referred to was marked Plaintiff's Exhibit 73 and received in evidence.)

Mr. Allen: If Your Honor please, we now offer from United Mine Workers Journal Volume 45, No. 1, dated Janu-

ary 1, 1934, page 3, not to be read before the jury but to be used as in effect in the record in matters of law. It deals with the Fishwick case and amendment of the constitution after that and so forth, to give greater power. There is too much mention in it here with reference to the Fishwick case to be properly read before the jury but we want it in the record for any arguments of law that we have to make before Your Honor if the Court of Appeals gets the case.

Mr. Robertson: As I understand, it is offered and if it is objected to it may be excluded by the Court because it is not relevant to go to the jury. The only benefit we page 1407 } will get is to have it marked Plaintiff's Exhibit excluded.

The Court: Do you gentlemen object to it?

Colonel Harris: Yes, we repeat all our objections.

The Court: The Court sustains the objection.

You want it marked, don't you, Mr. Allen?

Mr. Allen: Yes, we want it marked.

(The document referred to was marked for identification only Plaintiff's Exhibit No. 73-A and EXCLUDED.)

Mr. Allen: We now offer in evidence page 13 from Volume 45 of the United Mine Workers Journal dated January 1, 1934, headline: "Virginia Now a Provisional District of the United Mine Workers for the First Time."

"Great things have been happening in the coal industry in recent months, and one of these is found in the creation of a provisional district of the United Mine Workers of America in the state of Virginia. For the first time in the history of the coal industry the miners of Virginia are organized under the banner of the United Mine Workers of America. This achievement and the creation for the first time of a district in Virginia have come about as a result of the great organization campaign conducted by the union since the enactment of the National Industrial Recovery Law, which guarantees to employees the right to organize and belong to a union.

"Following the recent meeting of the international executive board, the following official circular was sent to all local unions and members in Virginia:"

We don't care to read that circular. It is signed by John L. Lewis and Thomas A. Kennedy.

Mr. Mullen: Your Honor, in addition to the objections heretofore made, no one disputes that under the constitution

he can create provisional districts. This is merely a news item that a district has been created in Virginia. There isn't any question of dispute in here. This has no relevancy as evidence in this case whatever. It is just announcing that we have organized a new provisional district in Virginia. It is solely a news item. It doesn't show any policy. It doesn't show any revoking of charters. It is simply something done under the constitution. I can't see that a mere news item like that is in any way relevant to the matter merely because it happens to have occurred in Virginia.

Mr. Allen: Let me read the letter that was sent that goes along with it. I think that would probably round it out better:

"To All Local Unions, United Mine Workers of America, Located in the State of Virginia.-

"Greeting:

"The international executive board has created Provisional District 28, effective December 20, 1933. This  
page 1409 } district will embrace all local unions of the United Mine Workers of America located in the state of Virginia.

"Mr. Dale Stapleton has been designated as President and Mr. William Minton as secretary-treasurer of Provisional District 28. The officers thus designated will establish a district office, assume charge of matters of internal concern and the obligations of the joint wage agreement on the date above set forth. Local unions in Provisional District 28 and the members thereof will cooperate with these officers in carrying out these duties.

"Effective December 20, 1933, and thereafter, all tax due from your local union on members who work five or more days per month, irrespective of the month for which it is due, should be paid by your local unions as follows:

"Fifty cents per month per member to the international secretary-treasurer; thirty-five cents per month per member to the secretary-treasurer of Provisional District 28; fifteen cents per month per member to be retained in the local union treasury.

"Application for exoneration from the payment of tax should be made to both the international and district offices on all members who do not work five or more days per month.

"Tax paid by your local union between now and December

20 will be credited to your local union under the district with which you are now affiliated.

page 1410 } "Yours truly, John L. Lewis, President,  
Thomas Kennedy, Secretary-Treasurer."

That is the first time, Your Honor, that the record shows that a provisional district was created in the first instance.

Mr. Robertson: It show the beginning of a flow of funds up to the throne.

Mr. Allen: It show that all of the chief officers were appointed by the International Union, Mr. Lewis, President. The key to the whole situation between autonomous districts and so-called provisional districts is who appoints the chief officers. That is shown through all these references.

Mr. Mullen: There is no question, Your Honor, but what the International Executive Board has the right to create provisional districts. That is shown in the charter which has been introduced. Where is there any bearing on this case in the fact that acting under that a provisional district has been created in the state of Virginia? I can't see that it has any probative value. The only reason it is brought in is because the word Virginia is in there.

Mr. Robertson: Judge, I think it has very material value, for this reason: They are trying to show that District 50 and the United Construction Workers have their own individual local self-government. We brought out page 1411 } here in answers to interrogatories yesterday that the United Mine Workers made operational advances in the form of loans which were all prepaid. This is the first time we have anything here to show the interrelationship and the binding up between these people where the money begins to go home to the parent organization. I was struck, speaking from memory. I think these poor local boys take 15 cents and what did they send up to the International Union? Whoever controls the purse strings runs the show.

Colonel Harris: If the Court please, in addition to all the objections which we asked to be interposed, it isn't a question in this case of how the money is divided. Counsel states to the Court the poor local boys. In my judgment that statement to the Court reveals that it is offered for the purpose of prejudice and any such statement to the jury we respectfully submit would be subject to objection as being injected into the case for the purpose of arousing prejudice. How can we possibly be trying the division of money between a local and a district and the international.

Mr. Robertson: Just to show the hook-up and who was in control, that is all, and how they exercised it. They exer-

eised it by taking the money and saying you have to send us 35 cents out of each dues. You send 35 cents to one of the higher units and then the big bunch goes to the page 1412 } top.

Mr. Mullen: I notice that in the question you read in the interrogatories you carefully omitted the question and answer which showed that UCW did not pay anything to the international union.

Mr. Robertson: I thought you could read that.

Mr. Mullen: I am not reading anything out of the interrogatories.

Mr. Robertson: I also understand that they are bankrupt, but they are not paying their way yet. They are getting help from the parent. In the form of operational loans which hereafter must be repaid in full.

Mr. Mullen: That is District 50, not UCW.

The Court: You contend that the payment of this money, the division of this money, has something to do with agency?

Mr. Robertson: Yes.

Mr. Moore: The same idea as family relationship, Judge. It is all laid out, I think, in Volume 15 of American Jurisprudence, which says family relationship, financial relations of the parties, all of that has a tendency to prove agency.

The Court: I will overrule the objection.

(The document referred to was marked Plaintiff's Exhibit 74 and received in evidence.)

page 1413 } Mr. Allen: We now offer in evidence the following paragraph from Volume 47, September 1, 1936, United Mine Workers Journal, the article on page 6 headed "Gas and Coke Workers Union Chartered by UMW of A." We read this paragraph:

"Gas and By-Product Coke Workers of America has been chartered by the United Mine Workers of America in a history-making convention held at Boston, Mass., August 16.

"The district is a provisional one and will be known as District No. 50 of the United Mine Workers of America."

Mr. Moore: I will show it to Mr. Mullen. He hasn't seen this one.

Colonel Harris: I don't think that is important enough to object to.

Mr. Mullen: We are not even going to give an objection to it. We don't think it is important.

(The document referred to was marked Plaintiff's Exhibit 75 and received in evidence.)

Mr. Allen: We now offer in evidence from United Mine Workers Journal, Volume 52, No. 16, article headed, "Plans for the Expansion of District 50 under way," reading as follows:

"The International Executive Board of the United Mine Workers of America has laid out a program for the further expansion and organization work of District 50, page 1414 } and changes effecting the district personnel have been made, in official effect on August 1.

"In a communication addressed to the officers and members of all local unions of District 50, and signed by President Lewis, Vice President Murray and Secretary-Treasurer Kennedy the status of the proposed program is outlined as follows:

"By authority of the International Executive Board of the United Mine Workers of America, and pursuant to its constitution, the administrative affairs of Provisional District 50 have been placed in charge of an organizing committee representing the International Union. This committee is composed of Mr. O. E. Gasaway, Mr. John Kimetz, Mr. John J. Mates, Mr. Martin Wagner and Miss Kathryn Lewis.

"Mr. O. E. Gasaway will act as president of District 50 and Miss Kathryn Lewis will act as secretary-treasurer. Mr. Martin Wagner will represent District 50 on the International Executive Board. For a temporary period, Mr. John J. Mates will be acting secretary-treasury of District 50, pending the return of Miss Kathryn Lewis, who is on leave of absence.

"This arrangement will be effective as of August 1, 1941. Additional facilities will be furnished District 50 by the International Union to expand its organizing work and increase its services to our membership. Local unions or page 1415 } individual members having business to transact with District 50 will communicate with President Gasaway or Acting Secretary Mates, or other executive officers as the case may be.

"The officers of the International Union, United Mine Workers of America, are gratified at the progress hitherto made by District 50, but are confident that under the new arrangement still greater progress can be made. Each of the new executive officers of District 50 are fully qualified, have had substantial experience and should inspire the full confidence and support of every member of our organization.

"The international officers will cooperate with District 50 in the carrying out of its work and policies, and we look forward to an increased membership, with more substantial gains."

"District 50 is largely made up of chemical, coke, paper pulp and kindred workers, many of whom convert coal into chemical constituents used in the commercial world, such as dyes, drugs, plastics and numerous other products in which raw coal is the basic product.

"At the present time the district has approximately 25,000 paid up members, representing 280 local unions from California to Massachusetts and from Michigan to Florida. These represent 354 shops and 278 contracts in force.

"The International Union recognizes the fact that the chemical industry is growing at a startling pace page 1416 } and represents an increasing number of workers, many of whom are not organized. It is estimated there are 500,000 workers included in the chemical, coke, paper pulp workers and kindred fields, 300,000 of whom represent some phase of the chemical industry."

We likewise offer the article on page 8 of the same Journal headed "District 50 Drive."

"Godspeed to the new organization drive of District 50. With the blessings, influence and resources of the International Union behind them the organizing committee have launched the drive with the enthusiasm and determination which cannot help but bring success. The committee consists of Ora Gasaway, president of District 50; Miss Kathryn Lewis, secretary-treasurer of the district; Martin Wagner, former district president and now a member of the International Executive Board; John J. Mates, acting secretary-treasurer and International Representative John Kmetz.

"These names stand for success in the organized labor movement. They are seasoned leaders and able executives and under their leadership the drive even now is gaining momentum in various parts of the country.

"There are several hundred thousand workers in that part of the chemical industry which uses coal in the processing of its products. The United Mine Workers of America which has brought the benefits of unionism to the count- page 1417 } less thousands in steel, oil, rubber, automobile and other great industries of the nation feels duty bound to help the workers in the chemical industry, especially since coal gives them a tie to the mine workers. There

is ample evidence that those kindred workers are only waiting to be contacted properly to join the greatest labor organization in the world, the United Mine Workers of America.

"The benefits to be derived from this great drive will be permanent, for indications are that coal will be used in increasing quantities during the coming years as a basic element in the making of chemical products. The chemical industry will grow larger and employ more people who will need the protection of a strong union like the United Mine Workers of America."

And we read from page 9 the official circular to the officers and members of local unions of Provisional District No. 50, United Mine Workers of America, dated August 4, 1941.

"Greetings:

"By authority of the International Executive Board of the United Mine Workers of America, and pursuant to its constitution, the administrative affairs of Provisional District 50 have been placed in charge of an organizing committee representing the international union. This committee is composed of Mr. O. E. Gasaway, Mr. John Kmetz, Mr. John J. Mates, Mr. Martin Wagner and Miss Kathryn Lewis.

"Mr. O. E. Gasaway will act as president of page 1418 } District and Miss Kathryn Lewis will act as secretary-treasurer. Mr. Martin Wagner will represent District No. 50 on the International Executive Board. For a temporary period, Mr. John J. Mates will be the acting secretary-treasurer of District 50, pending the return of Miss Kathryn Lewis, who is on leave of absence.

"This arrangement will be effective as of August 1, 1941. Additional facilities will be furnished District 50, by the International Union to expand its organizing work and increase its services to our membership. Local unions or individual members having business to transact with District No. 50 will communicate with President Gasaway or Acting Secretary Mates or other executive officers as the case may be.

"The officers of the International Union, United Mine Workers of America, are gratified at the progress hitherto made by District No. 50, but are confident that under this new arrangement still greater progress can be made. Each of the new executive officers of District No. 50 are fully qualified, have had substantial experience and should inspire the full confidence and support of every member of our organization.

"The International Officers will cooperate with District No.

50 in the carrying out of its work and policies, and we look forward to an increasing membership, with more  
page 1419 } substantial gains.

"John L. Lewis, President; Philip Murray, Vice-President; Thomas Kennedy, Secretary-Treasurer."

Mr. Mullen: May I see that? I didn't have a copy of that.

Mr. Robertson: If Your Honor please, I think it significant that in the answers to interrogatories yesterday it was brought out that the word "organization" means the international organization, and throughout that article there is reference to the organization. It is shot through with references to District 50 and the United Mine Workers of America being part of the organization, the one.

Mr. Mullen: We object to that, Your Honor, for the reasons previously stated.

The Court: The objection is overruled.

Mr. Mullen: Exception noted.

(The document referred to was marked Plaintiff's Exhibit 76 and received in evidence.)

Mr. Allen: We now offer in evidence from Volume 49, United Mine Workers Journal, dated February 15, 1948, the following from page 10, heading "Some Resolutions by District 50."

"The convention of District 50, Gas, By-Product Coke and Chemical Workers, United Mine Workers of America, which was in session January 24 to 26, in Washington, page 1420 } adopted a number of resolutions of importance to the workers.

"The convention took action looking to the establishment of a provisional district executive board to assist the district officers and organizers in the conduct of affairs of the district, which now has local unions in twenty-one states. The resolution was adopted and sets out that the members of the executive board shall serve without pay. The district officials proposed to consult with the international officers of the union as to the setting up of the board, which shall be chosen by the district officers. The purpose of the board, the resolution set out, was to cooperate and collaborate with district officers in furthering the growth of the district."

Mr. Mullen: We make the same objection.

The Court: The same ruling.

(The document referred to was marked Plaintiff's Exhibit 77 and received in evidence.)

Mr. Allen: We now offer the following in evidence, a paper designated United Mine Workers of America exhibit answering interrogatory 85. "United Mine Workers of America, Office of the International President."

"To Whom it May Concern:

"This is to certify that Kathryn Lewis is hereby duly authorized and legally commissioned to act as International Representative and Secretary Treasurer of Provisional District 50 of the United Mine Workers of America. This Commission is issued by virtue of the authority vested in the International President by the Constitution of the United Mine Workers of America and entitles the bearer to do and perform all lawful acts pertaining to his office and to exercise all the authority conferred by the laws of the organization.

"This Commission to remain in full force until April 1, 1951, unless sooner revoked by the President.

"Given under my hand and seal of the United Mine Workers of America this first day of April, 1950, John L. Lewis, President."

Colonel Harris: May we have the continuing objection we made yesterday to their reading or selecting any portion of an interrogatory.

The Court: The same objection continues.

Colonel Harris: We reserve an exception.

The Court: Exception is noted.

(The document referred to was marked Plaintiff's Exhibit 78 and received in evidence.)

The Court: Is that all, gentlemen?

Mr. Allen: We offer what is marked here. I won't read it, but will pass it over to His Honor. If you object and His Honor overrules us, we will just take our exception.

The Court: I don't know what is in it.  
page 1422 } Mr. Mullen: It is the answer in a suit out in Illinois.

The Court: Does the same principle apply here as it did a few moments ago when I sustained the objection?

Colonel Harris: We interpose all the objections we have interposed all morning.

The Court: The objection is sustained.

Mr. Allen: You understand we are offering only the parts that are marked.

The Court: That is relative to some law, is it?

Mr. Mullen: It is an answer in a lawsuit in Illinois.

(The document referred to was marked for identification Plaintiff's Exhibit No. 79 and EXCLUDED.)

Mr. Allen: This involves the same principle. They will object to it, and Your Honor can rule.

Mr. Mullen: We object, Your Honor. This is in regard to that suit. It has nothing to do with this.

The Court: I sustain the objection.

(The document referred to was marked for identification Plaintiff's Exhibit No. 80 and EXCLUDED.)

The Court: I guess we had better recess for page 1423 } lunch and be back at 2:15 and we will start with the jury at 2:15.

(Whereupon, at 1:10 o'clock p. m. the Court recessed until 2:15 o'clock p. m. the same day.)

page 1424 } AFTERNOON SESSION.

2:15 p. m.

(The following proceedings were had in open court:)

Mr. Robertson: If Your Honor please, they thought they would pass these exhibits to me and I would read them. I seem to have better staying qualities.

Mr. Allen: Mr. Robertson, I hand you United Mine Workers Journal, Volume XXXII, No. 20, dated October 15, 1921, and ask you to read from page 7 under the heading, "Charter of District 14 Is Suspended by President Lewis."

Mr. Mullen: If Your Honor please, this is objected to for the reasons already recorded this morning.

The Court: Very well. The Court ruled this morning on that. The same ruling is made.

Colonel Harris: Exception noted.

Mr. Robertson: "Charter of District 14 Is Suspended by President Lewis.

"Because of the complications that arose as a result of the

refusal of Alexander Howat and others in District 14 to obey the laws of the union and their defiance of the international convention and all constituted authority in the union, President John L. Lewis has suspended the charter of District 14 and deposed Howat from office as president, as well as all other officials of the Kansas district. Announcement of this action was made in the newspapers of October 13. President

Lewis appointed George L. Peck, International  
 page 1425 } Board member from District 14, as president of  
 a provisional district in Kansas, and Thomas  
 Harvey was appointed secretary-treasurer. They took possession of the offices and affairs of the Kansas miners at once. Peck, acting under direction of President Lewis, announced that all mine workers in that state would be expected to return to work at once. The work of reorganizing the district will proceed in regular order."

May I state to the Jury, Your Honor, the purpose of reading these exhibits?

Colonel Harris: No, we object to that, if the Court pleases. This is not the time to argue his case.

Mr. Robertson: I think they can get it without any assistance from me, then.

Mr. Allen: Now, Mr. Robertson, I hand you United Mine Workers Journal, Volume XXXIII, No. 21, dated November 1, 1922, and ask you to read the parts indicated on page 11 and page 13.

Mr. Robertson: It is entitled, "Executive Board Restores Autonomy of District 14 and Orders an Election."

Mr. Mullen: The same objection.

The Court: The same ruling.

Colonel Harris: Exception.

Mr. Robertson: "The international executive board, at its meeting at headquarters voted to restore the autonomy of

District 14 and ordered a district convention  
 page 1426 } held. The convention call was sent out by the  
 provisional officers of the district to meet on  
 October 25 at Pittsburg, Kan."

. . . . .

"Just who will be candidates for district officers remains to be seen. Neither George L. Peck, provisional president nor Thomas Harvey, provisional secretary will be candidates, they have announced. President Peck will continue to act as provisional president until January 1, when the new officers to be elected on December 12, take their seats."

Mr. Moore: That is the paragraph which you ruled this morning should be excluded.

The Court: Yes.

Just disregard what was said about the election of officers. The Court ruled that out.

Mr. Robertson: On page 13:

"Autonomy of District No. 19 Suspended by Executive Board."

"The international executive board in session at Indianapolis on October 20, adopted a report of the committee on organization, suspending the autonomy of District 19.

"President Lewis was directed to suspend the autonomy in conformity with the board's action and sent the following communication to the officers and members of the district:

page 1427 }

"Indianapolis, Indiana,  
October 23, 1922.

"To The Officers and Members of  
District 19, United Mine Workers of America.

"Greeting:

"You are hereby officially advised that the International Executive Board in session in Indianapolis, Indiana, on October 20th, adopted the report of the Committee on Organization with respect to District 19, reading as follows:

" 'The affairs of District 19 are in a chaotic condition due to serious internal differences and also to the evils resulting from the economic depression. It is more than apparent from the evidence adduced and in possession of your Committee that a more definite policy should be followed in that district and that its administrative affairs should be placed on a more stable basis. Your committee, therefore, recommends that effective November 1, 1922, the autonomy of District 19 be suspended and the district placed under the authority of provisional officers responsible to the International Union. The International President is directed to apply this policy.'

"In consideration of the foregoing action, the autonomy of District 19 is suspended and all offices within the district declared vacant effective November 1, 1922. The International Union, exercising its constitutional au-  
page 1428 } thority, will create a provisional district to take  
complete charge of the affairs, property and

funds of District 19, effective from the date of the suspension of autonomy. \* \* \*

Then:

"Yours Fraternally,

JOHN L. LEWIS,

President."

Mr. Allen: Now, Mr. Robertson, I hand you Volume XXXIV of United Mine Workers Journal, No. 15, dated August 1, 1923, and refer you to pages 3 and 4, and ask you to read the parts indicated on those pages.

Mr. Mullen: If Your Honor please, the same objection for the reasons previously stated and recorded.

The Court: The same ruling.

Colonel Harris: Note an exception.

Mr. Robertson: The article is entitled, "President Lewis Revokes Charter of District 26 and Orders Striking Miners Back to Work."

"President John L. Lewis, in a telegram to Daniel Livingstone, president of District 26, Nova Scotia, revoked the charter of the district and denounced Livingstone for his defiance and violation of the constitution and authority of the international union.

\* \* \* \* \*

"Under the order issued by Mr. Lewis the autonomy of the district was suspended and the authority taken page 1429 } over by a provisional government.

\* \* \* \* \*

"President Livingstone defies order of international union, whereupon he is summarily removed from office with other district officials. Reports show big percentage of men returned to work after autonomy of district was suspended."

This is signed by Lewis:

"By virtue of the authority vested in me by the constitution of the United Mine Workers of America, of which I am President, and in consideration of the further authority

granted in the premises by the International Executive Board, I, herewith, advise that the charter of District 26, United Mine Workers of America, stands revoked, effective this date. Under this action District 26 ceases to be an entity and you are automatically deprived of your office as President thereof. Alexander McIntyre, Vice-President, and J. B. McLachlan, as Secretary-Treasurer, likewise have their offices vacated through this same precise action. All members of the Executive Board of District 26, including any and all other officers of said District are in like manner automatically removed from office and can no longer undertake to represent in any capacity the United Mine Workers of America. This applies with equal force to Alexander Stewart, Member of the International Executive Board. Under separate order I am today creating a Provisional District to function within the jurisdiction of former District 26, under the direct authority and control of the International Union. International Representative Silby Barrett, of Glace Bay, Nova Scotia, has been designated as Provisional President thereof with sweeping authority to function in every proper capacity."

Signed, "John L. Lewis, President, United Mine Workers of America."

Mr. Allen: I now hand you United Mine Workers Journal, Volume XXXV, No. 24, dated December 15, 1924, and call your attention to the part indicated on page 4.

Mr. Mullen: That is objected to for the reasons heretofore stated and recorded.

The Court: Same ruling.

Mr. Mullen: And an exception.

Mr. Robertson: "Charters of 10 Insubordinate Local Unions Revoked by President Lewis in District 1."

"Charters of ten local unions of the United Mine Workers of America in the Pittston district, District 1, were revoked by President Lewis, following the refusal of the men to return to work pending the settlement of grievances held against the Pennsylvania and Hillsdale Coal & Iron Company."

Mr. Allen: I now hand you United Mine Workers Journal, Volume XI, No. 12, dated June 15, 1929, and direct your attention to page 8.

page 1431 } Mr. Mullen: We make the same objection;

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Robertson: The article is entitled, "President Lewis Revokes Charter of Sub-District No. 9 of District No. 12 for Insubordination of Officials."

"Indianapolis, Ind., June 8, 1929.

"Mr. D. B. Cobb, president; Mr. Heza Hindman, vice president; Mr. Ed. Loden, secretary-treasurer; Mr. Ed Rich, Mr. Glenn Malone, Mr. Luther Elliott, Mr. W. F. James, Mr. Luke Corley, members executive board; Sub-District 9, District 12, United Mine Workers of America, West Frankfort, Illinois.

"Dear Sirs and Brothers:

"The officers of Sub-District 9, District 12, United Mine Workers of America, are insubordinate to the laws of the United Mine Workers of America and the rulings of the international executive board. Pursuant, therefore, to the authority vested in me by the constitution of the United Mine Workers of America, I hereby revoke the charter of Sub-District 9, District 12, United Mine Workers of America, effective this date. This action dissolves the Sub-District, as such, and vacates all offices appertaining thereto, either elective, appointive, secret or otherwise.

"A provisional sub-district has been created page 1432 } and this office is designating Mr. John T. Jones, of West Frankfort, Illinois; Mr. John Belcher, of Zeigler, Illinois, and Mr. John Brown of West Frankfort, Illinois, as the provisional officers of Provisional Sub-District 9 District 12."

. . . . .

"John L. Lewis, President."

Mr. Allen: I now hand you United Mine Workers Journal, Volume XL, No. 20, dated October 15, 1929, and direct your attention to page 3.

Mr. Mullen: The same objection Your Honor, and for the same reasons.

The Court: The same ruling.

Mr. Mullen: An exception is noted.

Mr. Robertson: The article is entitled: "Charter of District 12 Revoked and Provisional District Organization Takes Charge of Affairs."

"Mr. Harry Fishwick, President, and  
All Members of the Executive Board,  
District 12, United Mine Workers of America,  
Springfield, Illinois.

"Gentlemen:

"The Executive Board of District 12 is insubordinate to the laws of the United Mine Workers of America and the rulings of the International Executive Board.

• • • • •

"The undersigned, acting by grant of authority vested in this office by the Constitution of the United Mine Workers of America, hereby revokes the charter of District 12, United Mine Workers of America, effective upon the date above given.

"This action vacates all of the elective offices of District 12, all of the appointive offices of said District, and all agents and appointees of said District, secret or otherwise.

"This order revoking the charter of District 12 does not, in any manner, affect the charters or the status of the officers of the various Sub-District organizations now functioning within District 12, nor in any way affect the charters of the Local Unions of Mine Workers in District 12. Said Sub-Districts and Local Unions will continue to function in their usual manner and retain, as usual, in their own possession, all monies, real estate and other valuable property heretofore accumulated and in their possession.

"Concurrently with the revocation of the District charter, the International Union is setting up a Provisional District organization and appointing officers of said Provisional District to take over the business of District 12, assume the obligations of the joint wage agreement and its protection, and carry on, in every particular, the beneficent activities of a District Union.

• • • • •

"Yours truly,

JOHN L. LEWIS

President."

page 1434 } Mr. Allen: I now hand you Volume XLI, No. 7, dated April 1, 1930, United Mine Workers Journal, and direct your attention to pages 4 and 18.

Mr. Mullen: The same objection, Your Honor, for the same reasons heretofore recorded.

The Court: Same ruling.

Mr. Mullen: And an exception is noted.

Mr. Robertson: The article is entitled: "President Lewis Revokes Charter of District No. 14."

"Acting under instructions from the international convention, International President John L. Lewis revoked the charter of District No. 14, on March 26. He then set up a provisional district government to function in District No. 14 and administer the affairs of the union until the charter is restored.

"President Lewis appointed Henry Allai, of Arma, as provisional district president, and Joseph E. Hromek, of Arma, as provisional secretary-treasurer. He announced that a provisional vice president and two provisional board members at large would be appointed later."

"Amendments to the International Constitution Afford Better Method for Handling Union's Affairs."

"The international convention made numerous changes in the international constitution. All of these changes were for the purpose of affording a better and more effective method for conducting the affairs of the union and handling emergency situations that may arise in the future. The following are the sections affected as they now stand since being amended."

Then the provisions of the constitution are listed.

Mr. Allen: I now hand you Volume 44, No. 1, dated January 1, 1933, United Mine Workers Journal, and direct your attention to page 8.

Mr. Mullen: The same objection, Your Honor, for the same reasons.

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Robertson: This is entitled, "Why Charter of Local Union 303, Orient Mine, Was Revoked by the International Union."

"The charter of Local Union No. 303, Orient mine, West Frankfort, Ill., has been revoked by President Lewis and a provisional government set up in the local."

Mr. Allen: I now hand you United Mine Workers Journal, Volume 44, No. 6, dated March 15, 1933, and direct your attention to page 13.

Mr. Mullen: The same objection, Your Honor.

The Court: The same ruling.

Mr. Mullen: Note an exception.

Mr. Robertson: The article is entitled, "International Board Names New Officers to Carry On the Business of District No. 12."

"District No. 12, United Mine Workers of America, is now functioning under the direction of the international union.

"Following the action of the district executive board, which petitioned the international to take over the affairs of the district, President Lewis and the international executive board designated representatives to assume charge of the district and direct the workings of the organization, the old officials being automatically replaced by the appointees of the international union under the laws of the organization.

"William J. Sneed, Herrin, a former state senator, and long active in the affairs of the union, was designated as provisional president, succeeding John H. Walker."

(Discussion off the record.)

page 1437 } Mr. Allen: I now hand you United Mine Workers Journal Volume 45, No. 1, dated January 1, 1934, and direct your attention to page 13—that already has been introduced and excluded.

Mr. Mullen: Which we objected to and I believe Your Honor sustained the objection.

The Court: Yes.

Mr. Robertson: "Virginia Now a Provisional District of the United Mine Workers for the First Time."

Mr. Mullen: Objection.

The Court: The same ruling.

Colonel Allen: Exception.

Mr. Robertson: "Great things have been happening in the coal industry in recent months, and one of these is found in the creation of a provisional district of the United Mine Workers of America in the State of Virginia. For the first time in the history of the coal industry the miners of Virginia are organized under the banner of the United Mine Workers of America. This achievement and the creation for the first time of a district in Virginia have come about as a result of the great organization campaign conducted by the union since the enactment of the National Industrial Recovery Law, which guarantees to employees the right to organize and belong to a union.

## Supreme Court of Appeals of Virginia.

“Following the recent meeting of the inter-  
page 1438 } national executive board, the following official  
circular was sent to all local unions and mem-  
bers in Virginia:

“December 16, 1933

“To All Local Unions, United Mine Workers of America,  
Located in the State of Virginia.

“Greeting:

“The International executive Board has created Pro-  
visional District 28, effective December 20, 1933. This dis-  
trict will embrace all local unions of the United Mine Work-  
ers of America located in the state of Virginia.

“Mr. Dale Stapleton has been designated as president and  
Mr. William Minton as secretary-treasurer of Provisional  
District 28. The officers thus designated will establish a dis-  
trict office, assume charge of matters of internal concern and  
in the obligations of the joint wage agreement on the date  
above set forth. Local unions in Provisional District 28 and  
the members thereof will cooperate with these officers in  
carrying out these duties.

“Effective December 20, 1933, and thereafter, all tax due  
from your local union on members who work five or more  
days per month, irrespective of the month for which it is due,  
should be paid by your local union as follows:

“Fifty cents per month per member to the international  
secretary-treasurer; thirty-five cents per month per member  
to the secretary-treasurer of Provisional Dis-  
page 1439 } trict 28; fifteen cents per month per member to  
be retained in the local union treasury.

“Application for exoneration from the payment of tax  
should be made to both the international and district offices  
on all members who do not work five or more days per  
month.

“Tax paid by your local union between now and December  
20 will be credited to your local union under the district with  
which you are now affiliated.

“Yours truly, John L. Lewis, President, Thomas Kennedy,  
Secretary-Treasurer.”

Mr. Allen: I now hand you United Mine Workers Journal  
Volume 47, dated September 1, 1936, No. 17, and direct your  
attention to page 6.

Mr. Mullen: The same objection, Your Honor, for the same  
reason as previously stated.

The Court: Same ruling.

Mr. Mullen: Exception.

Mr. Robertson: "Gas and Coke Workers Union Chartered by U. M. W. of A."

Mr. Mullen: I withdraw it. We did not object to that this morning.

Mr. Robertson: I am not going to read it all, though.

The Court: Let the record show the objection is withdrawn.

Mr. Robertson: I am not going to read it all.

Mr. Mullen: I have nothing to say.

Mr. Robertson: "Gas and Coke Workers Union Chartered by U. M. W. of A. Gas and By-Product Coke Workers of America has been chartered by the United Mine Workers of America in a history-making convention held at Boston, Mass., August 16."

"The District is a provisional one and will be known as District No. 50 of the United Mine Workers of America."

Mr. Allen: Exhibit 76 is the next one.

Mr. Mullen: Your Honor, we object to the one he is now offering.

The Court: Was this offered this morning?

Mr. Robertson: Yes. This is the photostat. It has those pictures on it.

The Court: Would you like to compare them?

Mr. Mullen: No.

The Court: The same ruling.

Mr. Mullen: And exception.

Mr. Robertson: "Plans for the Expansion of District 50 under way."

"The International Executive Board of the United Mine Workers of America has laid out a program for the further expansion and organization work of District 50, page 1441 } and changes effecting the district personnel have been made, in official effect on August 1."

"In a communication addressed to the officers of all local unions of District 50, and signed by President Lewis, Vice President Murray and Secretary-Treasurer Kennedy the status of the proposed program is outlined as follows:

"By authority of the International Executive Board of the United Mine Workers of America, and pursuant to its constitution, the administrative affairs of Provisional District 50 have been placed in charge of an organizing committee

representing the International Union. This committee is composed of Mr. O. E. Gasaway, Mr. John Kmetz, Mr. John J. Mates, Mr. Martin Wagner and Miss Kathryn Lewis.

"Mr. O. E. Gasaway will act as president of District 50 and Miss Kathryn Lewis will act as Secretary-Treasurer. Mr. Martin Wagner will represent District 50 on the International Executive Board. For a temporary period, Mr. John H. Mates will be the acting secretary-treasurer of District 50, pending the return of Miss Kathryn Lewis, who is on leave of absence.

"This arrangement will be effective as of August 1, 1941. Additional facilities will be furnished District 50 by the International Union to expand its organizing work and increase its services to our membership. Local unions or individual members having business to transact with District 50 will communicate with President Gasaway or Acting Secretary Mates, or other executive officers as the case may be.

"The officers of the International Union, United Mine Workers of America, are gratified at the progress hitherto made by District 50, but are confident that under this new arrangement still greater progress can be made. Each of the new executive officers of District 50 are fully qualified, have had substantial experience and should inspire the full confidence and support of every member of our organization.

"The international officers will cooperate with District 50 in the carrying out of its work and policies, and we look forward to an increasing membership, with more substantial gains."

"District 50 is largely made up of chemical, coke, paper pulp and kindred workers, many of whom convert coal into chemical constituents used in the commercial world, such as dyes, drugs, plastics and numerous other products in which raw coal is the basic product.

"At the present time the district has approximately 25,000 paid up members, representing 280 local unions from California to Massachusetts and from Michigan to Florida. These represent 354 shops and 278 contracts in force.

"The International Union recognizes the fact that the chemical industry is growing at a startling pace and represents an increasing number of workers, many of whom are not organized. It is estimated there are 500,000 workers included in the chemical, coke, paper pulp workers and kindred fields, 300,000 of whom represent some phase of the chemical industry."

I read now from page 8, same number, which was ruled on by the Court this morning:

“District 50 Drive.

“Godspeed to the new organization drive of District 50. With the blessings, influence and resources of the International Union behind them the organizing committee have launched the drive with that enthusiasm and determination which cannot help but bring success. The committee consists of Ora Gasaway, president of District 50; Miss Kathryn Lewis, secretary-treasurer of the district; Martin Wagner, former district president and now a member of the International Executive Board; John J. Mates, acting secretary-treasurer and International Representative John Kmetz.

“These names stand for success in the organized labor movement. They are seasoned leaders and able executives and under their leadership the drive even now is gaining momentum in various parts of the country.

“There are several hundred thousand workers in that part of the chemical industry which uses coal in the processing of its products. The United Mine Workers of page 1444 } America which has brought the benefits of unionism to the countless thousands in steel, oil, rubber, automobile and other great industries of the nation feels duty bound to help the workers in the chemical industry, especially since coal gives them a tie to the mine workers. There is ample evidence that these kindred workers are only waiting to be contacted properly to join the greatest labor organization in the world, the United Mine Workers of America.

“The benefits to be derived from this great drive will be permanent, for indications are that coal will be used in increasing quantities during the coming years as a basic element in the making of chemical products. The chemical industry will grow larger and employ more people who will need the protection of a strong union like the United Mine Workers of America.”

Then on page 9:

“August 4, 1941.

“To the Officers and Members of all Local Unions of Provisional District No. 50, United Mine Workers of America:

“Greetings:

“By authority of the International Executive Board of the United Mine Workers of America, and pursuant to its con-

stitution, the administrative affairs of Provisional District No. 50 have been placed in charge of an organizing committee representing the international union. This committee is composed of Mr. O. E. Gasaway, Mr. John Kmetz, Mr. John J. Mates, Mr. Martin Wagner and Miss Kathryn Lewis.

"Mr. O. E. Gasaway will act as president of District No. 50 and Miss Kathryn Lewis will act as secretary-treasurer. Mr. Martin Wagner will represent District No. 50 on the International Executive Board. For a temporary period, Mr. John J. Mates will be the acting secretary-treasurer of District 50, pending the return of Miss Kathryn Lewis, who is on leave of absence.

"This arrangement will be effective as of August 1, 1941. Additional facilities will be furnished District No. 50 by the International Union to expand its organizing work and increase its services to our membership. Local Unions or individual members having business to transact with District No. 50 will communicate with President Gasaway or Acting Secretary Mates, or other executive officers as the case may be.

"The officers of the International Union, United Mine Workers of America, are gratified at the progress hitherto made by District No. 50, but are confident that under this new arrangement still greater progress can be made. Each of the new executive officers of District No. 50 are fully qualified, have had substantial experience and should inspire the full confidence and support of every member of our organization.

"The International Officers will cooperate with District No. 50 in the carrying out of its work and policies, and we look forward to an increasing membership, with more substantial gains.

"John L. Lewis, President; Philip Murray, Vice-President; Thomas Kennedy, Secretary-Treasurer."

Colonel Harris: Your Honor, I was under the impression that only those parts that he read were to go to the jury under the rulings while the jury was out.

The Court: That is true.

Mr. Robertson: That is true.

Colonel Harris: Didn't he turn over an entire journal to the jury?

The Court: That was a photostatic copy which was read this morning, and I inquired of counsel, and he said that is the same which the Court approved this morning.

Mr. Allen: It had only those pages.

The Court: Is this part of the same one you have just read?

Mr. Robertson: No, this is a new one.

Mr. Allen: This is another one.

Mr. Robertson: I am reading from—

The Court: Has it been offered?

Mr. Allen: Yes, that was passed on this morning.

The Court: It is satisfactory to the Court.  
page 1447 } You have been offering them.

Mr. Allen: We now offer in evidence United Mine Workers Journal, Volume 59, Dated February 15, 1933, No. 49, and direct your attention to page 10.

Mr. Mullen: We object, Your Honor, for the reasons heretofore stated and recorded.

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Robertson: It is entitled "Some Resolutions by District 50."

"The convention of District 50, Gas, By-Product Coke and Chemical Workers, United Mine Workers of America, which was in session January 24 to 26, in Washington, adopted a number of resolutions of importance to the workers.

"The convention took action looking to the establishment of a provisional district executive board to assist the district officers and organizers in the conduct of affairs of the district, which now has local unions in twenty-one states. The resolution was adopted and sets out that the members of the executive board shall serve without pay. The district officials proposed to consult with the international officers of the union as to the setting up of the board, which shall be chosen by the district officers. The purpose of the board, the resolution set out, was to cooperate and collaborate with district officers in furthering the growth of the district."  
page 1448 }

Mr. Allen: If Your Honor please, we have now read what Your Honor passed on before lunch, and I take it that while we have only a few others to offer, Your Honor would want to pass on them before we have any discussion of them here.

The Court: Gentlemen, you may recess for a few minutes.

(Brief recess.)

page 1449 } (The following proceedings were had in chambers.)

Mr. Robertson: United Mine Workers Journal, Volume 47, No. 4, February 15, 1936, page 3, as follows:

"Bird's Eye View of the Doings of The International Convention."

"More than 1,700 delegates representing all the Districts of the United Mine Workers of America in the United States and Canada attended the Thirty-fourth International Convention in Washington, which opened on Tuesday, January 28, and closed on Friday, February 7. The Convention is regarded as having been one of the most important in the history of the Union, because of the far reaching decisions made on subjects affecting not only the coal miners but the entire American Nation. Foremost among these decisions by the Convention were:

"1. Reaffirmation of the policy of industrial organization of the unorganized workers of the country.

"2. Endorsement of President Roosevelt and his Administration and pledge of support for his re-election.

"3. Refusal to restore autonomy to provisional Districts at the present time or until such time as the International Union shall deem it advisable to do so.

"4. Adoption of Scale Committee Report."

We offer that, Your Honor, as showing the control of the International Union over the districts and provisional districts. It is along the same line that we went over before lunch.

The Court: Do you want to add anything?

Mr. Mullen: We object, Your Honor, for all the reasons heretofore stated.

The Court: The objection is overruled.

Mr. Mullen: And an exception is noted.

(The document referred to was marked Plaintiff's Exhibit \$1 and received in evidence.)

Mr. Robertson: United Mine Workers Journal, Volume 52, No. 14, July 15, 1941, page 13, as follows from a speech of John L. Lewis:

"I am looking forward to the expansion of our organization in its numerical strength. Years and years ago in our conventions we were careful to maintain our claim of jurisdiction in those collateral industries that have to do with the by-product processes of the coal industry, and we have today

a recognized jurisdiction in the coke and the by-product and the chemical field that contains the potentialities of a great collateral organization of workers in this country, part of the United Mine Workers of America, under our District 50.

"I want this organization of ours to push and press to the point where we can expand our form of organization in these related industries, and continue to be the type of page 1451 } a union that will always be able to play the part we have been playing, the part of leadership. And in the days and months to come, after the work of the months of our negotiations are completed, I want every officer and every member of our organization to join with the rest of us in putting our shoulder to the wheel and organizing this by-product and chemical industry when we have the chance."

That is along the same line.

Mr. Mullen: May I see that, please?

We object.

The Court: The same objection; the same ruling.

Mr. Mullen: An exception, please.

(The document referred to was marked Plaintiff's Exhibit 82 and received in evidence.)

Mr. Robertson: United Construction Workers News, Volume 3, June 15, 1942, page 5, an article entitled "Agreement United District 50, UMW, And United Construction Workers."

"Copy of agreement between District 50, United Mine Workers of America, and the Executive Officers of the United Construction Workers which was approved by the Executive Board of the International Union of the United Mine Workers of America on June 5, 1942.)"

"Pursuant to a resolution adopted by the National Policy Board of the United Construction Workers dated page 1452 } May 29, 1942, and pursuant to a resolution adopted on June 4, 1942, by the Organizing Committee of District 50, United Mine Workers of America, this agreement is this day made and entered into by and between the Executive Officers of the United Construction Workers and the Executive Officers of District 50, United Mine Workers of America, as follows to-wit:

"The resolution of the National Policy Board of the United Construction Workers (copy of which is hereto attached and

made a part hereof) having requested affiliation of the United Construction Workers with the United Mine Workers of America, the International President thereof having referred such request to the Executive Officers of District 50, UMWA, such affiliation is hereby granted and District 50, UMWA, accepts into its membership the United Construction Workers and all of its members, agreeing to fully and actively aid, support and promote the interests of the United Construction Workers, all of its locals and all of its members in their individual and collective efforts to organize the unorganized: **PROVIDED AND EXCEPT**, however, that District 50, UMWA, hereby assumes no present existing liabilities, debts or obligations of the United Construction Workers of any character whatsoever, and this agreement is not to be construed by either party hereto as any recognition or assumption, directly or indirectly, by District 50, UMWA, of any such liability, debt or obligation.

page 1453 } "The United Construction Workers accepts membership in said District 50, UMWA, upon the terms last hereinabove set out and agrees to abide by the laws, constitution and policies of the United Mine Workers of America in the performance of its duties.

"District 50, United Mine Workers of America agrees that proper certificate of affiliation will be issued the United Construction Workers as a division of said District 50, subject to the approval of the International Executive Board of the United Mine Workers of America.

"District 50 of the United Mine Workers of America further agrees that it will accept as officers and personnel of the division the present officers and personnel of the United Construction Workers, and that it will confirm in writing their appointment as officers and personnel of the division. Such appointment is, of course, subject to the constitution and policies of the United Mine Workers and the approval of the International Executive Board of the United Mine Workers of America, where necessary, and such employment is also subject to the powers vested in the Organizing Committee and Executive Officers of District 50.

"Such officers and personnel will include the Director of the Division, the Comptroller of the organization, the members of the National Policy Board, Regional Directors and Field Representatives or Staff Members, and  
page 1454 }

clerical or office employees.  
"District 50 further agrees that its Executive Officers will authorize the Director of the division to employ or remove such personnel as may be necessary in the exercise of his duties as Director, and in the accomplishment of the

administrative affairs of the division, subject only to the powers vested in the Organizing Committee and Executive Officers of District 50, or the Executive Officers of the International Union or the International Executive Board.

"The Director of the United Construction Workers division of District 50 shall report periodically to the Executive Officers and organizing staff of District 50 the financial and administrative affairs of the division.

"The United Construction Workers shall retain its name in functioning as a division of District 50, United Mine Workers of America.

"A. D. LEWIS,  
United Construction Workers.

"GARDNER H. WALES,  
United Construction Workers.

"O. E. GASAWAY, Pres.,  
District 50, UMWA.

"KATHRYN LEWIS, Sec.-Treas.,  
District 50, UMWA."

page 1455 } It is the same thing.  
Mr. Mullen: The same objection.  
The Court: The same ruling.

Colonel Harris: Note an exception.

(The document referred to was marked Plaintiff's Exhibit No. 83 and received in evidence.)

Mr. Robertson: United Mine Workers Journal, Volume 57, No. 20, October 15, 1946, page 19, article entitled, "District 50 Reports All-Time High In Membership And Local Unions."

"Observing its tenth anniversary, District 50, U. M. W. A., with 700 delegates in attendance, met in Atlantic City, N. J., for its fifth biennial convention and mapped out a constructive program of organizing the unorganized.

"Established in 1936 for the purpose of organizing under the banner of the United Mine Workers the employees in the coal by-products, chemical utility and similar industries, District 50 reported its growth from 13 to 1,186 local unions in the decade, making it now the largest single district of the United Mine Workers of America. These locals are situated in 644 cities, 44 states and the Dominion of Canada.

"With President John T. Kmetz, who is also an International Executive Board member from District 1, presiding,

the convention heard reports of progress in organizing, negotiating contracts, legal and research activities, and other major functions over the two-year period since page 1456 } its last session, and voted unanimous approval of the record.

"Commendation was voted of the services of the officers who, in addition to Kmetz, included Secretary-Treasurer Kathryn Lewis, Comptroller J. Raymond Bell, Director of Organization Michael F. Widman, Jr., and International Board Member Charles E. Fell, whose untimely death was mourned. The work of the international staff members in Washington as well as in the field was also praised.

"Comparing conditions that confront labor in this postwar period with those prevailing after World War I, Secretary-Treasurer Thomas Kennedy, U. M. W. A., said the outlook now is brighter because of the foresight of John L. Lewis in initiating the great drive which brought 15,000,000 workers into the house of organized labor, as against only four or five million a quarter century ago. He told of the great contribution of the coal miners to this tremendous task of organizing which still continues under the banner of District 50.

"In telling of the earlier organizing period, Kennedy described Lewis as a 'prophet crying out in the wilderness' and said he had so mobilized and energized American labor that it was going to continue to organize in the District 50 manner until the job was done. Suggestion that Lewis be named to replace Secretary of State Byrnes, brought cheers and applause from Kennedy's audience when he ob- page 1457 } served, in passing, that labor's outstanding champion be sent over to talk turkey to Molotov.

"Kennedy especially warned labor against inimical legislation which is scheduled to be presented in the next session of Congress and he commented that labor cannot depend on false friends, but must be alert itself at all times. When labor is only partially organized, Kennedy observed, all the liberals are for it, but when it is strong, then the liberals want laws to control it. 'They feel, then,' he added, 'that we ought to have a guardian, that we will not be able to manage our own affairs, and they are afraid of the influence of labor.' "

If Your Honor please, I think that paragraph ought to come out.

The Court: I think so, too. The last paragraph you read ought to come out.

Mr. Robertson: I am marking that out.

Now the next paragraph:

"Theme of the convention was 'Organize the Unorganized' and this was referred to by virtually all the speakers headed by Acting President John O'Leary of the United Mine Workers, and including International Board Members John Mates and John Ghizzoni, members also of the District 50 Organizing Committee; President William Mitch of District 20, who acted as chairman of the Officers' Report Committee; page 1458 } mittee; and many others."

I offer that for the same reason, Your Honor, with that paragraph deleted.

Mr. Mullen: May I see it just a minute

We object, Your Honor, for the reasons previously stated.

The Court: The same ruling.

Mr. Mullen: All of which are hereby repeated.

Exception is noted.

The Court: Mark that so it will be sure not to be read.

(The document referred to was marked Plaintiff's Exhibit No. 84 and received in evidence.)

Mr. Robertson: United Mine Workers of America, District 50 News, Volume 6, No. 8, January 15, 1947. I don't know what page it is. The article is entitled, "New Organizing Committee Named For District 50."

"The International Executive Board of the United Mine Workers of America, at its recent meeting in Washington, appointed a committee charged with the task of intensifying the organizational campaign of District 50.

"Members of the committee are: A. D. Lewis, chairman; John Ghizzoni, District 2, who will represent the international executive board; John P. Busarello, president of District 5; Martin F. Brennan, president of District 7; page 1459 } Hugh White, president of District 12, and George J. Titler, president of District 29."

That goes for the same purpose.

Mr. Mullen: The same objection.

The Court: The same ruling.

Colonel Harris: Note an exception.

(The document referred to was marked Plaintiff's Exhibit No. 85 and received in evidence.)

Mr. Robertson: United Mine Workers Journal, Volume 58, No. 21, November 1, 1947, page 6, article entitled, "UMWA

Defeats Attempt of Metal and Building Trades to Hamstring Dist. 50."

"In a high tribute to District 50 which, Kennedy pointed out, has often been referred to in a derogatory sense as being a 'catch-all' organization, he said: 'District 50 is no different from many other international unions that have gone forth to organize the unorganized in order to build up this labor movement; and District 50 is a responsible, legitimate district union of the United Mine Workers of America under its jurisdiction and under its control'.

\* \* \* \* \*

"Lewis told the convention that District 50 is a going concern with hundreds of thousands of members who were organized from the ranks of the unorganized. It has given protection to workers that various AFL international unions have neglected, he informed the convention.

"'Don't push us around,' Lewis intoned. 'We can't be pushed. This procedure here, as pointed out in the minority report, is irregular. It has not been before the Council. If you want to handle it in the usual way, all right. We will always talk to you about it \* \* \*'

I think that last paragraph ought to come out, about "Don't push us around."

Mr. Mullen: I think the whole thing ought to come out, because it is just the A. F. of L. convention proceedings.

Mr. Robertson: There is just one paragraph in there that is any good.

The Court: What is the paragraph you are offering

Mr. Robertson: I am offering this one paragraph:

"In a high tribute to District 50 which, Kennedy pointed out, has often been referred to in a derogatory sense as being a 'catch-all' organization, he said: 'District 50 is no different from many other international unions that have gone forth to organize the unorganized in order to build up this labor movement; and District 50 is a responsible, legitimate district union of the United Mine Workers of America under its jurisdiction and under its control.'"

The Court: Any objection

Mr. Mullen: Yes.

The Court: I will overrule the objection.

page 1461 } Mr. Mullen: Exception.

(The document referred to was marked Plaintiff's Exhibit No. 86 and received in evidence.)

page 1462 } Mr. Robertson: United Mine Workers Journal, Volume 59, No. 21, November 1, 1948, page 4, article entitled, "Convention Commends Dist. 50 Progress, All Districts Urged to Aid Organizing."

"Continued energetic support of the organizing efforts of District 50, UMW, was urged in a resolution unanimously adopted by the convention which commended the officers of that district for the degree of success achieved."

This is the one that I think is grand:

"Work of District 50, it was pointed out by Thomas Kennedy, international vice president, has been greatly increased and complicated by enactment of the NAM-Taft-Hartley Act and it is, therefore, more necessary than ever that all UMW districts lend full assistance to its organizing activities."

I will leave that paragraph out. Now:

" 'We believe,' Kennedy observed, 'that if you give this cooperation and support out in the field this great district will continue to make progress, not only as affects the membership of that particular district, but reacting into the parent organization and into the lives of the men who work in the mines. It means a great deal to us all and to all of you.' "

"Text of the resolution supporting District 50 follows:

page 1463 } " 'Whereas, For some years District 50 has been an integral part of our great organization, with an official staff that is efficient and energetic; they leave no stone unturned to bring under the banner of this branch of the UMW, thousands of unorganized men and women of our nation; and

" 'Whereas, Were it not for this branch of our union many who are now enjoying the benefits of working under a union contract would have never heard the story of collective bargaining and what it means to the men and women who toil; therefore, be it

" 'Resolved, That we commend the able officials of District 50 for their past untiring efforts, for their splendid victories, their unity of purpose to never rest on past victories, but to press forward ever diligently until the last man and woman who toils in our nation has learned of the many good things

of life that can come to them by associating themselves with a trade union; and, be it further

“Resolved, That our great parent body, through its responsible and efficient officers continue to lend every moral and financial support to District 50; that the coming generations may reap a harvest of increased wages, shorter hours and immeasurably more of the better things of life; that the officers of this fine district may be able to continue its ceaseless efforts to make the luxuries cherished by our people a reality.”

page 1464 } We say that makes them a general agent without any strings to it.

Mr. Mullen: If Your Honor please, we object for the reasons heretofore stated and because it is merely a pep speech.

Mr. Robertson: It is a resolution adopted by the International Convention and published in your official publication.

The Court: I will allow it for what it is worth.

Mr. Mullen: Exception.

(The document referred to was marked Plaintiff's Exhibit 87 and received in evidence.)

Mr. Robertson: United Mine Workers Journal, Volume 60, No. 1, January 1, 1949, page 6, an article entitled “President Lewis Commends District 50 and Reaffirms UMWA Goal of Organizing.”

“Support for District 50, UMWA, and the United Construction Workers was pledged anew by the international officers of the United Mine Workers of America at a meeting of district 50 and UMW regional directors on December 13 and 14 in Washington.

“President Lewis, in extending seasonal greetings to the regional directors, complimented them on the progress the two organizations had made during the last year. He counseled the directors not to be discouraged by obstacles, and recalled the long fight the mine workers had made to organize the coal industry.

“‘Serious obstacles and disadvantageous conditions,’ he said, ‘you will always have. The degree of success you are achieving can be measured by the degree of opposition you encounter. And, as you gain in strength, the measure of that opposition is bound to increase.

“‘So, carry on. You have a finely synchronized organiza-

tion. Its financial affairs are being administered in a highly efficient way, and every effort is being made to avoid unnecessary expenditures.

"I don't know of any greater contribution an individual can make than to be associated with an organization such as ours—an organization dedicated to principles such as ours. Because our purpose is to maintain for the future, our form of government, freedom of religion, personal liberty and the right to enjoy those Constitutional rights and privileges of which the founders of our Republic dreamed."

"Thomas Kennedy, vice president, and John Owens, secretary-treasurer, also recalled the early struggles of the miners to organize and praised the administrative abilities of A. D. Lewis, chairman of the Organizing Committee of District 50 and director of the United Construction Workers.

"Other speakers at the meeting included A. D. Lewis, Luke Brett, and Elwood Moffett, administrative assistants; Comptroller O. B. Allen, and Yelverton Cowherd, general counsel.

"Director Lewis told of plans for expanding regional offices east of the Mississippi, and for carrying on the work of 'organizing the unorganized.'"

I think we can leave out the last two paragraphs, don't you?

Mr. Allen: Yes.

Mr. Mullen: I object.

The Court: You object for the same reasons; the same ruling and an exception.

(The document referred to was marked Plaintiff's Exhibit 88 and was received in evidence.)

Mr. Robertson: United Mine Workers of America, District 50 News, Volume 1, No. 19, August 15, 1942, page 5, "A Letter From the President."

"On the sixth anniversary of its founding, District 50 today is one of the most militant and healthy organizations within the United Mine Workers of America and the legitimate Labor movement of this country."

\* \* \* \* \*

"These accomplishments would never have been met, however, if it had not been for the splendid leadership of John L. Lewis, international president of the United Mine Workers

of America. It was President Lewis who pro-  
page 1467 } vided the funds and men to make our success  
possible. It was his leadership that prevailed  
on thousands of members to join District 50. Mr. Lewis has  
given those thousands of workers the benefits that had been  
denied to them so long.

"Fraternally yours,

"O. E. GASAWAY."

I think that is just what he was doing.

Mr. Mullen: Same objection.

The Court: Same ruling.

Mr. Mullen: Exception.

(The document referred to was marked Plaintiff's Exhibit 89 and received in evidence.)

Mr. Robertson: United Mine Workers Journal, Volume 53, No. 12, June 15, 1942, page 15, article entitled, "Attacks upon District 50, United Mine Workers of America, by the Officers of the CIO and Its Affiliates."

I know that is no good.

Mr. Allen: It is a resolution. Don't read the heading. Just read that paragraph right there.

Mr. Robertson: "District 50 of the United Mine Workers of America is an integral part of this union, set up in 1936 to include coke, by-product coal and chemical workers, together with workers in the related industries. Upon its re-organization as of August 1, 1941, the District  
page 1468 } launched a broad organizing campaign under the  
instructions of its organizing committee. It has  
succeeded notably and is growing rapidly. Its affairs are con-  
ducted in accordance with the constitution and the policies  
of the United Mine Workers, and this committee desires to  
compliment its organizing committee upon the achievements  
of the district during the last few months."

Mr. Mullen: Let me see that, please.

Mr. Robertson: That is all, isn't it?

Mr. Allen: Yes.

Mr. Mullen: You read the first paragraph?

Mr. Robertson: That is right, only that.

Mr. Mullen: You omitted the heading about the CIO?

Mr. Robertson: Let's see.

Mr. Mullen: It is an attack by the CIO.

Mr. Allen: We don't want that read. Read that paragraph. It is a resolution.

Mr. Mullen: The same objection, Your Honor.

The Court: The same ruling, and an exception is noted.

(The document referred to was marked Plaintiff's Exhibit 90 and received in evidence.)

Mr. Allen: We will offer in evidence these various constitutions.

Mr. Robertson: Why don't you object to them page 1469 } and let them be excluded?

Mr. Mullen: I will object to them. I think the old constitutions have nothing to do with the present case. We are acting under the constitution in effect in 1944.

Mr. Moore: They show how the constitutions have been changed, Your Honor, how they have broadened the powers of the International Union.

The Court: I will admit them for what they are worth.

Mr. Robertson: I understand they are being introduced, but excluded; that they will be allowed in the record, but we don't want to read them to the jury.

The Court: One minute, then. You just introduce them for the record?

Mr. Robertson: That is all. I think the simplest way to do it is that we offer them, Mr. Mullen objects, the Court sustains the objection, and they are marked exhibit so-and-so excluded.

Mr. Allen: That is right.

Mr. Mullen: That is the way to handle them, I think.

The Court: I think probably that is right. Do you object, Mr. Mullen?

Mr. Mullen: Yes.

The Court: The Court sustains the objection.

Mr. Mullen: That means they can't read them page 1470 } to the jury, but may use them on appeal.

Mr. Allen: In order to use them on appeal and even before Your Honor for purposes of reference, I reckon we would have to let the record show an exception, wouldn't we?

The Court: I suspect you would.

Mr. Robertson: Let it show it, then. Nobody cares whether we except or not.

Mr. Moore: Plaintiff excepts to the Court's ruling on the constitutions.

(The documents referred to were marked for identification only Plaintiff's Exhibit 91 and EXCLUDED.)

Mr. Mullen: We object to the full proceedings of the 35th, 40th, 33rd, 36th, 37th, and 39th constitutional conventions. We object to them as irrelevant and because they contain a great deal of matter that it is very improper to go before the jury, financial statements, and so forth. We object to the introduction of these.

The Court: I sustain the objection.

Mr. Robertson: Exception.

(The documents referred to were marked for identification only Plaintiff's Exhibit 92 and EXCLUDED.)

(Brief recess.)

page 1471 } (The following proceedings were had in open Court:)

The Court: All right, Mr. Robertson.

Mr. Robertson: If Your Honor please, I refer to Plaintiff's Exhibit 81 which is a photostatic copy of United Mine Workers Journal, Volume 47, No. 4, February 15, 1936, page 3, which reads as follows—

Colonel Harris: We get in our objection. The same objection.

The Court: The same ruling.

Colonel Harris: Note an exception.

Mr. Robertson: "Bird's Eye View of the Doings of The International Convention.

"More than 1700 delegates representing all the Districts of the United Mine Workers of America in the United States and Canada attended the Thirty-fourth International Convention in Washington, which opened on Tuesday, January 28, and closed on Friday, February 7. The Convention is regarded as having been one of the most important in the history of the Union, because of the far reaching decisions made on subjects affecting not only the coal miners but the entire American Nation. Foremost among these decisions by the Convention were:

"1. Reaffirmation of the policy of industrial organization of the unorganized workers of the country.

"2. Endorsement of President Roosevelt and page 1472 } his administration and pledge of support for his re-election.

"3. Refusal to restore autonomy to provisional Districts at the present time or until such time as the International Union shall deem it advisable to do so."

I refer you to Plaintiff's Exhibit 82, which is a photostatic copy of United Mine Workers Journal, Volume 52, No. 14, July 15, 1941, page 13.

Mr. Mullen: We object, Your Honor.

The Court: Same ruling.

Mr. Mullen: For the reasons previously stated and note an exception.

Mr. Robertson: Part of an address by President John L. Lewis:

"I am looking forward to the expansion of our organization in its numerical strength. Years and years ago in our conventions we were careful to maintain our claim of jurisdiction in those collateral industries that have to do with the by-product processes of the coal industry, and we have today a recognized jurisdiction in the coke and the by-product and the chemical field that contains the potentialities of a great collateral organization of workers in this country, part of the United Mine Workers of America, under our District 50.

"I want this organization of ours to push and press to the point where we can expand our form of organization in these related industries, and continue to be the type of a union that will always be able to play the part we have been playing, the part of leadership. And in the days and months to come, after the work of the months of our negotiations are completed, I want every officer and every member of our organization to join with the rest of us in putting our shoulder to the wheel and organizing this by-product and chemical industry when we have the chance."

I refer to Plaintiff's Exhibit 83, which is a photostat of United Construction Workers News, Volume 3, June 15, 1942, page 5.

Mr. Mullen: Same objection, Your Honor.

The Court: Same ruling.

Mr. Mullen: An exception.

Mr. Robertson: This is entitled "Agreement Unites District 50, UMWA and United Construction Workers.

"Copy of agreement between District 50, United Mine Workers of America, and the Executive Officers of United Construction Workers which was approved by the Executive Board of the International Union of the United Mine Workers of America on June 5, 1942.

"Pursuant to a resolution adopted by the National Policy Board of the United Construction Workers dated May 29, 1942, and pursuant to a resolution adopted on June 4, 1942, by the Organizing Committee of District 50, United  
 page 1474 } Mine *Mine* Workers of America, this agreement  
 is this day made and entered into by and between  
 the Executive Officers of the United Construction Workers and  
 the Executive Officers of District 50, United Mine Workers of  
 America, as follows to-wit:

"The resolution of the National Policy Board of the United Construction Workers (copy of which is hereto attached and made a part hereof) having requested affiliation of the United Construction Workers with the United Mine Workers of America, the International President thereof having referred such request to the Executive Officers of District 50, UMWA, such affiliation is hereby granted and District 50, UMWA, accepts into its membership the United Construction Workers and all of its members, agreeing to fully and actively aid, support and promote the interests of the United Construction Workers, all of its locals and all of its members in the individual and collective efforts to organize the unorganized: PROVIDED AND EXCEPT, however, that District 50, UMWA, hereby assumes no present existing liabilities, debts or obligations of the United Construction Workers of any character whatsoever, and this agreement is not to be construed by either party hereto as any recognition or assumption, directly or indirectly, by District 50, UMWA, of any such liability, debt or obligation.

"The United Construction Workers accepts membership in said District 50, UMWA, upon the terms last hereinabove set out and agreed to abide by the laws, constitution  
 page 1475 } and policies of the United Mine Workers of  
 America in the performance of its duties.

"District 50, United Mine Workers of America agrees that proper certificate of affiliation will be issued the United Construction Workers as a division of said District 50, subject to the approval of the International Executive Board of the United Mine Workers of America.

"District 50 of the United Mine Workers of America further agrees that it will accept as officers and personnel of

the division the present officers and personnel of the United Construction Workers, and that it will confirm in writing their appointment as officers and personnel of the division. Such appointment is, of course, subject to the constitution and policies of the United Mine Workers and the approval of the International Executive Board of the United Mine Workers of America, where necessary, and such employment is also subject to the powers vested in the Organizing Committee and Executive Officers of District 50.

"Such officers and personnel will include the Director of the Division, the Comptroller of the organization, the members of the National Policy Board, Regional Directors, and Field Representatives or Staff Members, and clerical or office employees.

"District 50 further agrees that its Executive Officers will authorize the Director of the division to employ page 1476 } or remove such personnel as may be necessary in the exercise of his duties as Director, and in the accomplishment of the administrative affairs of the division, subject only to the powers vested in the Organizing Committee and Executive Officers of District 50, or the Executive Officers of the International Union or the International Executive Board.

"The Director of the United Construction Workers division of District 50 shall report periodically to the Executive Officers and organizing staff of District 50 the financial and administrative affairs of the division.

"The United Construction Workers shall retain its name in functioning as a division of District 50, United Mine Workers of America.

"A. D. Lewis, United Construction Workers.

"Gardner H. Wales, United Construction Workers.

"O. E. Gasaway, Pres., District 50, UMWA.

"Kathryn Lewis, Sec.-Treas., District 50, UMWA."

-I refer to Plaintiff's Exhibit 84, which is a photostat copy of United Mine Workers Journal, Volume 57, No. 20, October 15, 1946, page 19, article entitled "District 50 Reports"—

Mr. Mullen: If Your Honor please, I object for the reasons heretofore stated and recorded.

The Court: Same ruling.

Mr. Mullen: Exception.

page 1477 } Mr. Robertson: "District 50 Reports All-Time High in Membership and Local Unions.

"Observing its tenth anniversary, District 50, U. M. W. A., with 700 delegates in attendance, met in Atlantic City, N. J., for its fifth biennial convention and mapped out a constructive program of organizing the unorganized.

"Established in 1936 for the purpose of organizing under the banner of the United Mine Workers the employees in the coal by-product, chemical, utility and similar industries, District 50 reported its growth from 13 to 1,186 local unions in the decade, making it now the largest single district of the United Mine Workers of America. These locals are situated in 644 cities, 44 states and the Dominion of Canada.

"With President John T. Kmetz, who is also an International Executive Board member from District 1, presiding, the convention heard reports of progress in organizing, negotiating contracts, legal and research activities, and other major functions over the two-year period since its last session, and voted unanimous approval of the record.

"Commendation was voted of the services of the officers who, in addition to Kmetz, including Secretary-Treasurer Kathryn Lewis, Comptroller J. Raymond Bell, Director of Organization Michael F. Widman, Jr., and International Board Member Charles E. Fell, whose untimely page 1478 } death was mourned. The work of the international staff members in Washington as well as in the field was also praised.

"Comparing conditions that confront labor in this postwar period with those prevailing after World War I, Secretary-Treasurer Thomas Kennedy, U. M. W. A. said the outlook now is brighter because of the foresight of John L. Lewis in initiating the great drive which brought 15,000,000 workers into the house of organized labor, as against only four or five million a quarter century ago. He told of the great contribution of the coal miners to the tremendous task of organizing which still continues under the banner of District 50.

"In telling of the earlier organizing period, Kennedy described Lewis as a 'prophet crying out in the wilderness' and said he had so mobilized and energized American labor that it was going to continue to organize in the District 50 manner until the job was done. Suggestions that Lewis be named to replace Secretary of State Byrnes, brought cheers and applause from Kennedy's audience when he observed, in passing, that labor's outstanding champion be sent over to talk turkey to Molotov.

"Theme of the convention was 'Organize the Unorganized' and this was referred to by virtually all the speakers headed by Acting President John O'Leary of the United Mine

Workers, and including International Board page 1479 } Members John Mates and John Ghizzonni, members also of the District 50 Organizing Committee; President William Mitch of District 20, who acted as chairman of the Officers' Report Committee; and many others."

I refer now to Plaintiff's Exhibit 85.

Mr. Mullen: I object, Your Honor, to the introduction of that for the reasons heretofore stated and recorded.

The Court: The same ruling.

Mr. Mullen: An exception is noted.

Mr. Robertson: Which is a photostatic copy of United Mine Workers of America District 50 News, Volume 6, No. 8, January 15, 1947, an article entitled "New Organizing Committee Named For District 50."

"The International Executive Board of the United Mine Workers of America, at its recent meeting in Washington, appointed a committee charged with the task of intensifying the organizational campaign of District 50.

"Members of the committee are: A. D. Lewis, chairman; John Ghizzoni, District 2, who will represent the international executive board; John P. Busarello, president of District 5; Martin F. Brennan, president of District 7; Hugh White, president of District 12, and George J. Titler, president of District 29."

I refer now to Plaintiff's Exhibit No. 86.

Mr. Mullen: We object, Your Honor, for the page 1480 } reasons heretofore stated.

The Court: Same ruling.

Mr. Mullen: An exception, please.

Mr. Robertson: Which is a photostat copy of United Mine Workers Journal, Volume 58, No. 21, November 1, 1947, page 6, paragraph as follows:

"In a high tribute to District 50 which, Kennedy pointed out, has often been referred to in a derogatory sense as being a 'catch-all' organization, he said: 'District 50 is no different from many other international unions that have gone forth to organize the unorganized in order to build up this labor movement; and District 50 is a responsible, legitimate district union of the United Mine Workers of America under its jurisdiction and under its control.'"

I refer now to Plaintiff's Exhibit No. 87.

Mr. Mullen: Objection, Your Honor, for the same reasons stated heretofore.

The Court: Same ruling.

Mr. Mullen: Exception, please.

Mr. Robertson: Which is a photostatic copy of United Mine Workers, Volume 59, No. 21, November 1, 1948, page 4, the article entitled "Convention Commends Dist. 50 Progress All Districts Urged To Aid Organizing.

"Continued energetic support of the organizing efforts of District 50, UMWA, was urged in a resolution page 1481 } unanimously adopted by the convention which commended the officers of that district for the degree of success achieved.

" 'We believe,' Kennedy observed, 'that if you give this cooperation and support out in the field this great district will continue to make progress, not only as affects the membership of that particular district, but reacting into the parent organization and into the lives of the men who work in the mines. It means a great deal to us all and to all of you.'

"Text of the resolution supporting District 50 follows:

" 'Whereas, For some years District 50 has been an integral part of our great organization, with an official staff that is efficient and energetic; they leave no stone unturned to bring under the banner of this branch of the UMWA, thousands of unorganized men and women of our nation; and

" 'Whereas, Were it not for this branch of our union many who are now enjoying the benefits of working under a union contract would have never heard the story of collective bargaining and what it means to the men and women who toil; therefore, be it

" 'Resolved, That we commend the able officials of District 50 for their past untiring efforts, for their splendid victories, their unity of purpose to never rest on past victories, but to press forward ever diligently until the last man page 1482 } and woman who toils in our nation has learned of the many good things of life that can come to them by associating themselves with a trade union; and, be it further

" 'Resolved, That our great parent body, through its responsible and efficient officers, continue to lend every moral and financial support to District 50, that the coming generations may reap a harvest of increased wages, shorter hours and immeasurably more of the better things of life; that the officers of this fine district may be able to continue its ceaseless

efforts to make the luxuries cherished by our people a reality.' "

Mr. Robertson: I refer now to Plaintiff's Exhibit 88.

Mr. Mullen: The same objection, Your Honor, for the reasons heretofore stated and recorded.

The Court: The same ruling.

Mr. Mullen: And an exception, please.

Mr. Robertson: Which is a photostat of United Mine Workers Journal, Volume 60, No. 1, January 1, 1949, page 6. Article entitled "President Lewis Commends District 50 And Reaffirms UMWA Goal of Organizing:

"Support for District 50, UMWA, and the United Construction Workers was pledged anew by the international officers of the United Mine Workers of America page 1483 } at a meeting of District 50 and UCW regional directors on December 13 and 14 in Washington.

"President Lewis, in extending seasonal greetings to the regional directors, complimented them on the progress the two organizations had made during the last year. He counseled the directors not to be discouraged by obstacles and recalled the long fight the mine workers had made to organize the coal industry.

" 'Serious obstacles and disadvantageous conditions,' he said, 'you will always have. The degree of success you are achieving can be measured by the degree of opposition you encounter. And, as you gain in strength, the measure of that opposition is bound to increase.

" 'So, carry on. You have a finely synchronized organization. Its financial affairs are being administered in a highly efficient way, and every effort is being made to avoid unnecessary expenditures.

" 'I don't know of any greater contribution an individual can make than to be associated with an organization such as ours—an organization dedicated to principles such as ours. Because our purpose is to maintain for the future, our form of government, freedom of religion, personal liberty and the right to enjoy those Constitutional rights and privileges of which the founders of our Republic dreamed.'

"Thomas Kennedy, vice-president, and John page 1484 } Owens, secretary-treasurer, also recalled the early struggles of the miners to organize and praised the administrative abilities of A. D. Lewis, chairman of the Organizing Committee of District 50 and director of the United Construction Workers."

I refer now to Plaintiff's Exhibit No. 89.

Mr. Mullen: Objection for the same reason, Your Honor.

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Robertson: Which is a photostatic copy of United Mine Workers of America, District News, Volume No. 1, No. 19, August 15, 1942—I *think* it is page 5. It is entitled "A Letter from the President."

"On the sixth anniversary of its founding District 50 today is one of the most militant and healthy organizations within the United Mine Workers of America and the legitimate Labor movement of this country.

"\* \* \* These accomplishments would never have been met, however, if it had not been for the splendid leadership of John L. Lewis, international president of the United Mine Workers of America. It was President Lewis who provided the funds and men to make our success possible. It was his leadership that prevailed on thousands of members to join District 50. Mr. Lewis has given these thousands of workers the benefits that had been denied to them so long.

Faternally yours, O. E. Gassaway."

page 1485 } I refer now to Plaintiff's Exhibit 63 and wish to read this part down here, which has not been read.

Mr. Mullen: Objection has already been made to that, Your Honor.

The Court: The same ruling. I don't know whether you want me to rule on it again.

Mr. Mullen: We just renew the objection.

The Court: Same ruling.

Mr. Mullen: And we reserve an exception.

Mr. Robertson: "The above map shows the great expansion of District 50, United Mine Workers of America, and how it has been able to bring economic justice to thousands of workers in every section of the country. Starting from Washington, D. C., the organizational program of District 50 extends into practically every State in the country and has welded together many of the hard-fought gains won by labor.

"Many unions, much older than District 50, have never reached, in their greatest days, the success that has come to District 50 under the able leadership of its district officers and International President John L. Lewis.

"To make such an organization possible, other districts of the United Mine Workers of America cooperated, and today, after six years of fighting side by side with the men who mine the nation's coal, District 50 is one of the most aggressive units of the world's greatest labor organization.

"The map also illustrates the great responsibility of District 50 officers, O. E. Gasaway, president; Miss Kathryn Lewis, secretary-treasurer; Charles H. Fell, international board member, and Michael F. Widmann, Jr., organizational director.

"District 50 officers are in constant contact with all regional and sub-regional offices, insure members of District 50 that their rights as union members and Americans are fully protected.

"District 50 has a competent staff of field representatives fully capable of organizing and in negotiating contracts. These representatives are available for all locals anytime any local is in need of assistance.

"District 50 has a capable staff of lawyers to represent its members in every State whether they be involved in litigation before the War Labor Board, the National Labor Relations Board, State Labor or Mediation Boards, Workmen's Compensation Boards, etc. Chief counsel for District 50 is Attorney Alfred Kamin.

"Every dot on the map, indicating regional offices or sub-regional offices, means that Uncle Sam is collecting funds every day through war bond purchases of District 50 members. In practically every section of the United States locals of District 50 have taken a portion of their wages and invested them in the future of America.

"No other union in the country can equal the progress or the extensive program that has always been the aim of the United Mine Workers of America. District 50 has penetrated into areas that other forces of organized labor avoided for years because of the stranglehold giant corporations had on communities.

"In the deep South, in the North, on the West Coast, in the West and in the East, District 50 has marched to victory through the backing of John L. Lewis and the United Mine Workers of America.

"The benefits won by District 50 are now being given to thousands of unorganized workers in various sections of the country.

"Members of District 50 are urged to place a copy of this map in a conspicuous place in their meeting halls. The map shows that the members of District 50, from coast to coast,

*Alexander Hamilton Bryan.*

have brothers and sisters in the labor movement in all sections of the country. The map also shows that a great deal of organizing is needed to assist the unorganized.

"District 50 members can do their part by helping their field representatives organize plants in their own home communities that have not been organized under the banner of the United Mine Workers of America."

Mr. Allen: If Your Honor please, when Mr. page 1488 } Bryan was on the witness stand, he testified with reference to the identification of this, comparing it, and so forth, and that it was an exact copy. I don't think we asked him with reference to all these other exhibits. From what these gentlemen said in the Judge's chambers, I take it that would be sufficient to identify all of them. They were all identified in the same manner.

Mr. Mullen: I think that you could put him on the stand and let him testify that he compared them and identify them. He need not take up the separate papers, but just do it as a whole.

Whereupon,

ALEXANDER HAMILTON BRYAN,  
recalled as a witness for Plaintiff, having been previously  
duly sworn, resumed the stand and testified further as follows:

#### DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Bryan, you testified with reference to Exhibit 63, as to how you compared it, photostated it, and knew that it was an exact copy of the original from which you took it. Can you say the same thing with reference to all of the other exhibits which have been introduced here?

A. I can say the same for all of the exhibits, with the exception of a few of the later copies of the United page 1489 } Mine Workers Journal which I got from another source in Kentucky, and also with the exception of a few copies of the News which I got from a source in Hopewell. All of the photostats have been compared with the originals, either by me directly or under my direct supervision, and I can make oath that they are accurate copies.

Mr. Allen: That is all.

Mr. Robertson: If Your Honor please, that concludes Plaintiff's case in chief.

Mr. Mullen: Of course Your Honor knows that we have reserved the right to further cross-examine Mr. Bryan when further figures are compiled.

Plaintiff rests.

. . . . .

page 1490 }

. . . . .

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on February 6, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Frances V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James, Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

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# PROCEEDINGS.

(The following proceedings were had in Chambers:)

Mr. Allen: If Your Honor please, we have some exhibits we want to offer as part of our evidence-in-chief. If these gentlemen object to their going before the jury, we offer them before the Court for use before the court in any manner in which it is proper to use them. If they do not go before the jury, we would like to have them marked as being offered for use by the Court. We have a list of them here in different journals and documents, with a reference to the page which we wish to have the Court consider. I think the particular part on the page is indicated by some pencil marks, isn't it, Mr. Bryan?

Mr. Bryan: Yes.

Mr. Allen: Unless these gentlemen admit it, we will have to ask Mr. Bryan the usual question whether he prepared

them all and if they are true copies of what was found in the Labor Department in Washington.

Mr. Mullen: Judge, it would be impossible for us to go through this this morning and find out what is in there. We thought your case was closed. It is entirely within the discretion of the Court.

Mr. Robertson: I think the proper way to handle it is the way we handled the other. We offer it, you object to it, the Court excludes them, and we take an exception.  
page 1492 } Mr. Mullen: That is one thing, but by doing that we might be leading the Court into error.

The Court: Exactly.

Mr. Mullen: I don't see how we can do that very well because we might just be putting an error in without knowing it for your benefit in case you had to appeal the case.

Mr. Allen: We are not going to take any exception to His Honor's ruling in ruling it out because under the present rules if he initials it it is still a part of the record for him to consider if he wants to do so.

Mr. Mullen: I don't want to be led into an error that nobody is conscious of.

Mr. Allen: We are not thinking of that.

Mr. Mullen: Don't misunderstand me. I don't mean you intend to do it, but it might, as I said, unintentionally do so. I don't know what is in there. I don't know whether it is proper to object or whether it is improper to object. I have no way of finding out at that late date.

Mr. Robertson: Why don't you offer them and let the Court defer its ruling?

The Court: We possibly could do that.

Mr. Mullen: Do what?

The Court: Offer them and let the Court defer its ruling and give you gentlemen an opportunity to look  
page 1493 } them over.

Colonel Harris: I don't know when we would have time when we are interviewing witnesses.

Mr. Mullen: 321 documents.

(Discussion off the record.)

(Plaintiff's counsel withdrew for separate conference.)

Mr. Mullen: We are not going to get any chance to go through and see what is in there. It is impossible in the middle of the case.

Mr. Robertson: I haven't asked you to.

Mr. Mullen: I didn't mean that.

(Discussion off the record.)

The Court: Let the record show that you are offering them.

Mr. Allen: They are all photostatic copies of documentary evidence from the Department of Labor in Washington and Mr. Bryan is in position to verify them under the examined or verified copy rules just as he verified those we introduced yesterday. We would have to ask Mr. Bryan a few questions on that subject unless you all will agree that just for the purpose of offering them it may be assumed that he examined them and compared them jut exactly as he did those he testified to yesterday.

Mr. Mullen: We will not object to it on the page 1494 } ground that they are photostatic copies, based on Mr. Bryan's testimony that he has compared them and knows them to be copies, but it is proposed to offer 321 documents. The first knowledge we have had of it is this morning. We don't know whether there are things in there that are admissible or whether there are items that are not admissible. We are forced into the position, without knowing what is in it, to technically object to the introduction of them.

Colonel Harris: We further object on the additional ground that it is an offer en masse and is not the proper way to offer evidence in a trial.

Mr. Allen: We are prepared to offer them separately if you insist, at the proper time.

The Court: The Court will defer its ruling.

(The documents referred to were marked for identification Plaintiff's Exhibit 93.)

Mr. Mullen: When you opened your case you put in certain photographs which we did not object to and let them go in. We have the same thing. We have some photographs.

Mr. Robertson: Just let me look at them.

Mr. Mullen: I think they are much larger than yours and show things up a great deal better.

Mr. Robertson: Let me see them in the absence of the jury. I won't ask to be permitted to take them back to Kentucky like you took ours back to Washington.

page 1495 } The Court: When will you introduce your pictures?

Mr. Mullen: By one of the witnesses today.

The Court: I wonder if we couldn't save some time by you gentlemen viewing the pictures during the recess?

Mr. Mullen: One other question. We were going to bring a man from the C. & O. to testify that the Pond Creek Pocahontas Company is engaged in shipping coal out of Kentucky. They say that with the railroad situation as it is, they can't see why on earth we can't stipulate that, as everybody knows they are in interstate commerce. Can we stipulate that?

Mr. Allen: Of course, the C. & O. Railroad Company is a common carrier engaged in interstate commerce.

Mr. Mullen: We are not speaking of the C. & O. We are speaking of the coal being shipped in interstate commerce. They ship coal to the Lakes region.

Mr. Robertson: We object to the introduction of any evidence in this case about interstate commerce, upon the ground it has nothing to do with the case. It has been admitted here time and again that this case is governed by the substantive law of Kentucky and the procedural law of Virginia. We are going to object right now to the introduction of any evidence on any phase of the case about interstate commerce.

Mr. Mullen: All right.

page 1496 } Mr. Robertson: I haven't had a chance to confer with anybody else on our side, but I think anybody would concede that Pond Creek Pocahontas Company does engage in interstate commerce.

Mr. Lowden: I wouldn't be disposed to put it that way, but we agree with them that they ship coal outside of Kentucky.

Mr. Bryan: It is a question of when they started.

Mr. Allen: If Your Honor please, we had that same question in connection with the C. & O. tunnel up here. It is a question when they started to ship this coal; when that coal started in interstate commerce. You have to show that they were engaged in interstate commerce and mining coal out of this mine, and that has to be shown by the shipment of coal in interstate commerce; not the fact that they have heretofore shipped other coal in interstate commerce, but from this mine.

Mr. Robertson: I don't think Mr. Lowden had quite finished what he had to say.

Mr. Allen: I beg your pardon.

Mr. Lowden: I was merely going to say that "they are engaged in interstate commerce" is a conclusion of law, as I see it, and I don't think we are called upon to agree to that. I think Mr. Robertson's objection should be insisted upon, but rather than make Mr. Mullen bring a man from the C. & O. down here, why not make an offer of proof as to the facts,

and if Your Honor rules it can come in, we will  
 page 1497 } agree to the fact; and if Your Honor rules that  
 it should not come in, we can state the matter of  
 proof in the record. I don't think it is necessary to make a  
 man from the C. & O. come in, but I don't think we ought to  
 agree that they are engaged in interstate commerce, either.

The Court: During the recess today, couldn't you gentlemen, off the record, talk this matter over, and you can tell Mr. Robertson what you propose to prove by this witness or what his statement will be. Maybe you gentlemen can stipulate it.

Mr. Fred G. Pollard: Subject to Mr. Robertson's objection as to whether it is admissible, we would like to make this stipulation: That prior to July 1, 1949, the coal being mined at Pond Creek Pocahontas No. 1 Mine in Breathitt County, Kentucky, was being shipped out of the State of Kentucky.

Mr. Robertson: I don't want to make any stipulations at this moment. I don't know that the tippie was in operation then. When you get down to a question of dates, as to when it went into operation—

The Court: I suggest that counsel discuss this matter informally during a recess. It might save us a lot of time.

Mr. Mullen: You have already fixed the date when the mine went into operation, in your testimony.

page 1498 } Mr. Robertson: I can't remember everything  
 I have said in the case, and I may have said one  
 thing wrong.

Mr. Fred G. Pollard: I have one more little item here. Mr. Holt, who is examining the records of Laburnum Construction Corporation, advises us that the statements show the gross sales and the cost of sale and the profit or loss on the sales, and then the operating expenses, general office expenses. Then it has "Other Income" and "Other Expenses." Unless we know what the Other Income and Other Expenses are derived from, we can't tell whether any part of the overhead should be allocated to those items.

At the present time we have not been given access to information which would let us find out from what source Other Income was derived, and what the Other Expenses are.

Under our understanding of what was said by the Court last Monday, we think we are entitled to it. The Court said:

"Yes. I think he is entitled to see the books, any books that have anything to do with your profit or loss. One auditor may determine whether the loss is computed one way or the profit is computed one way, and another auditor may de-

*Homer Howard.*

termine it another way. That is a question of argument. But I think he is entitled to see the books."

The Court: That was my ruling.

Mr. Allen: If Your Honor please, I understand page 1499 } stand that Mr. Bryan asked Mr. Holt what he wanted, and that Mr. Bryan showed him exactly what he wanted; and so far as we know, Mr. Bryan has had no information that that wasn't what he wanted, that Mr. Bryan had not shown him exactly what he wanted.

Mr. Fred G. Pollard: We have been advised by Mr. Holt that the other income and other expenses have been taped up so it is impossible for Mr. Holt to determine the source of the other income or where the other expenses were incurred.

Mr. Robertson: Then I think Mr. Holt should come to Court and speak for himself in Chambers, and let us find out what he wants.

Mr. Mullen: It isn't what Mr. Holt wants; it is what we want.

Mr. Allen: Mr. Holt told Mr. Bryan he had exactly what he wanted.

The Court: The Court suggests that Mr. Pollard and Mr. Bryan and one representative of counsel for the Plaintiff, and Mr. Holt, get together and talk this matter over. The same ruling the Court made—what day is that?

Mr. Fred G. Pollard: The 29th.

The Court: —on January 29th holds good today. I suggest that such a conference be arranged so there won't be any misunderstanding.

Mr. Fred G. Pollard: May we meet you at 5:15 at your office today?

Mr. Allen: 5:15 today? All right.

page 1500 } (The following proceedings were had in open court:)

\* \* \* \* \*

**HOMER HOWARD**

called as a witness for the Defendants, having been first duly sworn, was examined and testified as follows:

Mr. Robertson: If Your Honor please, the Court will recall the ruling of the Court that the witnesses be separated. I don't know whether there are any of Defendants' witnesses

*Homer Howard.*

in Court other than those that are supposed to be here or not. If there are, I ask that they go out.

Mr. Mullen: The only one in here who is going to be a witness is Mr. Tom Raney. Your Honor ruled that each of the three defendants could have one man in here.

The Court: That is true.

Mr. Mullen: Mr. Raney is the only one who will be a witness. He is here as an employee of the United Mine Workers.

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your name.

A. Homer Howard.

Q. Are you a member of the Kentucky State Patrol?

A. I am.

page 1501 } Q. What is your rank?

A. Sergeant.

Q. How long have you been Sergeant?

A. Approximately four months.

Q. Were you in that service in July, 1949?

A. I was.

Q. What was your rank then?

A. Corporal.

Q. Did the area over which you were in charge include any counties in Kentucky?

A. It did.

Q. Did it include Breathitt County?

A. It did.

Q. Did any one introduce himself to you in July, 1949, in Salyersville as connected with certain work being done at the No. 1 mine of the Pond Creek Pocahontas Company?

A. Yes, sir; they did.

Q. Please state what he said his name was.

A. Mr. Bryan.

Q. Where was it that you saw him?

A. In Salyersville, Kentucky, in front of the Carpenter Hotel, as well as I remember at this time.

Q. What did he want of you?

A. He asked for some police protection. He informed me that he was contractor. I asked him why he  
page 1502 } needed police protection, and he said there was a mob over there that was interfering with his work. We went ahead with the conversation and I asked him if there had been any violence or any crime committed, and

*Homer Howard.*

he informed me that there wasn't. So I told him we were forbidden to take any hand or any part in labor disputes where there wasn't any crime committed or any violence, and he would have to get permission from higher authority.

Q. Did you make any recommendation to Mr. Bryan as to what he should do?

A. I informed Mr. Bryan if he thought he was in danger of any bodily harm, him or his employees, to go to the Governor or to the Commissioner, and if there wasn't, to try to get along and bargain with those people if he thought there was any threat or any violence or bodily harm to any one.

Q. To try to bargain with the people if he thought there was any danger?

A. That is right, yes.

Q. Do you know whether Mr. Bryan took your advice?

A. From the information I gathered, I suppose he didn't. I don't know.

Q. Did you or not tell Mr. Bryan that you had been shot in the leg or in the arm and pull up your trousers leg or sleeve and show him the wound?

page 1503 } A. I did not.

Q. Have you ever been shot?

A. I have been shot.

Q. Were you shot in the course of your discharge of duty or outside of that?

A. In line of duty.

Q. In what county were you shot?

A. In Johnson County.

Q. Where were you shot?

A. Through the intestines.

Q. Have you ever been shot in the leg or the arm?

A. I have not.

Q. What is the reputation of Breathitt County for law abiding or for law violation?

A. Breathitt County is considered at this time one of the best law abiding counties in Eastern Kentucky.

Q. Do you make many arrests in the counties that you patrol?

A. Our average for each month, that is Troopers, runs twenty on criminal and traffic.

Q. What, if any, percentage of those are for manslaughter?

A. Very, very low.

Q. Do you know why Breathitt County is sometimes spoken of as "Bloody Breathitt"?

*Homer Howard.*

page 1504 } A. It must have got that name before my time.

It goes by that name, I guess probably all over the United States, but why I don't know.

Q. Were the conditions in 1949 with regard to law abiding or law violation such as to give it the name of "Bloody Breathitt"?

A. It was not.

Q. Did you make some further investigation as to whether there had been any violence at the site of the work?

A. I inquired of several workers that were supposed to have been working there at that time, and they informed me that there was no violence over there other than a picket line.

Mr. Mullen: The witness is with you.

**CROSS EXAMINATION.**

By Mr. Robertson:

Q. How old are you?

A. 47 years old.

Q. Where were you born and raised?

A. In Magoffin County in Kentucky.

Q. That is the next county to—

A. Breathitt.

Q. Which county out there in Eastern Kentucky is it that the sheriff has been shot and killed within the last year?

A. I think that is in Perry County.

page 1505 } Q. Have you any bullet scars on your legs?

A. I have not.

Q. Can you show the scar on your body?

A. I will have to take this uniform off to do it.

Q. Will you just undo your jacket. I will ask you to do it.

(Witness exhibiting.)

The Witness: Right here.

By Mr. Robertson:

Q. How long did that put you in the hospital?

A. I was in the hospital eight weeks.

Q. How did you happen to get shot? What were you doing when you were shot?

A. Pardon?

Q. What were you doing when you were shot?

*Homer Howard.*

A. Making an arrest.

Q. Where?

A. In Johnson County.

Q. Is that next to Breathitt County?

A. It doesn't join Breathitt County.

Q. It is in Eastern Kentucky, though.

A. That is right.

Q. How many miles away would you say it is from "Bloody Breathitt"?

page 1506 } A. I would say 50.

Q. You say Mr. Bryan told you there was no violence at his job site in Breathitt County?

A. Mr. Bryan informed me that there was a mob over there.

Q. I will ask you to answer my question. I understood you to testify on direct examination that Mr. Bryan told you there was no violence at his job site on July 26. Is that right or wrong?

Mr. Mullen: If Your Honor please, the witness did not testify any such thing. He was not even questioned as to that.

Mr. Robertson: All he has to do is answer my question and say he didn't, then.

Repeat the question, please, Mr. Reporter.

(The pending question was read by the reporter.)

The Witness: Well, naturally Mr. Bryan made a statement like that or he wouldn't have wanted police protection.

By Mr. Robertson:

Q. I am asking you to answer the question. Did he tell you there was or was not violence at the job site?

A. I wasn't interested in it. I can't answer it definitely either way.

page 1507 } Mr. Robertson: Stand aside.

Mr. Mullen: Much obliged to you.

The Court: Gentlemen, is it understood that the witnesses for Defendants may return to Kentucky?

Mr. Robertson: I think they need him up there, Your Honor, and I would suggest that he go.

Mr. Mullen: I object to that remark, Your Honor. It is entirely improper.

*Murvel C. Caudill.*

The Court: Gentlemen, disregard that remark.

In other words, witnesses will be excused unless counsel for the Plaintiff requests that they remain. You are excused, Sergeant.

\*     \*     \*     \*     \*

MURVEL C. CAUDILL

a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your name.

A. Trooper Murvel C. Caudill.

Q. Where do you live?

A. I live at Morehead, Kentucky.

Q. Where is that?

page 1508 } A. That is in the eastern part of Kentucky.

Q. How old are you?

A. Thirty-two years old, sir.

Q. How long have you been a State Trooper?

A. Going on 44 months, sir.

Q. Has Breathitt County been in the territory that you have been serving?

A. Yes, sir. I was up there in charge of that post, 9-A, which includes Hazard and Breathitt County. It takes in five counties.

Q. How long were you in charge of that?

A. Approximately six months.

Q. During that time did you happen to make any arrests for manslaughter?

A. No, sir.

Q. What is the reputation, if you know, of Breathitt County, for law abiding citizens or law violating citizens?

A. In my experience up there as far as traffic and criminal arrests, it is very small.

Q. You say you had five counties. How does the criminal record in Breathitt County compare with the other four counties?

A. It compares as one of the lowest.

Q. Have you ever been called on to do anything between an employer and union members?

*Murvel C. Caudill.*

page 1509 } A. No, sir; no violence whatsoever.

Q. Is Breathitt County a dry county or a wet county?

A. It is a dry county, sir.

Q. Is Johnson County dry or wet?

A. Dry, sir.

Q. Was that true in July, 1949, that is, were they dry then?

A. Yes, sir.

Q. Was the condition as to law violation, what you have stated, was that true in July, 1949?

A. Yes, sir.

Mr. Mullen: That is all.

#### CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Caudill, how old did you say you are?

A. Thirty-two, sir.

Q. Where were you born and raised?

A. Rowan County, Kentucky.

Q. Where do you live now?

A. I live at Morehead, sir.

Q. Where is that?

A. That is in Rowan County.

Q. How far is Rowan County from Breathitt County?

A. About 70 miles from the County Seat, sir.

Q. How did Breathitt County get the name  
page 1510 } "Bloody Breathitt"?

A. Well, sir, that I would be unable to advise. The only thing I hear is back when they had those fueds back in the early part of time.

Q. They still call it "Bloody Breathitt," don't they?

A. Well, that I would be unable to state.

Q. Now, Mr. Caudill, don't you hear it called "Bloody Breathitt" all the time?

A. No, sir; not all the time, sir.

Q. Isn't it known all over the United States as "Bloody Breathitt"?

A. That I couldn't say.

Q. You say you don't know that it is known now as "Bloody Breathitt"?

A. You hear it once in a while. Once in a while you hear someone state that.

Q. What are the five counties that are in your territory?

*Allen Young Watkins.*

A. Perry, Knott, Leslie, Breathitt and Wolfe.

Q. Have you been shot?

A. No, sir.

Q. Did you ever hear of their making any moonshine in Breathitt County?

Colonel Harris: We object to that, if the Court please.

Mr. Robertson: If you object to it, I withdraw page 1511 } draw it.

Stand aside.

The Court: Any further questions?

Mr. Mullen: That is all.

Mr. Robertson: He may go to Kentucky.

The Court: Stand aside.

(Witness excused.)

Mr. Mullen: Call Mr. Watkins.

Whereupon,

ALLEN YOUNG WATKINS,

a witness on behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your full name.

A. Allen Young Watkins.

Q. Where do you live, sir?

A. In Jackson, Kentucky.

Q. How old are you?

A. Thirty-seven.

Q. In what county is Jackson?

A. That is in Breathitt County.

Q. Is that the county seat?

A. Yes, sir; Jackson is the county seat of Breathitt.

Q. Are you a lawyer?

page 1512 } A. Yes, sir.

Q. By education?

A. Yes, sir.

Q. Do you hold any position now in the county?

A. Yes, sir; I do.

Q. What is it?

*Allen Young Watkins.*

A. County Attorney of Breathitt County.

Q. How long were you practicing law over there?

A. I started practice in the spring of 1946.

Q. How far is Jackson from Evanston, where the Pond Creek Pocahontas Company was developing a mine?

A. It is approximately 40 miles.

Q. What are your duties as County Attorney?

A. My duties are to prosecute all cases, offenses in the courts inferior to the Circuit Court, and to assist the Commonwealth Attorney in prosecutions of charges in the Circuit Courts.

Q. Mr. Watkins, is Kentucky an Indian name?

A. That is my understanding from the history of the state, that the name did come from an Indian name.

Q. And what does it mean in the Indian language?

A. It always has been said that Kentucky in the Indian language meant dark and bloody ground.

Q. Is that name applicable now?

page 1513 } A. No, sir; I don't think so.

Q. It is ancient history?

A. Yes, sir; I think it is.

Q. Do you know how Breathitt County is called "Bloody Breathitt"?

A. I have heard through older people, the stories have been handed down that years ago, before my time, there were feuds in Breathitt County, and that there was a good deal of violence during those earlier years that caused Breathitt County to have that name.

Q. Was that before or after the county was opened up by roads and so forth?

A. That is back in the pioneer years of the county, I would say. That was back before we had railroads, highways, and when we had very few schools.

Q. Does the county of Breathitt have a slogan by which the county is now known?

A. Yes, sir; it does.

Q. What is it?

A. About 17 years ago Dr. Ora Latham Hatcher, a leader in education in America who was a resident of Richmond, Virginia, came to Breathitt County as a leader in the child guidance program. She started the program in Breathitt County. It is one of the first counties I understand in the country where her program was started. It was more  
page 1514 } or less the guinea pig for her program. Dr. Hatcher was in the most remote sections of that

*Allen Young Watkins.*

county for a number of years, and she had heard this story about the early days of Breathitt and she had also heard that Breathitt had been referred to as "Bloody Breathitt" in earlier years. She made the statement there, after she had been over the greater part of Breathitt, that that name should not apply, that Breathitt should be referred to as "Beautiful Breathitt." As a result of that, on nearly all of the official stationery that slogan is printed, "Beautiful Breathitt."

Q. Mr. Watkins, do you know the general reputation of Breathitt County for law and order?

A. Yes, sir; I do.

Q. What is it?

A. It is good.

Q. How does it compare with the other Eastern Kentucky counties?

A. It compares favorably. It is as good as the average, and I will say better than some.

Q. What is the character of the population with reference to religion?

A. The people of Breathitt County are very devout. Most any home that you go into you will find the Bible the favorite book.

Q. Did the County authorities learn of or take notice of the testimony that was being given here against page 1515 } the character of Breathitt County?

A. They did.

Mr. Robertson: If Your Honor please, I just want the record to show that I realize that this testimony is taking a scope that puts it outside of all rules of evidence that I ever heard of, but I do not object to it.

Mr. Mullen: If Your Honor please, I object to that statement because they themselves have put witness after witness on the stand to give this county a terrible reputation, and naturally we are entitled to show that that is not the reputation of the county.

Mr. Robertson: I say I have no objection to anything said so far, but I just want you to know that I am not so ignorant that I don't realize I could object if I wanted to.

The Court: Proceed.

Mr. Mullen: I realize that you are not as ignorant as some of our counsel whom you recommended go to night school.

Mr. Robertson: Of course I am not responsible for them.

The Court: Proceed.

*Allen Young Watkins.*

By Mr. Mullen:

Q. Do you know whether any other of the county authorities had intended to come here?

A. Yes, sir. The sheriff of Breathitt County had been contacted, and the County Judge had been contacted.

Q. Did something happen to prevent them page 1516 } from coming?

A. This is the tax collection period now, in the State of Kentucky, and the Sheriff wasn't able to come because of that; and the County Judge's father-in-law is in a very serious condition now, and they expect him to die at almost any time, and he wasn't able to come because of that condition.

Q. You came in their place?

A. Yes, sir.

Q. You said that the reputation of Breathitt County for law and order is good. Was that the condition in July, 1949?

A. Yes, sir, it was.

Q. And for years prior to that?

A. Yes, sir, in my memory, it has been.

Mr. Mullen: The witness is with you.

#### CROSS EXAMINATION.

By Mr. Allen:

Q. I didn't quite get your last name. What did you say it was?

A. Watkins.

Q. Where were you born?

A. Just about two miles from Jackson, Kentucky, in Breathitt County.

Q. Where were you reared?

page 1517 } A. In Breathitt County. I have always lived in Jackson or not more than three miles from Jackson.

Q. You now hold what position?

A. County Attorney?

Q. Of Breathitt County?

A. Yes, sir.

Q. Is that elective or appointive?

A. It is elective.

Q. So you were elected by the vote of the people to that office?

A. Yes, sir.

*Allen Young Watkins.*

Q. Do you know how far the records of Breathitt County go back with reference to prosecutions and convictions?

A. No, sir. I understand that sometime in 1870 there was a fire in the Court House that burned most of the records, if not all of the records.

Q. Would you say that your records of criminal prosecutions, then, at least go back to 1870?

A. Yes, sir, I think so.

Q. And any person examining those records could come here and tell us how many prosecutions you had had?

A. Yes, sir, I think so.

Q. Did you make any such examination of the records before you came here?

A. No, sir, I did not.

page 1518 } Q. So you cannot tell us whether the record shows that the prosecution are more or less than they were back in the days when you admit that Breathitt County deserved the name of "Bloody Breathitt"?

A. No, sir. I am going by reputation alone, rather than statistics.

Q. You claim that the people have reformed and that prosecutions are not as numerous, but you haven't examined the records to be able to inform us accurately on that subject?

A. That is true, sir.

Q. However, it still has the name and is mentioned to this day as "Bloody Breathitt" sometimes?

A. Yes, sir. It sometimes is referred to by people who don't live in Breathitt County, and they are thinking of those older days, I am sure.

Q. The people in Breathitt County sort of put on a soft pedal about it, don't they?

A. They are not proud of it.

Q. Now, with reference to the slogan about "Beautiful Breathitt," do you claim you have a beautiful country with reference to scenery, mountain views, and so forth?

A. Yes, sir.

Q. Was this lady who suggested that slogan talking about the people or the scenery?

A. She evidently must have taken in both.

page 1519 } Q. So you claim you have beautiful people, too?

A. Beautiful people in character.

Q. Are you being paid for coming here; and if so, how much?

A. No, sir, I am not being paid for coming here. It has

*Prock Jackson,*

been mentioned to me that if I want to submit a bill, that my expenses, my actual expenses for coming down here will be paid. I haven't as yet submitted a bill. I don't know that I will. I discussed this matter with our County Judge, and he proposed that the Fiscal Court of Breathitt County—

Q. He proposed what?

A. That the Fiscal Court of Breathitt County make an appropriation to pay my expenses down here, but I don't know if that proposal will go through.

Q. To protect Breathitt County against the reputation that it is being given?

A. Yes, sir; I think it is my duty to do so.

\* \* \* \* \*

page 1520 {

\* \* \* \* \*

#### PROCK JACKSON

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION.

By Colonel Harris:

Q. What is your name, please, sir?

A. Prock Jackson.

Q. How do you spell that?

A. P-r-o-c-k.

Q. How old are you, Mr. Jackson?

A. Thirty-three.

Q. Where were you born?

A. I was born in Magoffin County, Kentucky.

Q. Were you raised over there?

A. Yes, sir.

Q. Did you ever work for the Laburnum Construction Corporation?

A. Yes, sir.

Q. When did you go to work for them?

A. Sometime in April, 1949, along about the first of April.

Q. Did you quit working for them?

A. Yes, sir.

Q. When did you quit working for them?

*Prock Jackson.*

page 1521 } A. I guess it was around the last of April.  
Q. Did you quit to get a job elsewhere, or were  
you discharged by Laburnum Corporation?

A. To get another job, sir.

Q. What kind of work had you been doing for Laburnum Corporation?

A. Labor.

Q. When you quit working for Laburnum Corporation, where did you go to work?

A. I went to work for the Allen Codell Construction.

The Court: Face the jury, Mr. Jackson.

By Colonel Harris:

Q. Was that in Breathitt County that you were working for Allen Codell?

A. Yes, sir.

Q. What kind of work were you doing for Allen Codell?

A. When I first went to work, I did labor work. Later I went on a jackhammer.

Q. When you left Laburnum and went over to Allen Codell, did you make more money or less money?

A. I made more money.

Q. How much an hour more did you make with Allen Codell than you had been making with Laburnum?

A. I made 20 cents, as laborer, more on the hour.

page 1522 } Q. Did you take part in any way in getting the  
common laborers organized at Allen Codell?

A. Yes, sir, I did.

Q. What part did you take? Did you or not write a letter?

A. To Mr. Tom Raney, yes, sir.

Q. Were you there, working for Allen Codell, on July 26, 1949?

A. Yes, sir.

Q. Where were you working at that time?

A. I was working in the rock quarry.

Q. That was where Allen Codell was working?

A. Yes, sir, Allen Codell.

Q. How far was that rock quarry from the schoolhouse?

A. About 100 yards, I guess.

Q. Did you keep on working in the rock quarry, or did you quit work, when Mr. Hart and the men with him came to the schoolhouse?

A. They came to the rock quarry first. I quit work when I seen them acoming.

*Prock Jackson.*

Q. What kind of work were you doing at the time they came to the rock quarry?

A. I was running the jackhammer.

Q. Did you put the jackhammer out of your hands and go with them up to the schoolhouse?

A. No, sir. I laid it down and came off the hill  
page 1523 } to the toolhouse.

Q. Did you get at any place where you could see the men at the schoolhouse?

A. You could see them from the rock quarry; it is straight across the creek about a hundred yards.

Q. Did you get where you could hear anything that went on at the schoolhouse?

A. No, sir, I didn't.

Q. Did you see any men at that time that were staggering around in a drunken condition?

A. No, sir.

Q. At the rock quarry, did you do blasting?

A. Yes, sir.

Q. What kind of blasting was done down at the rock quarry?

A. We did two different types. We did the heavy, where we would shoot off big ledges; and then we would have to re-drill and shoot up big boulders that came out, what is called pop shots. That is what we called them.

Q. Along in July, 1949, was there any customary time of day at which shots were fired in the quarry?

A. Yes, sir. We always shot around between 11:30 and 12:00, and then in the afternoon just before quitting time, about 5:00 o'clock.

Q. How many shots ordinarily would be fired  
page 1524 } between 11:30 and 12:00?

A. At that time, we would have to shoot the pop shots, which sometimes would run around 50, maybe, sometimes more; just whatever we had drilled up and loaded.

Q. This letter that you said you wrote to Tom Raney, did you write it while you were still working for Laburnum, or after you left them in May and went to Allen Codell?

A. I wrote the letter while I was working for Laburnum.

Q. Did you ever hear anything from Raney or anybody else in reply to the letter?

A. No, sir, I did not.

Colonel Harris: I think that is all. You may take the witness.

*Prock Jackson.*

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Jackson, what union do you belong to now?

A. I belong to the United Mine Workers.

Q. You are here to testify for them?

A. Yes, sir.

Q. What union did you belong to when you left Laburnum?

A. None at all.

Q. Did you join the United Mine Workers before you went to work for Codell, or afterward?

A. No, sir, I joined the UCW after I went to work for Allen-Codell.

page 1525 } Q. Did you join the UCW before you went to work for Codell, or afterward?

A. Afterward.

Q. How soon afterward?

A. It was in July.

Q. Within 30 days?

A. No.

Q. Within what length of time after you went to work for them?

A. I will say a month and a half.

Q. Why did you join the UCW?

A. That is the first man that I had seen come around to organize with.

Q. They wouldn't let you work there unless you joined them, would they?

A. No, sir, they didn't say nothing about that.

Q. I say, you couldn't work on that job unless you joined the UCW, could you?

A. We had a majority on the job.

Q. I say, you couldn't work on that job unless you joined up with them, could you?

A. After we organized, yes.

Q. I say, when you went to work and got your job there, you couldn't go to work and stay at work there unless you joined up with the UCW, could you?

page 1526 } A. At that time we were all working, and nobody belonged to the union.

Q. I say, when you went to work for Codell, you couldn't go to work and stay at work with them unless you joined up with the UCW, could you?

A. I could work with them when they weren't organized.

*Prack Jackson.*

Q. That isn't what I asked. I am asking you, Mr. Jackson—

Mr. Mullen: If Your Honor please, the witness has answered the question directly.

The Court: Do I understand that when you went there, Codell was not organized by UCW?

The Witness: He was not.

By Mr. Robertson:

Q. I am asking, when they did organize, in order to stay at work you had to join up or get out, didn't you?

A. Yes, sir.

Mr. Robertson: Stand aside.

Colonel Harris: There is one question I neglected to ask him, if I may, Your Honor.

#### RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. Were you at the meeting on the 24th when a vote was taken as to whether or not they would strike?

A. Yes, sir, I was.

page 1527 } Q. Did you make the motion or second the motion?

A. I seconded it.

. . . . .

Mr. Robertson: If Your Honor please, we have no objection to any pictures which have been shown us.

Mr. Mullen: By agreement of counsel, then, Your Honor, we will introduce these pictures, and shall refer to them as we go along. They are too big to set on that easel all together.

(Discussion off the record.)

Mr. Mullen: Do you want to mark these?

The Court: I think it would be well to have them marked.

Mr. Mullen: Mark this Defendants' Exhibit 2 in evidence.

(The photograph referred to was marked Defendants' Exhibit No. 2 and received in evidence.)

Mr. Mullen: Now we introduce, Your Honor, a page 1528 } picture showing the Laburnum office and Buck Hughes.

(The photograph referred to was marked Defendants' Exhibit No. 3 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 4, we introduce a photograph taken from the air, showing the entire outlay from tipple No. 1 down to the houses referred to in the evidence.

(The photograph referred to was marked Defendants' Exhibit No. 4 and received in evidence.)

Mr. Mullen: As Exhibit No. 5, we introduce a photograph showing the location of the store that has been referred to and the houses that either have been built before or since, I don't know. These pictures were taken as of the present time.

(The photograph referred to was marked Defendants' Exhibit No. 5 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 6, we offer a photograph showing, among other things, the rock quarry that has been referred to as being operated by the Codell people.

(The photograph referred to was marked Defendants' Exhibit No. 6 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 7, we offer a photograph showing the road leading from the store across the railroad, which has been referred to in the evidence.

page 1529 } (The photograph referred to was marked Defendants' Exhibit No. 7 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 8, we introduce a picture showing the Tipple No. 1 and the offices of Laburnum and the road leading therefrom.

(The photograph referred to was marked Defendants' Exhibit No. 8 and received in evidence.)

*William Orbin Hart.*

Mr. Mullen: And as Defendants' Exhibit No. 9, we introduce a picture showing the tippie, the headhouse, and Tipple No. 1, and the road leading around to the top of the tippie where the coal mining operations were going on.

(The photograph referred to was marked Defendants' Exhibit No. 9 and received in evidence.)

Mr. Mullen: We will give the jury a few minutes to look at them, and then I will call another witness.

The Court: Yes.

(Jury examining photographs.)

Mr. Mullen: Please call Mr. W. O. Hart.

Whereupon,

WILLIAM ORBIN HART,  
called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. What is your full name, sir?  
page 1530 } A. William Orbin Hart.

Q. How old are you?

A. Forty-four.

Q. Where do you live?

A. I live in Clarksburg, West Virginia, at the present time.

Q. What is your business?

A. Representative of District 50, United Mine Workers of America.

Q. Do you also do work for United Construction Workers?

A. Assigned to the UCW, that is right.

Q. Assigned to the UCW.

What are your duties as such representative?

A. To organize the unorganized, and to negotiate contracts when they expire at the various local unions, with companies.

Q. Were you connected with the Pikeville office, or is it Paintsville?

A. Pikeville office, Region 58, yes, sir.

*William Orbin Hart.*

Q. Does that include Breathitt County?

A. Yes, sir.

Q. How long were you there connected with the Pikeville office?

A. I went to work at Pikeville on March 21, 1949, and stayed until May 15, 1950.  
page 1531 }

Q. On May 15, 1950, were you transferred to your present location?

A. That is right, Region 22, Clarksburg, West Virginia

Q. Who is the head of that region?

A. August Rouse.

Q. You were sent there to take his place, or as his assistant?

A. I was sent there to assist him in negotiating contracts.

Q. In July, 1949, had you had any contract with any employees of Laburnum Construction Corporation, which was doing work at the place called Evanston, in connection with the development of the Pond Creek Pocahontas Company's Mine No. 1?

A. Yes, sir.

Q. When did you first contact any of them?

A. On July 8, around noon. The boys were eating their lunch. Harvey Robinson and I contacted them and signed up four men.

Q. What was the work being done by the four men?

A. They were laborers.

Q. Did you contact any of the carpenters at that time?

A. Oh, I talked to several of them, the few of them that were around the job eating their lunch.

Q. For what purpose did you contact the laborers?

A. To organize them, to put them into a union.  
page 1532 }

They didn't have any organization.

(Documents shown to Plaintiff's counsel.)

Mr. Robertson: No objection.

By Mr. Mullen:

Q. Were these the four cards that you signed up at that time? (Handing documents to witness.)

A. They are.

Mr. Mullen: We offer as Defendants' Exhibit 10, membership application and check-off authorization, District 50, United Mine Workers of America, signed by Green Stacy; as No. 11, a like membership application and check-off authoriza-

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tion signed by Matt Miller; as No. 12, like membership application and check-off authorization signed by Lee Bach; and as No. 13, a like application and check-off authorization signed by Jerry Barnett.

(The documents referred to were marked Defendants' Exhibits No. 10, 11, 12, and 13, and received in evidence.)

By Mr. Mullen:

Q. When did you next contact or get in touch with any of the employees of Laburnum Construction Corporation on that job?

A. On July 12, I was at the Codell Construction job at Mine No. 2, which had the sloping shaft, and signed up several of those boys, and they were telling me that the page 1533 } other boys wanted to see me. So I beat it back to the store. I didn't get to see them any more until the 24th.

Q. "Them"? To whom are you referring?

A. The Laburnum employees.

Q. What Laburnum employees did you get that message from?

A. I don't know. The Laburnum boys told me the Laburnum boys were wanting to see me.

Q. I mean, what classification?

A. Laborers.

Q. You say you were up at the Codell Company at that time. Were you or not organizing them?

A. That is right, I was organizing all of the Codell.

Q. What class were you organizing there?

A. Laborers, helpers, and drillers.

Q. They had not been organized?

A. No, sir.

Q. Do you know whether their skilled workers had been organized?

A. Yes, sir.

Q. In what union were they?

A. Operating Engineers, A. F. of L.

Q. On June 12, you didn't see the Laburnum employees because you got back to the store too late. Did you leave any word for them?

page 1534 } A. I did.

Q. What was it?

A. I left word for them to attend a meeting on Sunday, the 24th, at the Carver Schoolhouse.

*William Orbin Hart.*

Q. When did you contact Laburnum Construction Company's office?

A. July 13.

Q. Are you certain of that date?

A. Yes, because I put in a long distance call for two other companies, Allen-Codell and the Spurlock Food Company at Huntington, and Allen-Codell at Winchester, Kentucky.

Q. It is alleged in the Notice of Motion that on or about the 14th; but you say it was the 13th?

A. I say it is the 13th, because I called the other two companies the same day.  
page 1535 } Q. What happened when you called the Laburnum office in Richmond?

A. I called the Laburnum office and asked for the person who was in charge of the construction job in Breathitt County. Whoever it was asked me to wait a minute. Someone came to the telephone, identified themselves, but I don't recall who the person was. I told them that I was a representative of the UCW, that we had several of his people signed up into the UCW and we wanted a recognition conference. The reply was that they were dealing with the A. F. of L., that their people belonged. I said, "No, the helpers and the laborers do not belong to any union at all, and the UCW has them signed up," and to give me a letter. I gave Mr. Hunter's address and gave them my address, to write a letter telling us when they would come in and sit down with us for a conference.

I told the person I had heard that they were going to build three or four hundred houses, just hearsay. Their reply was that they didn't know anything about the three or four hundred houses.

Q. Did you in that conversation make it clear what classification of employees you were asking them to recognize the union for?

A. I told them the laborers and helpers didn't belong to any union at all and we represented them.  
page 1536 } Q. Did they or not promise to write a letter?

A. I asked them to write a letter, and I don't know what his reply was. I gave them the address and told them to write us.

Q. Do you know whether he asked you not to do anything until you talked to him again?

A. No, sir; there wasn't any such statement as that made.

Q. Did you at that time say to whoever you were talking with, or not, that the territory in which they were working

*William Orbin Hart.*

was United Mine Workers' territory and that they would have to join up if they worked there?

A. No, sir; I didn't make any statement of that kind. I did say that Region 58 covered Breathitt County.

Q. Did you or not make any threat about what you would do if they didn't sign up for the laborers?

A. No, I didn't make any threats. The only thing is, I said we had the Beckett Construction job down there and the Wheelwright job, the link belt, rather.

Q. Did you organize the laborers at those two jobs?

A. I did.

Q. Were they recognized by the employer?

A. They were.

Q. What did you next do after you talked to Mr. Bryan? When were you next up in that territory, the site of that work?

A. I wasn't back up in there any more until page 1537 } the 19th. I was back in there on the 19th contacting those fellows there at the Codell Construction job.

Q. Did the Codell Construction Company employees take any action at that time to gain recognition?

A. They all signed up. They were all signed up.

Q. That was the Codell Construction Company?

A. That is the Allen-Codell, which signed up, and also Codell signed up something, and the Codell people had taken action, yes.

Q. What did they do?

A. They struck.

Q. On what date?

A. The 19th, in the afternoon before the second shift went on.

Q. That strike was for what purpose?

A. Union recognition and a contract.

Q. Did you at that time hear anything from the laborers on the Laburnum job?

A. Yes, sir. The boys asked Justice Cole, or some of the boys there told me, the Laburnum boys told me, they were going to strike the following Tuesday if we didn't get in and do something for them.

Q. Did you thereafter meet with Laburnum?

A. The 24th I did.

page 1538 } Q. Where did you meet on the 24th?

A. Carver School House.

Q. Who met with you there?

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A. All of the laborers and helpers in Breathitt County. It was for all the jobs on the Pocahontas Coal Company project there: Codell, Allen-Codell, and the Laburnum employees.

Q. Did you make any report to that meeting of what you may have accomplished for them?

A. I reported to the Codell employees what had taken place in the negotiations previous to this, and also told the Laburnum boys that we had given Mr. Bryan plenty of time to answer our call by letter, and that he hadn't taken such action, and therefore it was up to them to take whatever action they deemed necessary. The Allen-Codell boys did the same.

Q. Do you know how many of the laborers of Laburnum were present at that meeting?

A. The best I can recall, it was about 9.

Q. Do you know what the total number of laborers on the Laburnum job was?

A. Some said 18, some said 15. I didn't know.

Q. Did those nine at that meeting, or whatever number was there, the Laburnum laborers, take any steps to become members of the UCW or District 50?

page 1539 } A. They did. I obligated all of them.

Q. What do you mean by "obligated"?

A. We have an obligation in our rules and regulations that they always take before becoming a member, and I read that and they all taken it.

Mr. Mullen: Give me a copy of Plaintiff's Exhibit No. 2 or 3, please. We have a copy here.

The Court: Is there any objection to his using his copy?

(Discussion off the record.)

By Mr. Mullen:

Q. Do you want to refer in there to the obligation they took?

A. Page 29 is where it is. I know where it is. Right here.

Q. Did you read that to them?

A. I did.

Q. Did they all obligate themselves to comply with it?

A. They did, that is right.

Q. That was on the 24th of July?

A. That is right.

Mr. Mullen: I would like, gentlemen, to read this now:

*William Orbin Hart.*

"I do sincerely promise, of my own free will, to abide by the laws of the union; to bear true allegiance to, page 1540 } and keep inviolate the principles of the United Construction Workers; never to discriminate against a fellow worker on account of creed, color, or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on all occasions and to the extent of my ability the members of our organization.

"That I will not, unless officially authorized, reveal to any employer or boss the name of anyone a member of our union. That I will assist all members of our organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the union or seeking better remuneration for his labor; and as only by standing together can workers improve their lot, I promise to cease work at any time I am called upon by the organization to do so. And I further promise to help and assist all brothers in adversity, and to have all eligible workers join the union that we may be able to enjoy the fruits of our labor; and that I will never knowingly wrong a brother or see him wronged, if I can prevent it.

"To all this I pledge my honor to observe and keep as long as life remains, or until I am absolved by the union."

By Mr. Mullen:

Q. That is known as obligating the men who had joined the union?

page 1541 } A. That is right; yes, sir.

Q. Were there many people at that meeting on the 24th?

A. Yes, sir; there was a large number there.

Q. Did they all stay there through the meeting? Were they there when you obligated these people?

A. I asked all the people who did not belong to the union to retire from the room.

Q. Did they do so?

A. They did.

Q. Did the Codell employees, their common laborers, obligate themselves at the same time?

A. Yes, sir.

Q. After they had obligated themselves what steps, if any, did the Laburnum laborers take to organize?

A. Jerry Barnett made a motion to strike, that they had waited long enough for a letter to be written by Mr. Bryan

*William Orbin Hart.*

and to strike. Prock Jackson seconded the motion, and the vote carried unanimously.

Q. Was Jerry Barnett one of the laborers of Laburnum?

A. He was.

Q. The question I asked you, however, was, what steps did those eight or nine or ten laborers take to organize at that meeting after they had obligated themselves?

A. Oh, they elected stewards.

Q. Who did they elect stewards?

page 1542 } A. Jerry Barnett and Ossie Lovely.

Q. What does a steward do?

A. He participates in negotiations of contracts and takes care of all the grievances on the job.

Q. That is on behalf of the members?

A. On behalf of the membership.

Q. After having a unanimous vote to strike, what, if any, plans were made to carry out the strike?

A. They asked the Codell Construction boys to support them in the strike and to come over the next day. When we approached the job, they would quit the job, leave the job, and join the pickets. The Codell boys then voted that they would go along with them and support them in this strike.

Q. Which Codell boys are you referring to?

A. That is the Codell Construction.

Q. The Codell Construction Company is the one also known as the Codell Fauleoner Company?

A. Yes, sir.

Q. Were they the ones you say were already on strike?

A. Yes, sir.

Q. Then the other Codell people in that meeting were from what company?

A. Allen-Codell.

Q. Did they vote to strike?

A. They did.

page 1543 } Q. So all three were on strike?

A. Yes, sir. When we approached the job, the Allen-Codell boys walked off to join us and so did Laburnum.

Q. For what purpose were they going to strike?

A. For union recognition and union contract, in the way of more wages and other conditions of employment.

\* \* \* \*

Q. We stopped where you had described what occurred at

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the meeting on the 24th of July, 1949, at Carver. What was the next step that you took?

A. It was in the meeting that if it rained on Monday, the next day, we wouldn't be there because of the condition of the roads. So on Tuesday I met the Codell Construction employees at the store, at the forks of the road just off the foot of the hill.

Q. Where did you go from there?

A. We went from there to the Allen Codell Rock Crusher just above the store, and the Allen Codell boys joined us, several of them joined us there.

Q. You say at the rock crusher. What were they doing there?

page 1544 } A. How is that?

Q. What were they doing at the rock crusher?

A. They were crushing stone for the roads.

Q. Is that a quarry?

A. That is right, a stone quarry.

Q. Did they join you there or not?

A. They did.

Q. Was there any delay in their joining you?

A. No, sir. When we told the shovel operator that *were* were there for the strike, he shut his shovel down, and the truck was backing under the shovel to be loaded. He told the boys, he said, "It is down until we get a contract." He moved his shovel out of the pit down below where it wouldn't be in any danger.

Q. Is that where they blast the rock?

A. Yes, sir.

Q. Was any blasting being done at that time?

A. They had several holes drilled to be blasted, and when they walked off the job one of the boys—I don't recall who it was—said they had some shots there to put off, and they stayed and put off the shots before coming down and joining with us.

Q. You went on from there to what point?

A. To the school house, which was being done by the Laburnum Construction Company.

page 1545 } Q. I wonder if you can show on those pictures where the rock quarry and the schoolhouse were. Will you look at these. Does that show the rock quarry (showing Defendants' Exhibit 6 to the witness)?

A. This looks like it right here, I am not sure (indicating). Yes, this is it right here, I believe.

Q. What is at this point (indicating)?

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A. This is the new store building which has been built here.

Q. Where is the store that you referred to?

A. It was sitting over on this side of the road, over here.

Q. In which direction is the schoolhouse you are referring to?

A. The schoolhouse is back up this way.

Q. Did I understand you to say that some of the Codell boys met you at the store?

A. That is right. This building wasn't in here then. They were scattered out in here.

Q. Then you went—

A. From there to here.

Q. That is where the Codell Construction—

A. Allen-Codell was here.

Q. And some of them joined you there?

A. That is right, and from there we went on page 1546 } up this way. The schoolhouse isn't in here.

Q. Put that one down for the moment. Can you show on this the quarry?

A. Yes, here is the quarry right here.

Q. What is this right here?

A. That is the schoolhouse, if I am not mistaken. The company has built a new building in here of some kind. I don't know, it is for storage or something. I don't know what it is. It is connected with the store.

Q. What is this junction of the road there?

A. This road here, when you come off the mountain this way, you come across here. This goes to No. 2 mine and this goes down to No. 1 mine.

Q. That goes down to what you call the tipple?

A. That is right.

Q. How many men went with you to the schoolhouse where Laburnum was working?

A. Between 20 and 30.

Q. Where were those men from?

A. The Codell Construction Company employees, laborers and helpers.

Q. Were there any Allen-Codell men with you?

A. Yes, sir.

Q. Were there any outsiders?

A. I don't recall any.

page 1547 } Q. The people who went with you, you say, were the employees of Codell?

A. That is right.

Q. When you got to the schoolhouse what took place?

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A. I walked up and was talking to the steward. Who he was I don't know. I told him we were there, that the Laburnum Laborers and helpers were going to strike and we would like for them to go along with us and to support it, and they could join if they wanted to. It was up to them. But what I wanted was the laborers and the helpers, and while I was talking one of the laborers came over and signed, one who hadn't previously signed before.

Q. What did the steward say?

A. He told me, "You will have to see our business agent. He is at the tippie. You go down there and talk to him and we will be down as soon as we eat our lunch."

Q. Did any one of your people there have anything to say out of the way?

A. One boy started to talking, and I told him to be quiet, that I would handle the situation.

Q. Did you or not tell them that it was your job, you came there to take it over and they couldn't work unless they joined your union?

A. No, sir; I did not.

Q. Were the men with you armed or not?  
page 1548 } A. No, sir.

Q. Were they drunk?

A. I didn't see any one, no.

Q. Were or were not any threats made against the carpenters there at the schoolhouse?

A. No, sir.

Q. Did you see any physical contacts between any of the men with you and any of the carpenters there?

A. No, sir; it was impossible for there to be physical contact.

Q. Why?

A. Because there were saw horses standing between us with lumber piled on it, two-by-eights. We were on one side and they were on the other.

Q. Was that a lumber pile or lumber they were working on?

A. They were sawing. What they had used to saw had been stacked up there.

Q. That separated you and your people from the carpenters?

A. Yes, sir; plus the foundation which they were working on, which they were building.

Q. Were there any laborers of Laburnum there?

A. Yes, sir.

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page 1549 } Q. Do you know how many were there?  
A. I recall three.

Q. Who were they, if you recall?

A. Jerry Barnett and Burl King, and who the other was I can't recall, I guess.

Q. Had they been in the meeting at Carver on the 24th?

A. Yes, sir, Jerry had. I don't know about Burl. I can't recall him being there, but I believe he was.

Q. Were they or were they not expecting you and the company, the Codell people, to come at that time?

A. Yes, sir; they were.

Q. You went from there to what point?

A. To the tipple.

Q. Did you leave any people at the schoolhouse?

A. No, sir.

Q. What appeared to be the relationship between the men you brought and the men at the school house so far as any question of enmity was concerned?

A. Very friendly.

Q. Did the steward tell you who he wanted you to contact?

A. Yes, sir.

Q. Who was that?

A. Bert Preston.

Q. Who was he?

page 1550 } A. He was business agent for the A. F. of L. carpenters, of the Paintsville local union?

A. Did the carpenters there, the laborers, say anything as to what they would do? Was it dinnertime?

A. Yes, sir.

Q. Did they go up to the tipple with you?

A. Some did follow along behind us.

Q. On the way to the tipple from the schoolhouse did you hear any shots?

A. Only the rock quarry shots was all.

Q. Tha was the quarry that you have shown the jury on these pictures?

A. Yes, sir.

Q. Do these pictures show the road you went along from the schoolhouse up to the tipple?

A. This one does (indicating Defendants' Exhibit 8).

Q. In what direction was the schoolhouse?

A. In this direction (indicating).

Q. You came up—

A. I came from the schoolhouse. This is the direction from

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the schoolhouse in which we came. We came down through here, and this is the road leading off to the tipple down this way, down into here. We came up this road here, you see, right up to the tipple.

Q. What is this?

A. This is where Mr. Bryan had his office right page 1551 } here, employment office, where he signed on employees.

Q. Did you and the people with you pass through there and go on down somewhere by the tipple?

A. Yes, sir. We parked our cars right here. There were four cars parked right there.

Q. Where did you go to?

A. We came down here and crossed up to the tipple.

Q. When you got to the tipple, did you find the carpenters and other employees of Laburnum up there?

A. Yes, sir. They were eating lunch.

Q. Were there any buildings around there?

A. A small toolhouse.

Q. Did you find Bert Preston?

A. Yes, sir. The first man I contacted was Oscar Wireman, committeeman, and then we went on and met Bert Preston.

Q. Who was Oscar Wireman working for?

A. He was working for the Pocohantas Coal Company.

Q. Then you went on and who did you next contact?

A. There were two fellows sitting at the end of the building as you go around in front of the tipple. There were two men sitting here on my left and I asked them where was Bert Preston. They said he was around in the building. I went on around the back way and came back in through the door, and there were several boys sitting in there, page 1552 } about five or six. There might have been more.

Q. In what building was that?

A. Just an old toolhouse that they had there.

Q. How large a house was that?

A. Oh, maybe eight by ten or twelve, something like that, about eight by twelve. I don't think it would be much over that, if it was that big.

Q. Was Bert Preston in there when you got in there?

A. Not at first, no.

Q. Did you talk to the men in there?

A. Yes, sir; I talked to several of the men who were sitting around, telling them what the benefits of the organization were and talking to John Arnett. He asked me what

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were the benefits of the United Mine Workers, District 50, and UCW, and I was explaining the benefits that could be received from joining our organization and told them that the laborers and helpers had requested us to take them in and we were taking them in.

Q. Was Arnett a carpenter or a laborer?

A. He was a carpenter.

Q. Did you or not ask the carpenters to join you at that time?

A. No, I didn't ask the carpenters to join us. I asked them to join with us in the strike, but not to join the union.

Q. Did you and Arnett have any words?

page 1553 } A. I was just explaining what could be done by joining District 50, a part of the United Mine Workers, one of the districts, and the UCW was affiliated with the United Mine Workers. He said "If you are representing UCW as the Mine Workers as such, you are a damned liar." Then I went ahead and explained it to him and told him he was wrong and showed him the connection and how it was, that UCW was only affiliated with District 50 or the United Mine Workers.

Q. Did anybody have to separate you when he called you a liar?

A. No, I just laughed at him. He didn't understand what I was talking about.

Q. Then had Bert Preston arrived by that time or not?

A. Yes, sir; Mr. Preston came in and then I told him that the laborers and helpers were going on strike and wanted them to join in with us and help us to support it. He said, "Hart, you know that we can't strike." He said, "We have a contract with Bryan of the Laburnum Construction Company, and we would be breaking our contract if we struck, but if you will establish a picket line our men will honor it."

Q. Was there any conversation between you two as to the nature of the picket line?

A. He told me to put up a legal picket line.  
page 1554 } I asked him what he considered a legal picket line, and he looked at me and laughed and said, "You know what a legal picket line is."

Q. What did you do then?

A. I sent some boys and told them to get me a piece of cardboard and I would make a temporary picket sign to serve the purpose while we were there at that place.

Q. Did Bert Preston ask you as to whether you would have a picket line there the next day?

*William Orbin Hart.*

A. Yes, sir. He said "We will honor a picket line as long as it is established, but when there isn't any picket line we will sure as hell work."

Mr. Mullen: I would like to get the exhibits which are the picket signs, please.

Mr. Robertson: Those picket signs have 1, 2, and 3 on them to represent the order in which they were introduced and the chronological order in which they were put up, I think.

By Mr. Mullen:

Q. I hand you Plaintiff's Exhibit No. 23 and ask you what it is.

A. The temporary picket sign which was used on the job that particular day.

Q. Who prepared that?

A. I did.

page 1555 } Q. After you prepared it, what did you do with it?

A. This one that was nailed up, it looks like, on the side of the building right at the corner at the tippie.

Q. Can you show the jury on this picture just where it was put (referring to Defendants' Exhibit 8)?

A. No, this tippie here hides the building. Right here is the corner of the place right here. This sign was posted right on this corner right there temporarily. It didn't stay there more than an hour, maybe two. It stayed there until I got ready to leave.

page 1556 } Q. Were the men there to support the picket line?

A. There were several men there.

Q. How do you form a picket line in the country like that?

A. If you are on the highway, on each side of the highway. You can't block a highway or a public passageway.

Q. That is in the country?

A. Yes.

Q. Did you prepare any further picket signs?

A. I made two at that particular time.

(Object handed to the witness.)

A. I made this (indicating), but these holes weren't in it when I made it, I don't think.

Q. Where was that put?

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A. That was one that was carried in one of the boys' hands. This looks like the one the boys had out in front of the tippie when the tippie foreman came out and asked were we picketing the tippie, and I told him no. He said, "One of your boys is in front of the tippie," and I went out and called him back and told him to come back from in front of there because he was liable to get hurt.

Q. Did you move him to some other point?

A. Yes, sir. He was in the crowd. I brought him back out in front of the tippie.

Q. Were you on any road? Were those signs on any road?

A. Yes, sir. On the 28th we posted some signs, page 1557 } had some signs kind of decently printed to put up.

Q. Is that one of the signs you refer to? (Referring to Plaintiff's Exhibit 25.)

A. Yes, sir, it is. This one here was made by Edward Cole's wife.

Q. There is on it in pencil an arrow.

A. I did this myself, because it was referring to carpenter helpers and not carpenters.

Q. You say the mine people asked you to move it from the side of the tippie?

A. Yes, sir. Mr. Haslam—what position, General Manager, I think, of Pond Creek Pocahontas Coal Company—asked me to move—not to post the sign on the tippie and to move our pickets back up to the road.

Q. Show where you moved them toward the road.

A. I moved them from here back to right in here (indicating on Defendants' Exhibit 8), where this road turns over the hill, I moved them back right in there.

Q. Past the Laburnum office, and so forth?

A. That is right.

Q. You put a picket sign here?

A. I put it right up here, just over the bank from the road.

Q. That is the road that they go to work on the tippie?

A. Yes, sir. These boys here all moved back, page 1559 } and I was the last man to leave the tippie, to see that every man was removed as requested by the Coal Company.

Q. So, to go to work on the tippie, they had to pass this picket sign here?

A. Yes. That was their main passageway through there.

Q. Did you then sign up other laborers of Laburnum?

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A. I didn't, but under my supervision some of the other boys signed them up.

Q. Did that include those who had already obligated themselves?

A. Yes, sir. They all signed cards.

Q. They all signed there under your supervision?

A. Yes, sir.

Q. Then what was done with the cards?

A. I turned them over to Mr. Hunter, who was the Regional Director at that time.

Q. His office was at Pikeville?

A. Yes, sir.

Q. Were you working under Mr. Hunter?

A. Yes, sir, under his supervision.

Q. Were those cards preserved there as part of the records of the office?

A. Yes, sir.

(Documents handed to Plaintiff's Counsel.)

page 1559 } Mr. Robertson: No objection to any of them.

By Mr. Mullen:

Q. Do you know whether the four who had signed for you on the 8th of July again signed up on the 26th?

A. I believe they did. I know three of them did.

Mr. Mullen: If Your Honor please, we want to introduce as Defendants' Exhibit No. 14, Membership Application and Checkoff Authorization, United Construction Workers, Affiliated with United Mine Workers of America, signed by George P. Miller.

(The document referred to was marked Defendants' Exhibit No. 14 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 15, like Application and Checkoff Authorization, signed by Hargus Howard, who is the man that the expert said no two people could sign that rotten.

(The document referred to was marked Defendants' Exhibit No. 15 and received in evidence.)

*William Orbin Hart.*

Mr. Allen: State to whom they are made.

Mr. Mullen: Membership Application and Checkoff Authorization, United Construction Workers of America, Affiliated with the United Mine Workers of America. "I hereby request and accept membership in the United Construction Workers, affiliated with the United Mine Workers of America."

Mr. Allen: You can just state it, and not read it.

Mr. Mullen: The same, as Defendants' Exhibit 1560 }  
Exhibit 16, for Lee Bach.

(The document referred to was marked Defendants' Exhibit No. 16 and received in evidence.)

Mr. Mullen: The same, as Defendants' Exhibit 17, for Ossie Lovely.

(The document referred to was marked Defendants' Exhibit No. 17 and received in evidence.)

Mr. Mullen: The same form of Application and Checkoff Authorization, as Defendants' Exhibit No. 18, signed by Jerry Barnett.

(The document referred to was marked Defendants' Exhibit No. 18 and received in evidence.)

Mr. Mullen: The same instrument, as Defendants' Exhibit No. 19, signed by Earnest Howard.

(The document referred to was marked Defendants' Exhibit No. 19 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 20, like Membership Application and Checkoff Authorization, signed by John Jordan.

(The document referred to was marked Defendants' Exhibit No. 20 and received in evidence.)

Mr. Mullen: The same form of Membership Application and Checkoff Authorization, as Defendants' Exhibit No. 21, signed by Burl King.

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page 1561 } (The document referred to was marked Defendants' Exhibit No. 21 and received in evidence.)

Mr. Mullen: The same Membership Application and Check-off Authorization, as Defendants' Exhibit No. 22, signed by Luther Litteral.

(The document referred to was marked Defendants' Exhibit No. 22 and received in evidence.)

Mr. Mullen: The same Membership Application and Check-off Authorization, as Defendants' Exhibit No. 23, signed by Matt Miller.

(The document referred to was marked Defendants' Exhibit

Mr. Mullen: The same form of Membership Application and Checkoff Authorization, as Defendants' Exhibit No. 24, signed by Avis Salyers.

(The document referred to was marked Defendants' Exhibit No. 24 and received in evidence.)

Mr. Mullen: The same form of Membership Application and Checkoff Authorization, signed by Green Stacy, as Defendants' Exhibit 25.

(The document referred to was marked Defendants' Exhibit No. 25 and received in evidence.)

Mr. Mullen: Membership Application and Checkoff Authorization on the District 50, United Mine Workers, form but otherwise the same as those heretofore filed, page 1562 } signed by Green Trusty, as Defendants' Exhibit No. 26.

(The document referred to was marked Defendants' Exhibit No. 26 and received in evidence.)

Mr. Mullen: Like form of Membership Application and Checkoff Authorization, the same as Defendants' Exhibit 26, signed by Dan Combs,—

Mr. Robertson: Let the record show whether that is District 50 or UCW.

*William Orbin Hart.*

Mr. Mullen: I said the same as the previous.

Mr. Robertson: Which is it?

Mr. Mullen: All right. District 50.

Mr. Robertson: I didn't understand.

Mr. Mullen: I offer that as Defendants' Exhibit 27.

(The document referred to was marked Defendants' Exhibit No. 27 and received in evidence.)

Mr. Mullen: And as Exhibit No. 28, Membership Application and Checkoff Authorization on the form of District 50, United Mine Workers of America, signed by Green Conley.

(The document referred to was marked Defendants' Exhibit No. 28 and received in evidence.)

The Court: Would this be a good stopping point for you?

Mr. Mullen: Let me read one of those, and I will stop.

Mr. Robertson: Read one of each, please.

page 1563 } Mr. Mullen: All right, I will read one of each.  
(Reading Defendants' Exhibit 26:)

"Membership Application and Checkoff Authorization  
"District 50, United Mine Workers of America

"I hereby request and accept membership in District 50, United Mine Workers of America, and authorize it to represent me in my behalf to negotiate and execute any and all agreements pertaining to wages, hours, and conditions of work. This power to act in my behalf expressly revokes and shall supersede all previous authorizations which I may have given to any other person or organization for the purpose of representing me as an employee. The Constitution, Laws, Rules, Policies, Regulations and Edicts of the above Union and all amendments thereto shall be binding upon me. In consideration for services rendered and to be rendered by the above Union, I agree to pay all reasonable amounts of money lawfully required as a condition to obtain and maintain membership in good standing.

"My employer, therefore, is hereby authorized to deduct from my wages and turn over to the officer or representative, as designated in the applicable agreement, all such amounts of money above outlined and limited to the amounts provided in the applicable agreement between the above Union and my

*William Orbin Hart.*

employer, and this authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, until I give written notice to the Company and the Union at least 60 days and not more than.....days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.

Signature.....

Clock No.....

Address.....

Employed by.....

Social Security No.....

Date....."

These three so read.

The other one, since you wish me to read both: (Reading Defendants' Exhibit No. 25.)

"Membership Application and Checkoff Authorization  
United Construction Workers  
Affiliated with United Mine Workers of America

"I hereby request and accept membership in the United Construction Workers, affiliated with the United Mine Workers of America, and authorize it to represent me in my behalf to negotiate and execute any and all agreements pertaining to wages, hours, and conditions of work. This power to act in my behalf expressly revokes and shall supersede all previous authorizations which I may have given to any other person or organization for the purpose of representing me as an employee. The Constitution, Laws, Rules, Policies, Regulations and Edicts of the above Union and all amendments thereto shall be binding upon me. In consideration for services rendered and to be rendered by the above Union, I agree to pay all reasonable amounts of money lawfully required as a condition to obtain and maintain membership in good standing.

*William Orbin Hart.*

"My employer, therefore, is hereby authorized to deduct from my wages and turn over to the officer or representative, as designated in the applicable agreement, all such amounts of money above outlined and limited to the amounts provided in the applicable agreement between the above Union and my employer, and this authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, until I give written notice to the Company and the Union at least 60 days and not more than.....days before any periodic renewal date of this authorization and assignment of my desire to revoke the same."

This one is signed, has a signature, "Green Stacy," and the address. It has no Social Security number, as some of them do.

If Your Honor please, I believe that is all.  
page 1566 } The Court: Sheriff, recess the court until  
2:15.

(Whereupon, at 1:00 o'clock p. m., a recess was taken until 2:15 o'clock p. m., of the same day.)

page 1567 } AFTERNOON SESSION.

2:15 p. m.

Whereupon,

WILLIAM ORBIN HART,

. . . . .

FURTHER DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Hart, when you were leaving the toolhouse or before you left the toolhouse, did you have any further conversation with either Bert Preston or with Arnett?

A. I had a conversation with Bert Preston.

Q. What was that about?

*William Orbin Hart.*

Mr. Robertson: You said the schoolhouse?

Mr. Mullen: I meant the toolhouse.

The Witness: I was talking to Bert Preston and I told him that we wanted him to honor the picket line, and he referred that he would honor the picket line as long as there were pickets on the job, and that they would go back to work when there wasn't a picket line on. He said "We will sure as hell work when there isn't any pickets here."

By Mr. Mullen:

Q. Did you have anything to say about bringing in any other men to keep the picket line going?

A. I told him if it was necessary I could bring  
page 1568 { 500 men from Beaver Creek.

Q. What did he say to that?

A. He said, "I don't believe a damned word of it", that "I have as many friends on Beaver Creek as you have."

Q. Then did he say anything about what might happen if you brought those men over?

A. I said "There could be some butt kicking going on," and he said, "Yes, it will go on both ways," and laughed and walked out.

Q. Did you have any further talk with John Arnett?

A. John replied to me, too. They were laughing about it as we walked out. There weren't any harsh remarks made. We were all laughing together when I walked out of the toolhouse.

Q. Did the laborers who signed up that day do so of their own accord, or were they forced to sign?

A. They did it of their own accord.

Q. The larger majority of those had been obligated, you said, already, on the 24th?

A. The large number of them had.

Q. Did you make any threats as to what would happen if they didn't sign up?

A. No, sir.

Q. Did you make any threat against the carpenters if they crossed the picket line?

page 1569 { A. No, sir.

Q. How long did the group of men who came with you stay around there?

A. When we went up into the road they were all gathered at the road and waited until I came up. I was the last man who left the tipple. They came up into the road and some few of them stayed there by the picket line and the rest of us

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went up to the store and got our lunch. Some scattered off and went home.

Q. Did you see Mr. Bryan that day?

A. Yes, sir.

Q. Will you state where you saw him?

A. I saw him as you cross the railroad tracks, the road leading up to No. 1 and No. 2 mine, one comes down the road to No. 1 and one goes up to No. 2. I met him right in the forks of the road, he and two other gentlemen.

Q. Will you look at this picture, please, and show where you met him?

A. Yes, sir, right here. Mr. Bryan stood right in here (indicating) and I stood right here. We were waiting here. I saw him come up the road and I stood right along in here (Referring to Defendants' Exhibit 7).

Q. Please state what occurred between you and Mr. Bryan at that time.

A. Mr. Bryan identified himself and I identified myself, who I was and whom I was representing and presented my credentials. We told Mr. Bryan what we wanted, that we were wanting union recognition, wanting him to sit down and negotiate a contract. Mr. Bryan was very, very nasty from the beginning. He wanted to know what in the hell did I mean by closing his job down, and the tipples still operating. I said "Your boys have went on strike, the tipples boys belong to District 30 of the United Mine Workers, and Tom Raney would give them orders as to what for them to do." He said, "Who is Tom Raney?" I said "Tom Raney is the executive board member of the United Mine Workers with an office at Pikeville."

Q. Had Tom Raney given you any orders?

A. No, sir; Tom Raney wasn't my boss.

Q. What, if any, explanation did you make to Mr. Bryan at that time as to what employees of his you were organizing and asking recognition for?

A. I was after the laborers and the helpers. He said, "I called your office and told them that I could get in touch with you here." That was referring to me. I said, "Well, if you did call the office it was too late anyway because the strike had already been planned and you had plenty of time to write us a letter telling us when you would meet us." That hadn't been done and therefore we struck.

Q. What did he say to that?

page 1571 } A. He said he would not recognize the UCW at all.

*William Orbin Hart.*

Q. Did both you all get mad?

A. Very—Yes. Mr. Bryan was very nasty from the beginning and of course I got hot too after so long a time. I had never met any nastier person.

Q. Did your talk there result in any decision or any contract or any negotiation?

A. No, sir. He refused to negotiate at all.

Q. Did he say anything to you about going to work himself?

A. Yes. He said he and the two gentlemen who were with him would go up to the schoolhouse and finish it themselves, and I laughed at him and told him he wouldn't dirty his little white hands with a hammer and nails and go up there to go to work.

Q. How many men were with you when you met him?

A. I believe there were three—wait a minute, four. I remember the other boy who was with them. There were four of us.

Q. Had any of them been drinking?

A. Not that I knew of, no.

Q. Had you been drinking?

A. No, sir. I don't drink.

Q. Then did you stay around there longer or what did you do?

A. In a few minutes I went over to the store page 1572 } and then got in the car and went on home. The other boys did the same.

Q. All of that was Tuesday the 26th of July?

A. That is right.

Q. Were you over there on the 27th?

A. No, sir.

Q. Did any one go over in your place?

A. Mr. Hunter assigned Harvey Robinson to go in my place that day.

Q. Did you on the 27th of July have any further talk with Mr. Bryan or with any of the employees of the Laburnum Construction Company?

A. Yes, sir; I did.

Q. Where and when?

A. Mr. Hunter and I were in Paintsville to meet Mr. White and James Codell for negotiations. We waited there some time, around 11 or 11:30 and Mr. Swan was on the job. We got a call from Mr. Codell saying it was impossible to meet him and to make other arrangements for us to talk. Mr. Swan did. We came out onto the street and I ran into some of the carpenters. I was talking to them, and they asked

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where I could meet him. I said there is a misunderstanding, it seems like with, you fellows as to this whole  
page 1573 } thing, going along with us. They said "Well,  
now, Hart, if you want to talk, we will get our  
business agent and we will round up the boys and find out  
what it is."

I said, "O. k." Mr. Hunter was with me. They went after Mr. Preston, who lives some few miles away from Paintsville. They went out and rounded up the boys and set the meeting for two o'clock at the Carpenters Union Hall. At two o'clock we met. I went in to the meeting with him. Hunter went on in to Pikeville.

Q. What, if any, explanation did you make to the carpenters in that meeting?

A. I told the carpenters that we were not asking them to join the UCW, that they had a contract and we would not ask them to violate it. We did want them to honor our picket line, and that if they would honor ours then we would honor theirs in case they had trouble, that we would both work together and would gain more for our membership.

There wasn't any remarks made right in the beginning. We started to adjourn, and a fellow by the name of Patrick, who identified himself as a steward on the job at the tippie, called two other fellows back in the back end of the hall, some ante room, and came back and they talked a few minutes and then came back and told me, says, "Hart, we will not cross your picket line." Then Bert Preston raised up and said, "I am  
page 1574 } responsible for all of this." I said, "Bert, why  
do you say that?" He said, "Because if we had  
organized them in the beginning we wouldn't  
have had this trouble."

Q. Did anything else occur there or that was the end of the meeting?

A. That was the end of the meeting.

Q. When did you next go to the job site?

A. The 28th.

Q. What happened there then?

A. There was nothing in particular happened from there on up to the first.

Q. Were there or were there not pickets on the job?

A. Yes, sir; there were pickets on the job at all times. I checked the pickets each day.

Q. Were some of the signs still up?

A. Yes, sir.

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Q. You say nothing happened until August first. What happened on August first?

A. On August first I went back over to the job site, there at the picket line, and there were several carpenters there, carpenters, laborers, pickets and everybody else. There were several there. Bob Poe, who identified himself as the business agent for the Salyersville Local, said, "Hart, we have formed a new local union, and we are not going to have those damned Johnson County fellows in it. We are only having the Breathitt, Knott and Magoffin County men  
page 1575 } in the organization, and we are wondering if we do the work ourselves, would you withdraw your pickets."

I said, "Do you mean to say you want to scab on these helpers and laborers?"

From that talk—there is a building just above the road from Mr. Bryan's office, I called the boys up there in that meeting. I told them the same thing that I told Paintsville boys, that we weren't trying to take their local union away from them, that we weren't asking them to join. If they wanted to come into our organization as a unit, okay, but if they didn't we wouldn't take them at all unless they did come in as a unit. We wanted them to honor the picket line and we would honor their contract and we would all get along together. After some discussion there, the boys pulled out and went home.

Q. Was Mr. Bryan there?

A. He was in his office.

Q. Did Mr. Bryan also suggest to you that the carpenters could do the work and didn't have any need of the laborers?

A. I don't know whether Mr. Bryan did or not, but it was mentioned in the meeting. Bob Poe is the man I remember talking to me about it.

Q. At that time did Mr. Bryan ask you to talk to anybody on the phone?

page 1576 } A. Yes. I was down over the bank just a little. Mr. Bryan called me. I believe he hollered at me and told me someone wanted to talk to me over the telephone. I found out it was the President of the Richmond Building Trades Council, or something. I don't know who he was, but I know he was with the Richmond Building Trades Council. He told me they had a contract with Mr. Bryan and that it covered all of them.

I said "Like hell it does." I said, "These fellows down

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here don't belong to any union. They are working for 90 cents an hour."

He said "What is your rate?"

I said "\$1.36."

He said, "It is a good rate," and hung up.

Then Mr. Bryan had a document there by the side of him and held it out to me. He said it was a contract. I said, "It is too late now, because these boys didn't belong to any union when I came in here."

I suggested to Mr. Bryan there that we get together, that he recognize our union and that we work together. He said it couldn't work with the A. F. of L. and the UCW. I said "I don't see why it can't because we are doing it in other places."

He said, "Well, it just won't work."

Q. Did he at that time say anything about having a meeting with the A. F. of L. people?

page 1577 } A. No, not at this particular time, but later after I had been out on the picket line or to my car there, he came out and wanted a list of who to get in touch with besides me. Apparently he didn't want to settle it with me. I told him to get in touch with Mr. Hunter or Tommy Davis. Tommy Davis was the coordinator of the Regional Directors in the south. I gave him a list of all the directors in District 50, UCW.

Q. Who employed Tommy Davis?

A. UCW.

Q. Did you go over to Salyersville to attend a meeting on August 2?

A. Yes, sir. Mr. Bryan while we were talking over there asked me would I meet him in Salyersville on the next day, that some A. F. of L. officials were being sent in there and he asked me if I would be there that day, and I told him I would, at ten o'clock at the Carpenter Hotel in Salyersville.

Q. Was the meeting held?

A. Yes, sir.

Q. Were you admitted to the meeting?

A. No, sir.

Q. Did Mr. Bryan make any further request of you on that date?

A. He came out of this meeting or out of the hotel and said that he would try to get me in to the meeting,  
page 1578 } that the fellows were in there talking then and he would see what he could do about getting me in. He went back into the meeting. Then about an hour

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later, or something of that nature, he came back. I was half way in the block of the building between the Carpenter Hotel and the Coffee Cup. He told me that the A. F. of L. officials would not let me in the meeting, that I didn't have any business in there, and that he couldn't recognize the UCW, for if he did the A. F. of L. would pull the other men, their men, off his other jobs. He asked me to withdraw the pickets, and I refused.

Q. Did you have any further talk with Mr. Bryan after that at any time?

A. No, sir; I don't recall any.

Q. Did you go back to the job site any after that?

A. Yes, sir.

Q. What was going on there?

A. There wasn't anything going on, only just some of the boys were still there.

Q. Some of your boys or his boys?

A. Our boys.

Q. Now let's go back a little. Did you ever make a bet with anybody as to whether the work would be completed by Laburnum Construction Corporation?

A. No, sir.

Q. Did you or not at a later date meet one page 1579 } of the carpenters in Prestonsburg or elsewhere and say to him, "You showed good judgment in not going back to work, because I had men with rifles stationed above you and below you."

A. No, sir.

Q. The rates that you mentioned to him—were they subject to negotiation, was that what you were seeking?

A. Any rates submitted by representatives of labor are negotiable.

Q. He testified that a form of contract was submitted to him by Mr. Hunter on the fifth of August. Are those forms of contract absolutely required or are they subject to negotiation?

A. The contract which Mr. Hunter had and which we representatives always kept on hand are guides to negotiations, either to be added to or to be taken away from.

Q. It is alleged in the notice of motion filed by the Plaintiff in this cause that said Hart stated that the territory in which this work was being performed was the territory of the United Construction Workers and that he intended to take

*William Orbin Hart.*

over all of the Plaintiff's work at the Pond Creek Pocahontas Company in Breathitt County and that this statement was made to Mr. Bryan.

Is or is not that correct?

A. No, that isn't correct, that statement.

Q. It is also alleged, as to a talk with Mr. page 1580 } Bryan over the phone, said Hart then stated that the United Construction Workers had closed down a job of Beckett Construction Company at Wheelwright, Kentucky and unless the Plaintiff agreed to recognize immediately the United Construction Workers as the sole bargaining agent for the employees of the Plaintiff on said project in Breathitt County, Kentucky, he, William O. Hart, a field representative and officer of the United Construction Workers in District 50, would close down the work of Plaintiff in Breathitt County, Kentucky.

Is or is not that correct?

A. No.

Q. Did you ever make any such statement as that?

A. I don't recall any, no.

Q. It is further alleged that you stated that you were acting under the orders of Tom Raney and carrying out Raney's orders.

Were you ever under the orders of Tom Raney?

A. No, sir; I have never been under any orders of Tom Raney.

Q. Did he give you any orders about this strike?

A. No, sir.

Q. It is further alleged that said Hart went to the schoolhouse being constructed by Plaintiff in Breathitt County, Kentucky, being job No. 340 of the Plaintiff, and then went to the coal tipple in Breathitt County, Kentucky, page 1581 } being part of the Job No. 322 of Plaintiff, and immediately began haranguing the workmen employed by Plaintiff with threats and abuses, and then demanded that these men immediately become members of the United Construction Workers.

A. I did not.

Q. Then it is further alleged in said notice of motion that said Hart further in violent language said to these men that they would not be permitted to continue their work unless they became members of the United Construction Workers.

Did you tell them that?

A. No, sir.

Q. Did you ever hear anybody threaten to shoot any of the

*William Orbin Hart.*

carpenters or workmen or employees of Laburnum if they crossed the picket line or went to work?

A. No, sir.

Q. Did you ever make any such threat?

A. No, sir.

Q. After you left the schoolhouse and were on the way to the tippie did anybody in your group fire any shots or pistols?

A. No, sir.

Mr. Mullen: If Your Honor please, at this time I would like to introduce as exhibits by the Defendants, the constitution of the United Mine Workers of America adopted, the rules of District 50, effective March 16, 1949, and page 1582 } the rules of the United Construction Workers in effect—

Mr. Robertson: You are just introducing the same three things we have already introduced?

Mr. Mullen: Yes, but you may have introduced them in a manner that we can't use them.

Mr. Robertson: I don't object, but just don't put that one in that had 20 pages left out.

Mr. Mullen: I never had one that was defective.

The Defendant offers as Defendants' Exhibits 29 rules of District 50 United Mine Workers of America, March 15, 1949.

(The documents referred to were marked Defendants' Exhibit 29 and received in evidence.)

Mr. Mullen: Now the Defendant introduces as Exhibit No. 30 the rules of United Construction Workers, affiliated with United Mine Workers of America, revised March 15, 1949.

(The documents referred to were marked Defendants' Exhibit 30 and received in evidence.)

Mr. Mullen: We now introduce the constitution of the International Union, United Mine Workers of America, adopted at Cincinnati, Ohio, on October 11, 1948, effective November 1, 1948, and ask that it be marked Defendants' Exhibit No. 31.

page 1583 } (The document referred to was marked Defendants' Exhibit 31 and received in evidence.)

By Mr. Mullen:

Q. Have the UCW, the United Construction Workers, mem-

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bers and the A. F. of L. members worked peacefully together in Breathitt County?

A. They have.

Q. And in eastern Kentucky?

A. Yes, sir.

Mr. Mullen: If Your Honor please, may I confer with my associates just a minute?

The Court: Certainly.

We will recess for five minutes, gentlemen.

(Brief recess.)

page 1584 } Mr. Mullen: You may cross-examine.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Hart, how old did you say you are?

A. Forty-four.

Q. Where were you born and raised?

A. I was born in Knott County, Bath, Kentucky; raised in Letcher County at Seco.

Q. What county were you born in?

A. Knott County.

Q. How far is that from Breathitt County?

A. Oh, it is about 50 miles. I wouldn't want to be exact on it.

Q. What county did you say you were raised in?

A. Letcher County.

Q. How far is that from Breathitt County?

A. About 90 miles from my home.

Q. It is all in mountainous country in Eastern Kentucky, isn't it?

A. Yes.

Q. In the summer of 1949, were you living in Pikeville?

A. No, sir. I was living in Letcher County, in Fleming Kentucky.

Q. But you know the town of Pikeville pretty well, don't you?

page 1585 } A. Oh, sure. I have worked there before.

Q. That is the County Seat of Pike County, isn't it?

A. That is right.

Q. How big a town is it?

*William Orbin Hart.*

A. Oh, I don't know.

Q. About 10,000?

A. I wouldn't want to be quoted on what the population is, because I don't know.

Q. Do you know what the name of the Sheriff there was in the last 12 months; not the one there now, but the one who preceded the one in office right at this moment?

A. Yes, sir, I knew him.

Q. What was his name?

A. Lloyd Conway.

Q. He was shot and killed when he went out of the house one night, within the last six months, wasn't he?

A. I don't know.

Colonel Harris: We object to that as immaterial, if the Court please.

Mr. Robertson: If Your Honor please, they have brought in here about what a law-abiding section this is. I just want to show that the Sheriff was shot within the last six months in Pikeville, which is the seat of this headquarters.

Colonel Harris: That is not in Breathitt County.

Mr. Robertson: No. It is the next county to page 1586 } it. I have been out there. It is very close to it.

The Court: I will allow it for what it is worth.

Colonel Harris: Exception.

By Mr. Robertson:

Q. Don't you know, as a matter of fact, that within the last six months, at night the Sheriff of Pike County got a call that there was trouble, and went out of his home to get in an automobile, and was shot in the back and killed?

Colonel Harris: We object to that, because he could not possibly know what was said to the Sheriff when the Sheriff got a call and went out; and on the further grounds that we interposed in our objection a moment ago.

Mr. Robertson: I withdraw the question.

By Mr. Robertson:

Q. Don't you know, as a matter of fact, that the Sheriff of Pike County has been shot and killed within the last six months?

Colonel Harris: We object to that. That is a repetition. He just asked it two minutes ago.

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The Court: I sustain the objection. That was the question you asked first, which I allowed. I allowed the question.

Mr. Robertson: But you don't allow this one?

The Court: I allowed it. I think this is the page 1587 } same question you asked first.

By Mr. Robertson:

Q. Don't you know, as a fact, that the Sheriff of Pike County has been shot and killed within the last six months?

Colonel Harris: We object to it. That is the third time he has asked that question. Your Honor let him ask it over my objection the first time.

The Court: I understood, Mr. Robertson, that he answered that question. That was the first question you asked him. Mr. Harris objected, and I overruled the objection and allowed him to answer; and my recollection is that he answered the question.

Mr. Robertson: I don't recall that he did.

The Court: Look at the record.

Mr. Robertson: If he answered it, I don't want to go over it.

The Court: The Court may be in error. Check it.

(The record was read by the reporter as follows:)

"Q. He was shot and killed when he went out of the house one night, within the last six months, wasn't he?

"A. I don't know."

By Mr. Robertson:

Q. I am going to ask you if you don't know it to be a fact from your common knowledge, from living in page 1588 } that territory, that the Sheriff of Pike County was shot and killed within the last 6 or 8 months?

A. I have heard that he was. I didn't see it.

Q. Do you doubt the truth of it?

A. Sir?

Q. Do you doubt the truth of it?

Colonel Harris: We object to that as argumentative.

Mr. Robertson: I have the man on cross examination, Your Honor.

*William Orbin Hart.*

Colonel Harris: That doesn't mean he can argue with him.

Mr. Robertson: I withdraw that, if he objects to that.

By Mr. Robertson:

Q. You have heard it?

A. That is right.

Q. Are you a member of the United Construction Workers?

A. No. United Construction Workers? Sure. I have been in District 50, United Mine Workers, and United Construction Workers, too.

Q. So you are a member a United Construction Workers, are you?

A. Not as such.

Q. Are you a member of the United Construction Workers?

A. I said "not as such."

page 1589 } Q. What do you mean by that?

A. What do I mean by it?

Q. Yes.

A. I mean that I am not a member of the United Construction Workers as such.

Q. What did you mean when a moment ago you said you were a member of it?

A. District 50 and UCW, we work with the same. I am assigned to the UCW and District 50.

Mr. Robertson: If Your Honor please, I think I am entitled to have the witness answer the question.

By Mr. Robertson:

Q. I asked you: Are you or are you not a member of the United Construction Workers?

A. As such, no.

Q. What do you mean by "as such, no."?

A. I have already stated.

Mr. Robertson: I don't think he has answered the question, Your Honor, and I ask the Court to instruct him to answer the question.

The Court: See if you can make a fuller explanation of the answer, Mr. Hart.

The Witness: I am a member of District 50. The UCW is an affiliate organization.

*William Orbin Hart.*

page 1590 } By Mr. Robertson:

Q. Are you an agent of the United Construction Workers?

A. I am assigned, yes, sir.

Q. Are you an agent of District 50?

A. Yes, sir.

Q. Are you a member of District 50?

A. Yes, sir.

Q. Are you a member of the United Construction Workers?

A. As such.

Q. What?

A. As such.

Q. What do you mean by that?

A. I have explained it once.

Q. All right. What do you mean when you say you are a member of the United Mine Workers, but don't put the "as such" or any qualifications to that?

Mr. Mullen: I object. He hasn't stated he was a member of the United Mine Workers. He said United Construction Workers.

By Mr. Robertson:

Q. Didn't you say a moment ago you were a member of the United Mine Workers?

A. District 50, United Mine Workers.

Q. Didn't you say a moment ago you were a member of the United Mine Workers of America?

page 1591 } A. District 50, United Mine Workers of America.

Mr. Robertson: Read the question back there, and see whether he said it inadvertently or not.

(Discussion off the record.)

By Mr. Robertson:

Q. Are you a member of the United Mine Workers of America?

A. No, sir.

Q. You are a member of District 50?

A. District 50, United Mine Workers.

Q. How long have you known Tom Raney?

Q. About how long?

A. I have known Tom Raney for a number of years.

*William Orbin Hart.*

A. Oh, 15 years.

Q. Do you and he call each other by your first names?

A. Why, sure.

Q. How long have you known David Hunter?

A. I have known David Hunter since '45.

Q. Do you and he call each other by your first names?

A. Yes, sir.

Q. You have worked under his orders out of Hopewell, in the Hopewell area, before you went to Breathitt County, Kentucky, haven't you?

A. No, sir.

Q. Have you ever worked under his orders before you went to Breathitt County?

A. No, sir.

Q. Are you and he on friendly terms?

A. The best of friends.

Q. Do you regard him a man of high character?

A. I regard him as a friend.

Q. I say, do you regard him as a man of high character?

A. As far as I know, yes.

Q. You would accept his word without any question?

A. No.

Q. Why?

A. Well, it is according to what he is talking about.

Q. Suppose he is talking about you.

A. Oh, I don't know. It is according to what he is saying about me.

Q. In this telephone call you had with Laburnum on July 14, you said nothing at all that you were going in there and take the work over by threats or violence?

A. I didn't say anything to him on the 14th.

Q. You have testified that you called Laburnum in Richmond on July 14, 1949, haven't you?

Mr. Mullen: No, sir, he has not.

The Witness: No, sir.

By Mr. Robertson:

Q. July 13th?

A. That is right.

page 1593 } Q. Whoever you talked with, you said nothing about you all were moving in and taking the job over?

A. No, sir.

*William Orbin Hart.*

Q. This meeting you had on July 31 at Carver is also the same place known as Tiptop, isn't it?

A. No; Carver.

Q. How far apart are Carver and Tiptop?

A. They might be a mile or two, something like that.

Q. On July 26, you were with the group that went to the schoolhouse?

A. Yes, sir.

Q. And there was no rough stuff there at that time?

A. No, sir.

Q. And no profanity?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. You went with the group from the schoolhouse to the tipple, didn't you?

A. Yes, sir.

Q. You went into the schoolhouse at the tipple, didn't you?

A. State your question.

Q. You went into the toolhouse at the tipple?  
page 1594 } A. Yes, sir.

Q. When you made the statement there and Arnett said, "If you say that, you are a damned liar," you thought he was joking?

A. Oh, no. He just didn't understand what I was referring to.

Q. I say, when he said that, you didn't think it was fighting words or any occasion to get alarmed?

A. Not for a representative of labor, it isn't.

Q. And not out in a toolhouse in Breathitt County, Kentucky?

A. That is right. It was in the toolhouse, but those are not fighting words for a representative.

Q. When Bert Preston said to you, "If you don't have a picket, we will sure as hell work," you weren't at all upset over that statement?

A. No, sir.

Q. And at no time while you were in the toolhouse were there any threats?

A. No, sir.

Q. Or any violence?

A. No, sir.

Q. And at no time on the job site at the tipple were there any threats or violence, so far as you know?

A. No, sir.

*William Orbin Hart.*

page 1595 } Q. Whatever picketing was done there was done in a peaceful way?

A. Absolutely.

Q. Nobody threatened anybody else?

A. As far as I know, no.

Q. Why didn't you talk to Delinger when you went down there to the job site near the tipple on July 26?

A. I didn't have any business with Delinger.

Q. You knew he was the superintendent in charge of the work, didn't you?

A. No, sir. I don't even know him. I wouldn't know him today if I saw him.

Q. Did you know who was the superintendent in charge of the work?

A. No, sir.

Q. Did you try to find out?

A. No, sir.

Q. Why?

A. I was there to pull a strike. I had already contacted top management. I don't contact the lower brackets.

Q. You were there to run those men off the job, too, weren't you?

A. No, sir.

Q. When you met Bryan on the afternoon of the 26th down near the railroad crossing, which you have testified about—do you recall that?

page 1596 } A. Yes.

Q. Did you say to Bryan, "I will bet you \$500. you will never be able to finish this job out here unless you use United Construction Workers labor"?

A. No, sir.

Q. Did you say to Bryan, "Nobody yet has ever been able to buck John L. Lewis, and you can't do it, either"?

A. No.

Q. Did you say to him, "We have run other people off the job, and they didn't complain, so there is no reason why you should complain"?

A. No, sir.

Q. You said something about your having organized the job of the Corbett Construction, something at Wheelwright, Kentucky.

A. Who?

A. Beckett Construction Company at Wheelwright, Kentucky.

A. Yes.

William Orbin Hart.

Q. Do you know a man named Nelson Baldrige who was doing the painting out there on that job?

A. Yes, sir. Not on that job, no.

Q. On a job at Wheelwright, Kentucky?

A. Yes, sir.

Q. What job was it?

page 1597 } A. Painting the houses.

Q. What houses?

A. Camp houses.

Q. For whom?

A. Inland Steel Corporation.

Q. And you ran him off the job, didn't you?

A. No, sir.

Q. You met him out there with 200 or 300 men and told him to get the hell out of there, you would upset the truck and run them out of there, didn't you?

A. I did not.

Q. What were the circumstances under which you met Nelson Baldrige and a group of men there on the road going into Wheelwright, Kentucky, and turned them back and ran them out?

A. I never even spoke—

Colonel Harris: Wait just a minute, Mr. Hart.

We object to that as immaterial and outside the issues of this case, and it is a transaction *inter alios actio*, a transaction with third persons not involved.

Mr. Robertson: The Court has already ruled here repeatedly that that is admissible to show the pattern of the scheme they have followed to run anybody out of Eastern Kentucky that had the temerity to buck John L. Lewis. It is for that purpose, Your Honor.

page 1598 } Colonel Harris: As I recall, he misquoted

Mr. Bryan. Mr. Bryan didn't say John L. Lewis. He said United Mine Workers.

Mr. Robertson: All right. I stand corrected.

Colonel Harris: And the fact that Your Honor has ruled on numerous occasions doesn't end the matter, and we have to keep objecting when he keeps asking the questions.

The Court: The Court understands that, Colonel Harris.

The objection is overruled.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. What did you say to Nelson Baldrige when you ran him out, if you recall?

*William Orbin Hart.*

Colonel Harris: We renew our objection, if the Court pleases, and reserve an exception.

By Mr. Robertson:

Q. What did you say to Nelson Baldridge when you ran him out, if you ran him out?

Colonel Harris: We renew our objection.

By Mr. Robertson:

Q. What did you say to Nelson Baldridge when you ran him out, if you ran him out?

Colonel Harris: We repeat our objection.

The Court: The objection is overruled.

page 1599 }

Colonel Harris: We reserve an exception.

The Court: Now, go ahead and answer the question.

The Witness: I never even spoke to Nelson Baldridge that day.

By Mr. Robertson:

Q. Do you know him?

A. No.

Q. Did you run him out of there?

Colonel Harris: We object to that on the same grounds assigned, and we reserve an exception.

By Mr. Robertson:

Q. Answer the question.

A. No, sir, I didn't.

Q. What are the circumstances under which he left, if you know?

Colonel Harris: The same objection.

The Court: Same ruling.

Colonel Harris: Exception.

By Mr. Robertson:

Q. Answer the question.

The Witness: Repeat the question.

(The pending question was read by the reporter.)

*William Orbin Hart.*

The Witness: That particular day, I am not familiar with Mr. Baldridge that day.

page 1600 } By Mr. Robertson:

Q. Are you familiar with any of the circumstances under which he quit work over there at Wheelwright?

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: We reserve an exception.

The Witness: The only thing I know about it there is that he came in the next day or sometime later, and we negotiated a contract, but this particular day I never even spoke to Mr. Baldridge.

By Mr. Robertson:

Q. Do you deny that you and your men ran him out of there?

Colonel Harris: Same objection.

The Court: Same ruling.

Colonel Harris: Exception.

The Witness: Sure; me and my men, sure, I deny it, that me and my men, absolutely.

By Mr. Robertson:

Q. Who ran him out, if you know?

A. I don't know who did what.

Q. When you were working in Breathitt County, Kentucky, you had occasion frequently to go to David Hunter's office in Pikeville, didn't you?

A. He was my boss. I taken his orders.

page 1601 } Q. I said, you had occasion frequently to go to his office in Pikeville, didn't you?

A. Yes, sir.

Q. His office is on the second floor of the Seward Building?

A. Yes, sir.

Q. And Tom Raney's office is on the second floor of the Seward Building, isn't it?

A. Yes, sir.

Q. I call your attention to Defendants' Exhibit 10, which is the application blank signed by Green Stacy for membership in District 50, United Mine Workers of America, and ask you to look at it. (Exhibit handed to witness.)

How does it happen that it is not dated?

*William Orbin Hart.*

A. I don't know why he didn't date it.

Q. Why didn't you date it?

A. I didn't have any business putting any date on another man's signature.

Q. So you don't know when it was signed, do you?

A. The 8th, there were four men signed, and Green Stacy was one of those four. Whether this is the one, I don't know.

Q. Then you don't know whether he signed it or not on the 8th?

A. I know he signed one with me on the 8th, page 1602 } but whether it was this one or not—

Q. How do you know it, if it is not dated?

A. Because I signed it.

Q. Because what?

A. Because I was the one that he signed with.

Q. Why didn't you date it or make him date it?

A. I didn't ask him to date it, and it is not my business to date them.

Q. And it is not possible that that could have been signed since the 26th of July, 1949, is it?

A. It is impossible.

Q. I call your attention to Defendants' Exhibit 11, which is an application for membership in District 50, United Mine Workers of America, signed by Matt Miller, and ask you to look at that. (Exhibit handed to witness.)

Why isn't that dated?

A. The same reason that the other one wasn't.

Q. It is not possible that that could have been signed after the 26th of July, 1949, is it?

A. After July 26?

Q. Yes.

A. No, it wasn't signed after that.

Q. How do you know?

A. Because those cards we kept in our office in the custody of our own office.

page 1603 } Q. Now I call your attention to Defendants'

Exhibit 12, which is an application for membership in District 50 signed by Lee Bach, and ask you to look at that. (Exhibit handed to witness.)

Why isn't that dated?

A. The same reason the others are not.

Q. And that is what?

A. Because I don't have any business putting anything on those cards after they are once signed by the employee.

*William Orbin Hart.*

Q. But you procured the signatures, didn't you?

A. Sure, I procured them.

Q. And you procured the Social Security numbers where they are on them?

A. Not on this one.

Q. The ones that they are on it?

A. No, sir, we never put the Social Security number on them, unless they do themselves.

Q. It is not possible that that could have been signed after July 26, 1949?

A. No.

Q. Now I call your attention to Defendants' Exhibit 13, which is an application for membership in the United Construction Workers, Affiliated with the United Mine Workers of America, signed by Jerry Barnett, and ask you why that is not dated? (Exhibit handed to the witness.)

page 1604 } A. Because I don't have any business putting any dates on them.

Q. Everything you said about the others applies to that one?

A. That is right.

Q. Why did you sign that for United Construction Workers instead of District 50?

A. Because we had the cards mixed. We just put them all in one, the same as on the others.

Q. What is the criterion that makes you sign some people in District 50 and some in United Construction Workers?

A. One is an affiliated union, and the other is the District.

Q. That is the only explanation you have to offer?

A. That is all I have to offer.

Q. Now, I call your attention to Defendants' Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, which you testified about this morning and I ask you if any of them are dated?

A. (Examining documents.) Only one, Exhibit 24, has "7-24," but not the year after it.

Q. How many of those did you take, and which ones were they?

A. Sir?

Q. Which ones of those did you procure?  
page 1605 } A. I didn't procure any of them. The boys were signing up several of the boys out on the grounds where I was at.

Q. So you don't know what date they were signed?

A. Yes, those particular ones were signed on the 26th, be-

*William Orbin Hart.*

cause those are the only two days we were out there signing them up.

Q. These were signed on the 26th?

A. The 26th; and the other group here, these four men, were signed on the 8th.

page 1606 } Q. When you met Bryan at the road fork on the afternoon of July 26 he told you he wasn't going to take your treatment lying down, didn't he?

A. I don't know. No, I don't think so.

Q. He told you he was going to hold you and your unions responsible for your actions, didn't he?

A. No, sir; not then.

Q. He gave you to understand that there was liable to be a lawsuit because of what you had done there that day, didn't he?

A. No. I don't remember any lawsuit being mentioned.

Q. Those men that you signed up for were going into Local Union 778-A, weren't they?

A. That is right, until they were completely organized and then they would be given a charter of their own.

Q. That was the union that you used to put them in until you got a sufficient number to put them in a union of their own?

A. That was for small groups. They would go into that local union and then a charter would be secured for them and they would have their own local union.

Q. All the people that have signed all the cards that we have been talking about there were going into 778-A?

A. That is right.

Q. You were required to make daily reports, page 1607 } weren't you?

A. Yes.

Q. Who did you make them to?

A. Mr. Hunter in Washington.

Q. You made them in duplicate, didn't you?

A. Yes, sir.

Q. You would send the original where?

A. To Washington.

Q. To whom?

A. To Mr. A. D. Lewis.

Q. What is his title?

A. Chairman of the Organizing Committee and Director of the UCW.

Q. A copy would go to David Hunter in Pikeville?

A. Yes, sir.

*William Orbin Hart.*

Q. What is his title?

A. Director—Who, Mr. Hunter?

Q. Yes.

A. He was regional director at that time of Region 58.

Q. When did you leave Breathitt County to go to work in Clarksburg, West Virginia?

A. May 15, 1950. That is when I was released from Region 58.

Q. I call your attention to the fact, which is in evidence here, that all your reports covering this time from page 1608 } July 25 through August 2 of these activities have disappeared. What about that?

A. I only keep my reports six months and destroy them.

Q. Your answer then is that all your reports about these occurrences in Breathitt County for the week beginning July 25, 1949, have been destroyed by you?

A. My records, yes.

Q. Your file copy?

A. That is right.

Q. What is the custom, if you know, about keeping them in A. D. Lewis' office in Washington?

A. I don't know a thing about that.

Q. What is the custom of David Hunter about keeping them in Pikeville?

A. I don't know anything about that.

Q. You don't know anything about that?

A. No, sir.

Q. You have no explanation to offer of why your file copies have gone and the copies from A. D. Lewis and from David Hunter also have disappeared?

A. I have explained why mine are gone.

Q. Why?

A. Because it gets to bundlesome to carry around and not to destroy them every six months. I don't have any use for them.

Q. Now I am going to call your attention to page 1609 } the answer of District 50, United Mine Workers of America, to interrogatories, Exhibit 4-8, which is the report of David Hunter to A. D. Lewis, Chairman of the Organizing Committee, District 50, UMWA and UCW, United Mine Workers, Washington 5, D. C., on Saturday, March 18, 1950, which reads as follows—

Mr. Mullen: If Your Honor please, it is necessary for us to renew our objection to any partial use of the interroga-

*William Orbin Hart.*

tories for the reasons that we have been into very thoroughly and it is necessary of course to maintain our position and we now object to that.

The Court: The objection is overruled.

Mr. Mullen: An exception noted.

By Mr. Robertson:

Q. When Mr. David Hunter was reporting to A. D. Lewis in Washington for Saturday, March 18, 1950, he said this:

“Checking the four construction jobs we have under contract and also the road into Breathitt County, Kentucky, which Representative Hart informs me was impassable, I found the road in fair condition and had no difficulty in getting through. I have reasons to believe Representative Hart has lied on several occasions. Therefore I wanted to know definitely if the road was passable or not. At times his actions show he resents taking orders, and in order not to carry them out will make some excuse, such as: the roads  
page 1610 } are impassable. I have requested Representative Hart to be in this office Wednesday, 10 a. m.  
March 22.”

What have you got to say to that?

A. Let me read that, will you, please?

(Document handed to the witness.)

The Witness: Well, I am sorry that Mr. Hunter made a report of that kind, for we were good friends, and if he has made a report of that kind it is unfortunate.

Mr. Robertson: Stand aside.

Mr. Mullen: Is that all you have?

Mr. Robertson: Yes, sir.

#### RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Hart, what was the occasion that gave rise to that report?

A. That occasion is the time that I went into Breathitt County or started in to Breathitt County, and I had bought a new automobile, a new Buick, 1950 model. I bought it in December. The roads were bad, and I didn't undertake to take this car over this bad road. I hired a jeep. Mr. Jackson

*William Orbin Hart.*

went with me that particular day and drove the jeep. The roads were very bad. I presented a bill to Mr. Hunter of \$7.00. He refused to pay it because he didn't order me to get the jeep. Therefore, it was worth \$7.00 to me not to drive a new automobile over that road.

page 1611 } Q. Did Mr. Hunter drive over it the same day or on a later day?

A. I learned—I don't know when he went over the road in particular, but he had some special larger tires for his car than were required, and he probably could get over rougher road than I could with my car.

Q. He had special treads and all to get over those roads?

A. That is right. In other words, they were higher off the ground, brought his car up higher.

Q. That report was made as of March 17. What is the general state of the roads at that time of year?

A. One day they are impassable and the next day they are passable because they scrape it. When they scrape the road you could get over it that particular day, but if they let it go one day and there is rain, you couldn't get over it at all with a car. A jeep can get over it.

Q. This report was a result of the argument you had with him about the passability of the road and about not using your new car on it?

A. It wasn't an argument. We didn't argue about it. He just didn't want to pay it, and I said "O. k., it is worth \$7.00 to me not to take my car over such a road."

Q. Then he called you in on the 22nd. Did he suggest that you be discharged or anything on that date?

page 1612 } A. I was never called in on the 22nd.

Q. In other words, there was nothing further done?

A. Nothing further was ever done about it.

Q. You remained there, you say, until May 15?

A. Yes, sir; and that is when I met Mr. Bryan, in Mr. Hunter's office, that particular day, on the 15th.

Q. You remained, notwithstanding that report, in the employ of the United Construction Workers or not?

Mr. Robertson: Don't you think you the leading him just a tiny little bit?

The Witness: I was to be transferred, and Mr. Hunter gave me a good recommendation when I left on May 15. He told me when I left there that I was being transferred to Clarksburg, West Virginia, because of my long standing with

*William Orbin Hart.*

the organization and ability to negotiate contracts, and the director in Region 22 needed some help.

By Mr. Mullen:

Q. Mr. Hart, you are employed by whom?

A. District 50, United Mine Workers.

Q. And are you assigned to work for anybody else besides District 50?

A. Yes, sir; UCW, Local unions, to service them and negotiate contracts.

Q. You are a member of District 50, employed by District 50, but are assigned to do some work for United page 1613 } Construction Workers?

A. Yes, sir.

Q. At Hopewell was Mr. Hunter under you or over you?

A. Mr. Hunter worked under my supervision. I was assistant director in the Richmond area, and Mr. Hunter was put in my place at Hopewell and I came to the Richmond office to supervise the work at Hopewell.

Mr. Mullen: You may stand aside.

Mr. Robertson: Wait a minute.

#### RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. Have you ever run anybody off any job anywhere at any time?

Colonel Harris: We object to that on all the grounds before assigned, on the additional ground that this is far too remote and too indefinite.

The Court: For what period of time, Mr. Robertson?

By Mr. Robertson:

Q. In the year 1949 did you ever run anybody off any job in eastern Kentucky?

Colonel Harris: The same objection.

The Court: I overrule the objection.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. Answer the question.

page 1614 } A. No, I never did run anybody off. We struck some jobs.

*Harvey J. Robinson.*

Q. You closed them down, didn't you?

A. The boys come out on strike and the fellows would not cross the picket line.

Q. I say you closed them down, didn't you?

A. I say the boys came out on strike and the boys wouldn't go across the picket line, the A. F. of L. men wouldn't cross the picket line.

Q. I say the work stopped, didn't it?

A. As the result of a strike.

Mr. Robertson: No further questions.

The Court: Any further questions, gentlemen?

Stand aside, Mr. Hart.

(Witness excused.)

Colonel Harris: Mr. Harvey J. Robinson.

Whereupon,

**HARVEY J. ROBINSON**

a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Colonel Harris:

Q. Are you Mr. Harvey J. Robinson?

A. Yes, sir.

Q. How old are you, Mr. Robinson?

page 1615 }

A. Fifty.

Q. Where were you born?

A. Scranton, Pennsylvania.

Q. The work that you now do is for whom?

A. The United Construction Workers.

Q. How long have you been an employee of the United Construction Workers?

A. Since February 18, 1949.

Q. Of what region?

A. Region 58.

Q. Is Pikeville or Breathitt County, Kentucky, either one in that region?

A. Breathitt County is.

Q. Did you ever go over to Evanston, Kentucky, under di-

*Harvey J. Robinson.*

rections of either Mr. Hart or Mr. Hunter, to the job site of the Laburnum Construction Corporation?

A. I went over there at the direction of Mr. Hunter.

Q. When was it that you went over to the job site?

A. My first visit over there was on July 8.

Q. Did you have any discussion with anybody on that occasion as to who you wanted to sign up?

A. Representative Hart and I both went in together.

The Court: Talk a little louder, Mr. Robinson, and turn toward the jury.

The Witness: Representative Hart and myself went in on that particular date and contacted the workers at lunch time. We found that there were some A. F. of L. carpenters who did belong to a union, but the laborers did not belong to a union, and the carpenters informed us that the laborers would like to become a member of the union in order that they might be taken care of so far as wages and other conditions of work were concerned. So we contacted some of the laborers and as well as I can remember, we signed up four that particular day.

The Court: Mr. Robinson, face the jury and listen to Colonel Harris' question when he speaks, but you speak to the jury.

By Colonel Harris:

Q. When was the next time that you were over to the job site of the Laburnum Construction Corporation?

A. July 27.

Q. Did you go with Hart that day?

A. No, sir. I went alone.

Q. What time did you get to the scene?

A. About 8:30 a. m.

Q. Where did you go on the 27th at 8:30 a. m.?

A. I went to the scene—in fact, I arrived at the scene about 8:30 a. m. at the Laburnum Construction office, where there was a group of men gathered, some sitting around, some standing around. I began talking to them, and  
page 1617 } they were the laborers who were members of our organization, the United Construction Workers. I asked them if any one was working. They said "Yes, a few of the carpenters, A. F. of L. carpenters, had gone to work that morning." A short distance on the side of the road was another group of people who I was informed by the first

*Harvey J. Robinson.*

group that I talked to that they were A. F. of L. carpenters.

Q. Did you talk to that group?

A. No, sir. During the conversation Mr. Bryan came up, introduced himself—in fact, he asked me who I was. I introduced myself and he introduced himself and used his title, President of the Laburnum Construction Company of Richmond, Virginia. The statement he made to me was, "What are you over here for?"

I said, "I am over here to bring about a settlement if I possibly can, if we can get together on it."

Mr. Bryan said, "These A. F. of L. carpenters are not going to join your union."

I told Mr. Bryan that we had no intention whatever of getting any of the A. F. of L. carpenters to join our union. If they had been told such, they had been told falsely.

Then the carpenters had gathered around at that time and Mr. Bryan and I were more or less in the middle, I might say, in so far as the two groups were concerned. Mr. Bryan said, "You do not have a legal picket line or a legal strike."

I said, "We are only hopeful, Mr. Bryan, that  
page 1618 } these carpenters, A. F. of L. carpenters, will  
honor our picket line."

He said, "Well, the carpenters are not going to honor your picket line." He said, "They held a meeting last night and I was present in that meeting, and they voted 100 per cent to cross your picket line and to go to work."

I told Mr. Bryan if that was the decision of the carpenters, they were at liberty at any time to cross the picket line and to go to work, that we were only hopeful that they would honor our picket line, but if they felt like crossing it they were at liberty to do so.

Mr. Bryan turned to the A. F. of L. carpenters and said, "All right, let's go to work."

Mr. Bryan started in the direction of the job, the tipple, and when he did the men followed him. I would say possibly two or three didn't follow him. He went on over in the direction of the job and disappeared at the tipple.

Mr. A. Meli, who I understand was the mechanical engineer, came out and said that he would like to see this thing settled. I told him I certainly would be glad if we could settle it, and I would do everything that I possibly could and I suggested to Mr. A. Meli to use what influence he might have with Mr. Bryan so that we could sit down and try to thrash the thing out. He said he would do what he could, but Mr. Bryan

*Harvey J. Robinson.*

seemed to be a little worried and was running  
page 1619 } around like a chicken with his head cut off, and if  
he wasn't so bull-headed he would sit down and  
try to thrash the thing out.

During this time Mr. Bryan came back and Mr. Meli went on back into the office. Mr. Bryan walked up to the group of laborers and said, "If you fellows want to work for 90 cents an hour, you can."

No one made any attempt to work. Mr. Bryan said, "If you want to work, you can go to work. The pay will be 90 cents an hour. If not, you are fired."

Then a man, a gentleman, came to the door and looked out, and Mr. Bryan said to him, "Make out their checks. They are all fired."

It appears to me that Mr. Bryan went on into the office at that time, and I remained outside of the office. This bookkeeper—I learned it was the bookkeeper whom Mr. Bryan was addressing with reference to making out the checks—came to the door and said, "Men, your checks are ready."

Well, the men started to accept the checks, and I advised the men to accept only the check that was due them that pay period. It was pretty close to payday at that time, as I understand it.

Then the fellows accepted the checks, just what was due them. That is the way I understood it at that time. And

Mr. Bryan went back into the office and was  
page 1620 } talking with Mr. A. Meli. I walked in the office  
and I just motioned to two or three of the fellows  
of our group to come on in. I didn't know what might be said,  
and they would be there possibly to hear whatever did take  
place.

I understood Mr. Bryan to say, "No, we can't settle it."

I said, "Mr. Bryan, if you are referring to the strike, we can settle it."

He said, "How?"

I said, "Sit down. We can sit down and work together on this thing and see if it can be settled."

So the bookkeeper said, "You don't have any strike and you don't have any legal picket line. Our people are working, and your people quit."

That is the way he termed it.

I said, "They were fired."

He said, "They quit."

I said, "You gave them their checks."

*Harvey J. Robinson.*

He said, "We did that through courtesy so they wouldn't have to come back."

I said okay.

"Mr. Bryan said they are fired and you say they quit. I declare them on strike, and I hope that is legal."

Mr. Bryan left the office then and went back in the direction of the tippie, and later came back. He was back about five minutes, I would judge, and I happened to glance  
page 1621 } in the direction of the tippie and the men were all coming off the job. Why they came off, I don't know. I asked some of them, and none of them seemed to know.

That just about winds up the 27th.

Q. Let me ask you one or two questions more about this. Did you hear any threats made?

A. None.

Q. Was there any violence out there on the 27th?

A. None.

Q. Did you see any weapons of any kind?

A. None.

Q. Did you leave any pickets there when you left there?

A. On the 27th we left two men there with instructions that they might leave when they felt they should leave. If they wanted to stay on a while it was okay, and if they wanted to leave it was all right.

Q. Out in the country that way when you establish a picket line, do the men walk up and down the highway with a picket sign?

A. As the usual thing over in that part of the country, a group of men gather around who are on strike, and that would constitute a picket line. Sometimes they carry a sign. It is honored either way.

Q. Did you see Mr. Bryan any time after the 27th?

A. No. On the 27th I didn't see Mr. Bryan any more.

Q. Did you go back there another day?

page 1622 } A. I went back on the 28th.

Q. On this trip did you see Mr. Bryan?

A. I am not positive. It appears that I did see Mr. Bryan in and out of his office. I am not positive of that.

Q. You did not have any further conversation with him on that day?

A. No, sir.

Q. Did you in talking to the carpenters when you were out

*Harvey J. Robinson.*

there tell them whether or not you wanted the carpenters to join up in the union or whether you wanted only a limited group?

A. On the 27th Mr. Bryan understood from our conversation that we were only interested in the laborers.

Q. How many laborers were fired out there on the 27th? How many did you see after the language you have used go in and get their pay?

A. I would say there was probably 10 or 12 men in that group. I didn't count them in particular as to how many received their checks, but I would say all who were employed, possibly 10 in that group, would have received their checks. I couldn't be exact on that.

Q. Did you notice whether or not there was a picket sign out there on the 27th or the 28th?

A. I noticed one on the 27th. As well as I can page 1623 } remember there was a sign there on the 27th when I arrived there.

Q. Did anybody take it down while you were there?

A. Not that I noticed.

Colonel Harris: That is all. You may cross-examine.

The Court: We will recess, gentlemen, for a few minutes.

(Brief recess.)

page 1624 } Colonel Harris: Judge, there is one other matter that I want to bring out by witness.

The Court: All right.

By Colonel Harris:

Q. You said a while ago that you were out there on the 28th.

A. Yes, sir.

Q. Did you have out there or at any other place on the 28th of July a meeting with any of the carpenters who belonged to the A. F. of L.?

A. Yes, sir.

Q. Was that out on the job site?

A. The meeting was held in a so-called bunk house—it had been used for that purpose—a short distance from the Laburnum Construction Company's office. It was up on the bank a little bit. I don't know just the exact distance, possibly 25 or 30 feet. We held a meeting with the A. F. of L. carpenters along with the laborers. Representative Hart and

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I were in that meeting. Representative Hart talked, addressed the group and told the A. F. of L. carpenters that we had heard that someone had told them that we were making an effort to bring them into our organization. If anyone had told them any such, it was untrue. We had no intention whatsoever of trying to get those people to become members of our organization. We were only hopeful that they  
page 1625 } would honor our picket line. We were interested at that time in the laborers. The carpenters were well organized. We had worked with them before on other jobs. We didn't see any reason why we could not work with them on this one. The carpenters agreed in that meeting that they would not cross our picket line.

Q. That was on the 28th of July, 1949?

A. Yes, sir.

Colonel Harris: You may cross-examine the witness.

### CROSS EXAMINATION.

By Mr. Robertson:

Q. How old did you say you are, Mr. Robinson?

A. The 20th of October I was 50 years old.

Q. How much do you weigh?

A. I weigh 195, approximately.

Q. Where were you born in Pennsylvania?

A. Scranton, Pennsylvania.

Q. Is that in the coal mining fields of Pennsylvania?

A. Well, I was brought away from there when I was one year old, so I was told by my family.

Q. I didn't ask you that. I said, is Scranton in the coal mining field of Pennsylvania?

A. I don't know.

Q. Where were you born and raised after you left Scranton?

A. Richmond, Virginia.

page 1626 } Q. Do you live here now?

A. No, sir.

Q. Where do you live now?

A. Paintsville, Kentucky.

Q. How long have you been living there?

A. It will be two years the 16th of this month.

Q. Are you a member of the United Construction Workers?

A. I am a member of the United Construction Workers, yes, sir.

*Harvey J. Robinson.*

Q. Are you a member of District 50, United Mine Workers of America?

A. No, sir.

Q. Are you a member of the United Mine Workers of America?

A. No, sir.

Q. Who is your present boss?

A. My present boss is our Director of Region 59, James Dixon.

Q. Who was your boss in the month of July, 1949?

A. David Hunter.

Q. By virtue of the fact that he was the boss, you went frequently to his office in Pikeville, didn't you?

A. At that time that was my territory.

Q. I say, since he was your boss, you went frequently to his office in Pikeville, did you not?  
page 1627 } A. I say at that time he was my boss, of course, but that was my territory.

The Court: Can you answer the question?

The Witness: Maybe I don't understand it.

The Court: Repeat the question.

By Mr. Robertson:

Q. I say, due to the fact that Mr. David Hunter was your boss at that time, did not you have frequent occasion to go to his office in Pikeville, Kentucky?

A. Not necessarily because he was my boss.

Q. Did you go frequently to his office?

A. I went occasionally.

Q. His office as Regional Director of Region 59, United Construction Workers, was on the second floor of the Seward Building, wasn't it?

A. At one time it was on the third floor.

Q. Then by July he had moved down to the second floor, hadn't he?

A. I don't remember. No, I don't think he had moved down in July.

Q. Do you call him by his first name, and he call you by your first name?

A. Well, as the usual thing.

Q. Do you know Tom Raney?

A. Yes, sir.

page 1628 } Q. How long have you known him?

A. Since I have been over in Kentucky.

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Q. Do you and he call each other by your first names?

A. Occasionally, usually.

Q. Coming back to David Hunter, his office as Director or Acting Director of Region 58 of the UCW was in the Seward Building in Pikeville, was it not?

A. Yes, it was in the Seward Building, Soward Building.

Q. And his office as Director of Region 58 of District 50 was also in the Soward Building, wasn't it?

A. He had jurisdiction of District 50.

Q. I say, he just maintained the one office there, didn't he?

A. That is right.

Q. To do both jobs.

A. Yes, sir.

Q. Tom Raney also had his office in that building didn't he?

A. Yes, sir.

Q. Did you work over in Hopewell before you went to Breathitt County?

A. I worked at the Hercules Powder Company.

Q. Did you make daily reports on what you did in July, 1949?

A. Occasionally.

page 1629 } Q. Didn't you make them right straight along?

A. Not straight along.

Q. I say, wasn't it your duty to make a daily report to David Hunter?

A. It was our duty, yes.

Q. Did you do it?

A. Not always.

Q. Have you got any of the reports that cover the week commencing July 25, 1949?

A. No, sir.

Q. What became of them?

A. We didn't have to keep those reports. When we made one, we didn't have any copy. Of course we had a book sometimes that we carried our things in that we had done.

Q. I say, what is the reason that all your reports for the week beginning July 25, 1949, have disappeared?

A. I wouldn't say only those have disappeared; the others as well, if you term it that.

Q. Did you make your report just to David Hunter or to anyone else?

A. I made my report to David Hunter and to Washington when I made one.

Q. And you made them in duplicate, didn't you?

*Harvey J. Robinson.*

Yes, sir.

page 1630 } Q. You made them on a typewriter, didn't you?  
A. Not always.  
Q. Generally?

A. Usually.

Q. And kept a carbon for yourself?

A. Sometimes.

Q. Anyway, they are all gone.

A. They are gone. I don't know where they are. We weren't required to keep a copy.

Q. When you were at the job site, you were working for whom? Who paid you?

A. United Construction Workers.

Q. When you were out there at the job site on Wednesday, July 27, you were representing Green Trusty, weren't you?

A. Representing who?

Q. Green Trusty.

A. I don't know any Green Trusty.

Q. You were representing all the people that had signed up.

A. I was representing the United Construction Workers.

Q. I show you Defendant's Exhibits 26, 27, 28, and 15, and ask you if you were representing any of those and, if so, which ones. (Documents handed to witness.)

A. I think I stated before that the people that I signed up, I signed them up on the 8th of July.

Q. I asked you if you were representing any of page 1631 } those that you have in your hand.

A. Any person who has signed one of these I would represent.

Q. All right, why were you representing people that were trying to sign up with District 50?

A. Because we are assigned to District 50 by our Director, if and when necessary.

Q. So you were working both for United Construction Workers and for District 50.

A. Well, I am on the payroll of the United Construction Workers. Our Director can assign us to work under District 50 as well as United Construction Workers.

Q. At that time you were working both for United Construction Workers and District 50?

A. I was representing anyone who was signed on one of these applications.

Q. Those ones that I showed you are all signed on the applications of District 50, aren't they? I ask you to look at them and see.

*Harvey J. Robinson.*

Yes, sir.

Mr. Robertson: The witness has just referred to Defendant's *Exhibit* 15, 26, 27, and 28.

By Mr. Robertson:

Q. When you were out at the job site on Wednesday, July 27, you didn't see any rough stuff there, did you?  
page 1632 } A. No, sir.

Q. There was nothing to get scared about?

A. Not that I could see.

Q. You weren't scared?

A. No, sir.

Q. You have not at any time been scared out on that job site, have you?

A. I didn't have anything to be scared of.

Q. Either before or since then?

A. That is right.

Q. You didn't hear any threats?

A. None.

Q. Did you say they were actually walking the picket there on the morning of July 27?

A. They were congregated; there was a group congregated, and as well as I can remember, there were two men walking there, too.

Q. They couldn't possibly have been the spotters sitting down there on the creek near the tipple, could they?

A. The men that I am referring to were not near the tipple.

Q. But there weren't any threats there of any kind?

A. No, sir.

Q. And no cussing that you know of out of the ordinary?

A. No.

page 1633 } Q. I believe you said it was customary out in that country for men to congregate in the way that you have described, wasn't it?

A. Yes.

Q. It is customary for them to carry guns, too, isn't it?

A. No, sir.

Q. It is not customary to carry a gun in Breathitt County?

A. Not that I know of.

Q. You have never seen anybody carry a gun there?

A. Officers of the law?

Q. No. I mean just people like you and me.

A. No, sir.

Q. Where are you working now?

*Harvey J. Robinson.*

A. United Construction Workers.

Q. Did you hear any threats out there on July 28?

A. No, sir.

Q. Did you see any rough stuff?

Q. Your boss was who?

A. Would you repeat that?

Q. Who was your boss at that time?

A. David Hunter.

Q. Now, Mr. Robinson, I am referring to the page 1634 } answers of United Construction Workers, affiliated with the United Mine Workers of America, to summons of the Plaintiff to answer interrogatories; the report of David Hunter to A. D. Lewis, Chairman of the Organizing Committee, District 50, United Mine Workers of America and United Construction Workers, for the week ended September 9, 1950, and under the heading "Organizational" he has this to say regarding the Paintsville, Kentucky, area.

Mr. Mullen: We object, Your Honor.

The Court The objection is overruled.

Mr. Mullen: For the reasons previously stated. We reserve an exception.

By Mr. Robertson:

Q. "Representative Robinson has been unable to make any progress in organizing the Paintsville area. Inasmuch as he has been run off a couple of jobs, I believe he has lost his nerve and is afraid to work alone. Therefore, I have temporarily assigned him to work with Representative Gilbert in the Williamson area. I am hoping that a few weeks work with other representatives will help him regain his lost confidence. Otherwise, I am of the opinion Representative Robinson will have to be replaced. This matter has been discussed with Representative Robinson, and I certainly hope he can overcome the fear he has developed.

"Fraternally yours, David Hunter, Acting Director, Region 58."

page 1635 } What have you got to say about that fear?

A. Well, he has a right to make a report on

*Harvey J. Robinson.*

his men. There is no question on that. So far as the fear, I have none.

Mr. Robertson: Stand aside.

Colonel Harris: I want to ask you a question.

RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. When you stated a while ago that you made reports and sent one to Washington, you didn't state where you sent it in Washington. Would you tell us that?

A. I sent it to Mr. A. D. Lewis, the Director of the Organizing Committee.

Q. Is he the Chairman of the Organizing Committee of District 50?

A. Yes, sir.

Q. Are you able to look back in your mind and recall any job that you were run off of out there in eastern Kentucky?

A. If I was run off any job, I don't know anything about it. I am still working in that territory.

Colonel Harris: That is all.

RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. Maybe I can help your memory a little. Did you have anything to do with this job out there in Wheel-  
page 1636 } wright, Kentucky, when Nelson Baldrige was  
run off?

A. No, sir.

Q. You didn't either run other people off or get run off yourself at any time out at Wheelwright?

A. No, sir.

Q. You don't know anything about that?

A. No, sir.

. . . . .

GRANT DAVIS,  
called as a witness in behalf of the Defendants, having been  
first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Colonel Harris:

Q. How old are you, Mr. Davis?

A. Fifty-one. I will be fifty-one my birthday.

Q. Where were you born?

A. I was born in Dawson County.

. . . . .

page 1637 } The Witness: Very well. I was born in Dawson County, Kentucky.

By Colonel Harris:

Q. Have you lived in Kentucky practically all your life?

A. All my life.

Q. What business do you follow now?

A. Mining.

Q. Coal mining?

A. Yes, sir.

Q. Are you a member now of the United Mine Workers of America, as a coal miner?

A. Yes, sir.

Q. You were mining coal during July, 1949?

A. No, sir.

Q. What work were you doing then?

A. Carpentering.

Q. Were you carpentering out in Kentucky?

A. Yes, sir.

Q. On what job were you carpentering?

A. On the Laburnum job in Breathitt County.

Q. When did you go to work for the Laburnum Company out there?

A. December 6, 1948.

Q. When did you quit work out there?

A. I quit work on July 26, 1949.

page 1638 } Q. While you were working for Laburnum Construction Company were you a member of any union?

A. Yes, sir.

Q. What union did you belong to then?

*Grant Davis.*

A. I belonged to the A. F. of L. carpenters union; also the United Mine Workers of America.

Q. How many of them out there were members of both the A. F. of L. and the United Mine Workers?

A. I don't know. I couldn't answer that question.

Q. Did you know anybody else that belonged to both?

A. No.

Q. Did you take any active part in United Mine Workers union or did you merely keep your dues paid up?

A. I just kept my dues paid up. During what times I was working on that Laburnum job in Breathitt County I didn't attend any meeting of the United Mine Workers whatever.

Q. When you were with the A. F. of L., you were working there on July 26?

A. Yes, sir.

Q. Did you see Mr. Hart there then?

A. No, sir.

Q. Whereabouts were you working?

A. I was working on top of the hill, what they call up at the head house.

Q. What kind of work were you doing up there?

A. I was doing carpenter work.

page 1639 } Q. Did anybody come up there to talk to you all at the head house on top of the hill?

A. No, sir.

Q. Did you do a full day's work on July 26?

A. Yes, sir.

Q. Did the other carpenters who were working there on the head house do a full day's work?

A. Yes, sir.

Q. How many of the carpenters were there working up on the head house?

A. There were four of us.

Q. Did you have any carpenter helpers or common laborers up there working with you?

A. We had a couple of laborers with us.

Q. Did you go back any after July 26 to work?

A. Yes, sir.

Q. We will take it up in order, though. Did your union hold a meeting—

Mr. Robertson: Which one, just to keep it plain.

Colonel Harris: He has made it clear that he took no active part in the United Mine Workers.

*Grant Davis.*

Mr. Robertson: But he belonged to both of them.

Colonel Harris: Suppose he argues that to the jury.

Mr. Robertson: If Your Honor please, I am page 1640 } speaking seriously. I think if counsel is going to examine this witness, he is entitled to know which union he is talking about, in common sense. I think the man showed real good judgment, but I want to know which one he is talking about.

Colonel Harris: The witness is not in distress.

Mr. Robertson: I think counsel is in distress.

Colonel Harris: If you never get any more distressed than I am, you will be a very happy man the rest of your life.

Mr. Robertson: You look mighty unhappy to me.

Colonel Harris: That shows how little you know.

Mr. Robertson: That looks like a forced smile to me.

The Court: All right, gentlemen.

By Colonel Harris:

Q. What date was it that you attended a union meeting near July 26 in Paintsville union hall?

A. On the 27th day of July.

Q. Was that an A. F. of L. meeting?

A. Yes, sir.

Q. Was Mr. W. O. Hart, of the United Construction Workers, present at that meeting?

A. Yes, sir.

Q. Did he make any kind of speech or talk to you A. F. of L. carpenters?

page 1641 } A. Yes, sir, he sure did.

Q. Did he say who he wanted to sign up with the United Construction Workers in that meeting?

A. No, sir, he didn't.

Q. Did he tell them whether or not he wanted the A. F. of L. carpenters to sign up with the United Construction Workers?

A. No, sir. He said he didn't want the A. F. of L. carpenters union to sign up. He said he wasn't working A. F. of L. carpenter union jobs at all. He was only to organize the laborers.

Q. In that meeting did Mr. Hart make any threats that you heard?

A. No, sir.

Q. Were you in that meeting from the time the meeting was called until it adjourned?

A. Yes, sir.

*Grant Davis.*

Q. On the 27th did you go back to the Laburnum job site?

A. What?

Q. On the 27th of July did you go back to the Laburnum job site?

A. Yes, sir.

Q. What time of day did you go back?

A. We went back that morning at work time.

The Court: Are you gentlemen of the jury hearing him?  
Mr. Davis, see if you can look toward me when  
page 1642 } you answer the questions. The gentlemen of the  
jury have difficulty hearing you.

The Witness: Yes, sir.

By Colonel Harris:

Q. Where did you go on the morning of the 27th when you went back at work time?

A. We were informed at Salyersville to go back to the bottom of the hill, what we call the foot of the hill, on the tipple on the 27th, in the morning, to our work, by our foreman.

Q. Who was your foreman?

A. Charlie Patrick.

Q. Did you carry out the orders of your foreman and go there to the foot of the hill on the morning of the 27th?

A. Yes, sir, I sure did.

Q. Tell us what happened when you got there on the morning of the 27th.

A. We went to the foot of the hill, and all of our carpenter force were kind of held up there at the foot of the hill, what we call the foot of the hill, which was the Laburnum pay office. That is where their pay office was. There was a little road which led down off the main highway going down to the tipple, and just below the forks of that road was a picket sign there, tacked up. We halted at that picket sign. We  
page 1643 } didn't go through it because it was a peaceable  
picket sign. There were only two pickets that I seed of at that picket line, but they had a picket sign tacked up on a post—a stake. It wasn't on a post; it was on a stake.

Mr. Bryan, over there (indicating), walked down and tore the picket sign down and brings it back up into the office. Then he asked us fellows if we would go on to work, and nobody didn't go on to work right at that time. So we kinda

*Grant Davis.*

halted there. I think maybe a few of them did go on and go to work.

He went us back to the top of the hill, to our job. We went back to the top of the hill and went to work. We worked something like maybe fifteen or twenty minutes, maybe a little longer than that. After we started to work we were called off our job, and Dave Miller was the man who called us off. He was running the hoisting engine at the top of the hill on the high line. He came out there and hollered to us and told us that they said for us to put our tools up and come to the foot of the hill again. Mr. Daniels, Mr. Harrison Daniels, asked him who said to come to the foot of the hill, and he said Cecil Delinger. That was Laburnum's superintendent. So we put our tools up and went to the foot of the hill, and when we got to the foot of the hill all of our carpenters were still just mixing and milling through one another there and wouldn't go to work.

page 1644 } By Colonel Harris:

Q. When Mr. Bryan tore down the picket sign did he use any violent language at that time?

A. Yes, he did, but I would rather not repeat what the man said.

Q. Your religion prevents you from repeating it?

A. I would rather not repeat that.

Q. I won't ask you to repeat it.

Did he do anything to show his feeling toward the picket sign after he threw it down?

A. He throwed it in the office. He stood on it and turned around and around a time or two and wanted to know if any of us fellows were going to work after he tore the picket sign up, took the picket sign down.

Q. In the A. F. of L. union, under the customary methods of procedure of a union, can outsiders stay and be present at a meeting?

A. No, sir; not as long as the meeting is in business order, they can't.

The Court: I didn't catch that answer.

The Witness: Not as long as the meeting is in business order.

The Court: Mr. Davis, see if you can talk just a little louder.

*Grant Davis.*

By Colonel Harris:

page 1645 } Q. While you carpenters were milling around  
did you hear anybody say that they were afraid  
of getting shot?

A. I heard some of the boys say that they said some of the  
boys said they were afraid to go to work, said they were  
afraid they might be picked off the tippie by rifles or a gun  
or something. Some said they weren't afraid to go but they  
wouldn't go through the picket lines because they felt like  
they ought to stay out to sympathize with the other boys.

Q. Ought to stay what?

A. Yes, sir; to sympathize with the laborers.

Q. Did you at any time out there on that Laburnum job  
hear anybody make any threats to shoot anybody?

A. No, sir.

Q. Did you hear them make any threats to beat anybody or  
to kick anybody?

A. No, sir; I sure didn't.

Q. Did you see any disorderly conduct of any sort out  
there?

A. No, sir.

Q. You didn't go back to work, did you, after that meeting  
when you were milling around?

A. No, sir; not after the 27th day I wasn't back in there  
any more. I don't know what happened after that.

page 1646 } Mr. Robertson: Wait a minute. Let him  
finish.

Colonel Harris: I beg your pardon. Did I interrupt you?

The Witness: No. That is all I was going to say, just I  
didn't go back any more. I don't know what happened after  
that day.

By Colonel Harris:

Q. Were you afraid that you would get hurt if you went  
back to work?

A. No, sir; I sure wasn't.

Q. What was the occasion that prompted you to stay away  
after the 27th?

A. I felt like I ought to stay away to sympathize with the  
other boys, the other union that was coming in there, until they  
were recognized as a body of union men.

Colonel Harris: You may take him.

*Grant Davis.*

CROSS EXAMINATION.

By Mr. Robertson:

Q. How long have you been a member of the A. F. of L., Mr. Davis?

A. I joined the A. F. of L. on December 6, 1948.

Q. When did you go to work for Laburnum?

A. December 6, 1948.

Q. When did you join the United Mine Workers?

page 1647 } A. I joined the United Mine Workers in 1918.  
Q. So you belonged to the United Mine  
Workers before you did to the A. F. of L.?

A. That is right.

Q. Doesn't your obligation to the United Mine Workers convince you not to join the A. F. of L.?

A. No, sir.

Q. It does not?

A. No, sir.

Q. You were sort of playing both ends against the middle by belonging to them both out there, wasn't you?

A. No, sir.

Q. Did you keep your dues paid up in both of them?

A. I paid my dues in both of them, yes, sir.

Q. You knew nobody would bother you out on that job as long as you were a member of the United Construction Workers, didn't you?

A. No, sir; I didn't. I didn't have that intention whatever.

Q. Anyway, you were a member of the United Mine Workers.

A. Yes, sir.

Q. In good standing?

A. Yes, sir.

Q. Were your dues all paid up?

A. Yes, sir.

page 1648 } Q. Belonging to what local?  
A. I belonged to 5834.

Q. Where is that?

A. At Thealka, Kentucky.

Q. How far is that from the job site in Breathitt County?

A. It is about 43 miles, I guess.

Q. Nobody ever bothered you at all?

A. No, sir.

Q. You said that you did hear some of these men say, what about getting shot?

*Grant Davis.*

A. How is that?

Q. You said something about some of the carpenters down there on the 27th were talking about they were scared to go back to work for fear they would get shot. Just what was it they said?

A. They said "We don't know who might be in these hills with rifles in there." No, we didn't know what was in them hills. We couldn't swear there was anybody in them hills. We didn't know there was anybody in them hills whatever, because I never had been over there. I didn't know what was in them hills, but still I wasn't afraid to go back to work because I wasn't afraid of anybody bothering me. I never had people treat me better in my life than I was treated in Breathitt County.

page 1649 } Q. Then what was eating on those fellows that kept on talking about somebody shooting them from the hills?

A. They were just natural cowards, that is all, brother, if you want me to tell you. That is what it was.

Q. They had not joined the United Mine Workers either, had they?

A. What?

Q. They had not joined the United Mine Workers, had they?

A. No, sir. Some of them couldn't get in there, I guess, if they wanted to.

Q. Did you take your obligation when you joined the A. F. of L.?

A. Yes, sir.

Q. Doesn't that commit you not to give any aid or comfort to a rival union like the United Mine Workers?

A. Yes, sir.

Q. Why did you koin up with the United Mine Workers?

A. I didn't join up with the United Mine Workers. I already belonged to the United Mine Workers.

Q. Well, did you belong to the United Mine Workers or United Construction Workers?

A. Huh?

Q. Did you belong to the United Mine Workers or United Construction Workers?

page 1650 } A. I belonged to the United Mine Workers of America.

Q. Well, did your obligation with them keep you from joining the A. F. of L.?

*Grant Davis.*

A. No, sir.

Q. You were free to join anything you wanted?

A. Yes, sir.

Mr. Robertson: I have no other questions.

RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. Are you mining coal now or working around the mines now?

A. Yes, sir. I am working inside of the mine.

Q. What was the occasion that prompted you to keep your dues paid up in the United Mine Workers?

A. Well, sir, the reason I kept my dues paid up in the United Mine Workers, I didn't want to drop out because I knew this job over there wasn't going to last too awful long and I didn't want to leave my home to go to work in other places, so I kept my dues paid up in the United Mine Workers of America so I wouldn't have to pay an initiation fee again when I started back in to working in the coal mine. The reason I was over in Breathitt County on the job during the time I was working, our tippie burned down at the Northeast Coal Company and it throwed us all out of work for 18 long months. So I had to make a living for my family some way. That  
page 1651 } is why I was in Breathitt County during the  
time that I was in there when this trouble came  
up.

So I kept my dues paid up in the United Mine Workers of America so I wouldn't have to pay that \$50 when I went back in the mines.

Colonel Harris: That is all.

RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. You had to keep your dues up in the United Mine Workers if you were going to work there in eastern Kentucky, didn't you?

A. No, sir.

Mr. Robertson: All right.

The Court: Stand aside.

*Harrison Daniels.*

(Witness excused.)

The Court: You may adjourn Court until tomorrow morning at 10 o'clock.

(Whereupon, at 4:50 o'clock p. m., the Court recessed until 10:00 o'clock a. m. Wednesday, February 7, 1951.)

. . . . .

page 1652 }

. . . . .

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on February 7, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

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## PROCEEDINGS.

(Roll call of the jury.)

The Court: Who is your next witness, Mr. Mullen?  
Colonel Harris: Call Mr. Harrison Daniels.

Whereupon,

## HARRISON DANIELS

called as a witness for Defendants, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By Colonel Harris:

Q. What is your name, please, sir?

*Harrison Daniels.*

A. Harrison Daniels.

Q. Where do you live?

A. I live at Paintsville, Kentucky.

Q. Where were you born?

A. I was born in Lawrence County, Kentucky.

Q. How old are you, Mr. Daniels?

A. I was born in the year 1889.

Q. Have you ever worked for the Laburnum Construction Company?

A. I did, yes, sir.

Q. Where did you work for them?

A. In Breathitt County.

Q. Are you a member or were you a member then of the American Federation of Labor?

page 1654 } A. A. F. of L.?

Q. Yes.

A. Yes, sir.

Q. Which local union did you belong to, the one at Paintsville or the one at Salyersville?

A. Paintsville, 646.

Q. What time did you go to work on the Laburnum job for the Pond Creek Pocahontas Coal Company?

A. I started in on Monday after the November election in 1948.

Q. Do you know who was the first man that went to work on the job?

A. You mean—

Q. The Laburnum job.

A. The superintendent?

Q. No, of the carpenters. Were you among the first?

A. I was one of the first ones, yes, sir.

Q. Are you now a member of the United Mine Workers of America?

A. Yes, sir.

Q. How long have you been a member of the United Mine Workers of America?

A. I guess twelve years altogether.

Q. Are you still a member of the A. F. of L.?

A. No, sir; I am not.

page 1655 } Q. When did your membership with the A. F. of L. terminate, when did it end?

A. I believe—I wouldn't say for sure, but I believe it ended in October in 1949.

Q. Whereabout were you working on the Laburnum job on Tuesday, the 26th of July, 1949?

*Harrison Daniels.*

A. I was working on top of the hill at the head house.

Q. Did anybody come up to the head house that day and interfere or interrupt the work you were doing up there?

A. No, sir; they did not.

Q. Did you see them interrupt the work that any of the other men were doing up there?

A. No, sir; I did not.

Q. Do you remember what men were working up on the head house with you on the 26th of July?

A. I think I remember all of them. There was Monroe Sublett, Grant Davis, Albert Dotson, and Tony Wireman and Tony Miller.

Q. When did you first learn that the strikers from Allen-Codell and Codell Faulconer had been over to the Laburnum job that day?

A. I never heard nothing about it until after quitting time in the afternoon.

Q. That night, the night of the 26th, did you go to a meeting in Paintsville?

page 1656 } A. Yes, sir; I did.

Q. Where was that meeting?

A. It was held in the City Hall.

Q. Did you hear any speeches or conversations at that meeting?

A. Yes, sir; I did.

Q. Did you hear Mr. Bryan make any speech?

A. I did.

Q. Do you recall what he said at that time?

A. Mr. Bryan come in there and he got up and addressed the crowd, and he asked the boys all to go back the next day and go to work. He said, "I will put my overalls on," he said, "and go out on the job with you." He said, "I will lead the way."

Well, they all talked around there some time, and then they agreed, some, to go back in the next morning and go to work.

Q. Did you hear a man named Bert Preston say anything to Mr. Bryan on that occasion?

A. Yes, sir; I sure did.

Q. Had you known Bert Preston before that meeting?

A. Yes, sir; I sure did.

Q. How long had you known him?

A. Well, I have known Bert Preston I guess 10 or 15 years.

Q. When Mr. Bryan said he would lead them  
page 1657 } across the picket line, what, if anything, did Bert Preston say to that?

*Harrison Daniels.*

A. Bert Preston said that he was not going to have anything to do with it because it was dangerous in there, to go across it, something similar to those words.

Q. Did he say anything about a picket line?

A. That he wouldn't cross the picket line.

Q. That he would not?

A. That is right, that he would not cross a picket line.

Q. Did you go back out there on the 27th?

A. I did.

Q. Whom did you ride with on that day?

A. I started in with a fellow by the name of Dave Miller and rode about half way and he had a breakdown and I got in with Charlie Patrick. That was the foreman I was working for.

Q. Did you ride from there in to the job site with Patrick?

A. I rode in to the office there, where the office was, with him.

Q. What did you find when you got to the office?

A. When we got there at the office, I seen Mr. Bryan walk down and take the picket sign down and bring it in to the office.

page 1658 } Q. Did you hear him make any speech on that occasion?

A. He was talking to them and trying to get them all to go back to work. Then later they all agreed to go to work, and the foreman started to leading the crowd and they went towards the tipple. Me and my crew that I worked with, we got something like half way between the tipple and the office, and someone hollered from back over from the office—I don't know who it was, and I couldn't recall—and said they wanted us fellows that worked on top of the hill to come back and go to our job. We turned and come back over and they said we want you fellows, the superintendent did, to go back on top of the hill to your job. So we turned and drove something like three miles, I guess, or more, back to the top of the hill, the way we had to go. We got up there and got our tools out, and then we had to drop down over the hill maybe a couple of hundred feet or something like that, up on the head house. We got up there and started work. I worked something like between 15 and maybe 20 minutes, and a fellow by the name of Dave Miller came out on a big wall built there and he hollered down and said, "Hey, you fellows, they want you all off the hill down to the bottom." I said "Who said so?" He said Delinger did. That was the superintendent. So we turned and went back down and got in our car and drove back

*Harrison Daniels.*

down. They were all met there at the office. They pondered around there some time trying to get settled, page 1659 } Bryan still trying to get them to go back to work. Then the men just decided they wouldn't cross that picket line and go to work. Then they decided they wouldn't do nothing. Then they went ahead on, just first one and another kept drifting out, until directly they were all gone.

Q. When Mr. Bryan pulled down the picket sign, were there any pickets anywhere near when that happened?

A. I wouldn't say there were any pickets. There were lots of fellows there. I talked with lots of those boys around there, there were plenty of them that didn't belong to our organization.

Q. Didn't belong to the A. F. of L.?

A. That is right, they didn't belong to the A. F. of L.

Q. When Mr. Bryan tore down the picket, did any of these men that were standing around there at that time threaten him or make any effort to injure him?

A. I never seen nobody do nothing like that.

Q. Did you hear any cursing or loud talking going on there?

A. I did not.

Q. Did you at any time hear anybody threaten to shoot anybody else?

A. No, sir; I did not.

page 1660 } Q. Do you know a man named Henry Starr?

A. I do.

Q. How long have you known Henry Starr?

A. I knowed him something like five year, I guess.

Q. Were you and he ever members of the same union?

A. Yes, sir, we was.

Q. Did you both hold jobs in the union?

A. Yes, sir.

Q. What was the job that you held?

A. I was Trustee of the union.

Q. What was Henry Starr?

A. He was the Treasurer.

Q. As Trustee, was it your duty to examine the books of the Treasurer?

A. That is right, every six months.

Q. Did you and Henry Starr have any argument about that?

A. I tried about two months or three, there, to get a settlement out of him, and I never could get none.

*Harrison Daniels.*

Q. Do you know Henry Starr's reputation for truth and veracity in the community where he lives?

A. Well, I know pretty well, yes, sir.

Q. Is that reputation good or bad?

A. It is not good in our country.

Q. Did you go to the meeting on the 28th at Paintsville?

A. No, sir, I didn't attend that meeting.

page 1661 } Q. Did you talk to Mr. Bryan any more?

A. Later, after that, yes, sir, I did.

Q. Was that after you had finished all your work at Laburnum?

A. No, sir. I went back after I talked to Mr. Bryan, and talked some more.

Q. Where was your conversation with Mr. Bryan?

A. It was in the Herald Hotel in Paintsville.

Q. Do you recall what day of the month that conversation was?

A. No, sir, I sure can't.

Q. What was said by Mr. Bryan and what was said by you at that hotel in Paintsville?

A. I went in there, and he was taking statements from all the boys who worked for him. I went in, and he asked me where I worked, and I told him where I was working. He wrote my name down, probably, I believe he did, on a slip of paper. He asked me a few questions.

"Well," he said, "You don't know anything that would do us any good or help us," something like that. He asked me, "Are you afraid to go back in there to work?" And I said, "No, sir. I am not afraid to go back in there to work." He asked me if I would go back in and work, and I told him I would.

page 1662 } Q. Did you?

A. Yes, sir, I did.

Q. Go ahead. I didn't mean to interrupt.

A. He told me to report on Monday morning to Salversville to a fellow by the name of Louis something. I don't know just exactly what his last name was, Belcher or Belter, or what.

Q. Veltry?

A. Veltry, something like that, yes, sir.

So Monday morning I went back there and reported to Louis there at the hotel. So I worked that week, helped crate up all the stuff that Laburnum had in there, stayed with them and crated up, loaded everything they had out into boxcars and railroad cars. I worked that week, and after we got

*Harrison Daniels.*

everything done we nailed boxcars. I drove the last nail that was drove on the job, and the first.

Q. When you went back to work on or about August 1st, were there any picket signs there then?

A. Yes, sir, there was a picket sign there.

Q. Did you see any men standing around then?

A. Yes, there were some men standing there.

Q. What happened to the picket sign that was there?

A. Louis went down and took it down and brought it in the office and laid it down there. It laid there all the time we worked until we got done, and it was still in there page 1663 } when we left.

Q. Did anybody at any time, from July 26 on up until August 1, ask you to join the United Construction Workers?

A. No, sir, they did not.

Colonel Harris: You may take the witness.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Daniels, you say you were doing carpentry work out on the job?

A. Yes, sir.

Q. When did you arrive in Richmond for this trial?

A. I came in last Saturday or Sunday.

Q. Did you come in here the 26th of January?

A. I came in last Sunday, whatever date it was.

Q. Last Sunday a week ago?

A. Yes, sir.

Q. Were you in town the Sunday that John L. Lewis was in town?

A. I never seen him.

Q. You never saw him?

A. No, sir, I did not.

Q. You belong to the United Mine Workers of America?

A. I do.

Q. You have belonged to them for how long?

A. Something near twelve year, I guess, ten or twelve.

Q. And you belong to the United Construction Workers? page 1664 }

A. No, sir.

Q. Do you belong to District 50 of the United Mine Workers?

*Harrison Daniels.*

A. No, sir. I belong to the United Mine Workers. That ain't District 50.

Q. Do you still belong to the American Federation of Labor?

A. No, sir, I do not.

Q. How long did you belong to that?

A. Well, let's see, now. I belonged to them something like four year.

Q. But you belonged to the United Mine Workers of America before you joined the A. F. of L.?

A. Yes, sir, I did.

Q. How long had you belonged to the United Mine Workers when you joined the A. F. of L.?

A. I didn't belong to the United Mine Workers at that time when I joined the A. F. of L. I had quit mining and hadn't mined none since 1946.

Q. Well, did you ever belong to both unions at the same time?

A. I did for a period of time, yes, sir.

Q. Did you join the A. F. of L. and then rejoin the United Mine Workers, or did you take up your membership 1665 } ship in the United Mine Workers and then rejoin the A. F. of L.?

A. No, sir, I didn't rejoin the A. F. of L. I didn't join the A. F. of L. but one time.

Q. That was after you had joined the United Mine Workers?

A. I had belonged to the United Mine Workers, yes, sir.

Q. When you joined the A. F. of L.?

A. I didn't belong to them at that time. I had dropped out. I hadn't worked in and around the mines since 1946.

Q. But you never belonged to both unions at the same time?

A. I did for a period of time, yes, sir.

Q. On Tuesday, July 26, you were working on top of the hill, up in the neighborhood of the headhouse?

A. Yes, sir.

Q. You put in a full day's work without any trouble?

A. I sure did, yes, sir.

Q. You went to the union meeting in Paintsville that night?

A. I went down to the City Hall, yes, sir, at a called meeting. It wasn't a regular meeting. It was a called meeting.

Q. You said that at that meeting some of the men said it was dangerous out there on the work and didn't want to go back. Just what did they say about that, as nearly as you can remember?

*Harrison Daniels.*

A. I told you they said it was dangerous and  
page 1666 } wouldn't go back to work. They wouldn't go  
over a picket line.

Q. It was dangerous to cross a picket line?

A. They didn't say it was dangerous to cross a picket line.  
They just said they wouldn't cross it.

Q. But they said it was dangerous?

A. Yes, sir, they said it was dangerous.

Q. Did you hear Bert Preston saying anybody going back  
out there ought to pack not less than a .38?

A. No, sir, I did not.

Q. Did you hear anybody say if they were going back out  
there they ought to pack a gun?

A. No, sir, I did not.

Q. Did you hear Mr. Bryan say that they ought not to pack  
a gun?

A. I never heard Mr. Bryan say nothing about it.

Q. You were there during the whole meeting?

A. I certainly was.

Q. When you went back out to the job site on July 27, in  
the morning, which would be Wednesday, you say about how  
many men were out there?

A. I didn't go back on Wednesday. Monday was the 26th,  
wasn't it?

Q. Tuesday was the 26th. You didn't go back until the  
following Monday?

A. I went back the next day after I worked the full day  
on top of the hill.

page 1667 } Q. If you worked a full day on top of the hill  
on the 26th, that was Tuesday?

A. That is right.

Q. And then you went to the union meeting at Paintsville  
that night?

A. That is right.

Q. Then did you go back out to the job site the next morn-  
ing?

A. Yes, sir, I did.

Q. When you got out there, how many people would you say  
were out there?

A. You mean on the job?

Q. Yes.

A. I guess maybe there might have been 30, altogether, by-  
standers and laborers and everything.

Q. Did you hear any talk that morning about anybody be-  
ing scared?

*Harrison Daniels.*

A. No, sir, I never heard nothing said about it.

Q. You never heard anything about that at all?

A. No, sir, I did not.

Q. There was no reason for you to be scared, because you were a member of the United Mine Workers, weren't you?

A. No, sir, I didn't belong to them at that time.

Q. You belonged to the A. F. of L. at that time?

A. Yes, sir.

page 1668 } Q. You were not scared at all?

A. No, sir, I was not.

Q. When you went back to work to help Laburnum move out, you went back at 90 cents an hour, didn't you?

A. No, sir, I went back at my same scale that I was getting.

Q. You were getting carpenter's pay. I beg your pardon. You were getting how much an hour?

A. I was getting \$1.75 an hour.

Q. How long have you belonged to the United Mine Workers this last time?

A. I belonged to them about a year and a half, probably, something like that.

Q. This last time?

A. Yes, sir.

Q. I am referring to Plaintiff's Exhibit No. 1, which is the Constitution of the International Union, United Mine Workers of America, and I am turning to page 88, and it talks about when you take your obligation. It states:

"President—Fellow Workmen: The United Mine Workers of America requires perfect freedom of inclination in every candidate for membership to its body. An obligation of fidelity is required; let me assure you that in this obligation there is nothing contrary to your civil or religious duties;

page 1669 } with this understanding are you willing to take  
an obligation which binds you upon your honor  
as a man to keep the same as long as life remains?

"Each candidate answers—I am.

"President—Raise your right hand.

"I do sincerely promise, of my own free will, to abide by the laws of this Union; to bear true allegiance to, and keep inviolate the principles of the United Mine Workers of America; never to discriminate against a fellow worker on account of creed, color, or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on

*Harrison Daniels.*

all occasions and to the extent of my ability the members of our Organization.

"That I will assist all members of our Organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the Union or seeking better remuneration for his labor; and, as the mine workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the Organization to do so. And I further promise to help and assist all brothers in adversity, and to have all mine workers join our Union that we may all be able to enjoy the fruits of our labor; that I will never knowingly wrong a brother or see him wronged, if I can prevent it.

"To all this I pledge my honor to observe  
page 1670 } and keep as long as life remains, or until I am  
absolved by the United Mine Workers of  
America.' "

Have you ever violated that obligation when you joined the A. F. of L.?

A. Did I ever what?

Q. I say, have you ever violated your obligation to the United Mine Workers of America by joining the A. F. of L.?

Colonel Harris: We object to that as immaterial and irrelevant.

Mr. Robertson: All right. I withdraw the question if he doesn't want to answer it.  
doesn't want to answer it.

No further questions.

RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. I understood you to say when you rejoined the A. F. of L. you were no longer a member of the Mine Workers.

A. I didn't belong to them at that time.

Colonel Harris: That is all.

The Court: Stand aside.

(Witness excused.)

Colonel Harris: If the Court pleases, the next witness is

*Lindon Higgins.*

somewhat deaf, and I think, although I don't know, that he does a little lip-reading, and I will have to talk loud. At Mr. Mullen's suggestion, I will swap places with him.

The Court: Very well.

page 1671 } Mr. Robertson: What is the witness' name?

Colonel Harris: Lindon Higgins.

Whereupon,

LINDON HIGGINS

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Colonel Harris:

Q. What is your name, please, sir?

A. Lindon Higgins.

Q. How old are you, Mr. Higgins?

A. Thirty-five.

Q. Where were you born?

A. In Morgan County, Kentucky.

Q. Have you spent most of your life in Kentucky?

A. Yes, sir.

Q. Were you a member of the Paintsville Local or the Salyersville Local at the time the Laburnum job was going on out in Breathitt County?

A. I was a member of the Salyersville Local.

Q. Are you a member of the Salyersville Local now?

A. Yes, sir.

Q. Do you hold any job with it?

A. President of the Local.

page 1672 } Q. How long have you been President of the Salyersville Local?

A. Since June of this year.

Q. Is that a United Mine Workers Local, or an A. F. of L. Local?

A. A. F. of L.

Q. Are you a carpenter?

A. Yes, sir.

Q. Were you a carpenter back in 1949 during the month of July?

A. Yes, sir.

Q. Were you a member of the A. F. of L. then?

A. Yes, sir.

*Lindon Higgins.*

Q. Were you a member of the Salyersville Local then?

A. Yes.

Q. During July, 1949—would the Salyersville Local take in laborers?

A. No, sir.

Q. Did you have a conversation with Mr. Bryan on the 27th of July, the day after the men from Codell and Allen-Codell had come over to the job site?

A. Yes, sir, we talked with him down at the lower tipple.

Q. Do you remember what Mr. Bryan said to you and what you said to Mr. Bryan?

page 1673 } A. Speaking to us all as a whole, he asked us to go back to work; and I told him I didn't think I would like to go back to work for him; to settle it in higher headquarters of the United Mine Workers and the A. F. of L., and if they made a decision we would do whatever the outcome was.

Q. What did Mr. Bryan say to that, if anything?

A. It wasn't but just a few minutes from that time until they said it was all over with, and we could go back home.

Q. Who said it was all over with and to go back home?

A. I couldn't recall just who said that. In other words, we weren't going to work.

page 1674 } Q. Where were you working on July 26th?

A. I was working at the schoolhouse.

Q. What sort of work were you doing at the schoolhouse?

A. We were laying the foundations for the building.

Q. Were you there at the schoolhouse when Mr. Hart and the men on strike from Codell and the employees of Codell-Faulconer came up?

A. Yes, sir.

Q. Did they come up anywhere near you? How close did they get to you?

A. The saw horse was about where this table is here, and my buddy and I were working on the inside of the foundation. We were putting joists across.

Q. Do you know any men that were working there by the name of Hackworth?

A. Yes, sir; there were three of them.

Q. Three brothers?

A. Yes, sir.

Q. Were they working that day?

A. Yes, sir.

Q. Did you at any time while those men were there hear anybody threaten any of the Hackworth boys?

*Lindon Higgins.*

A. No, sir; I didn't hear any remarks to the Hackworth boys.  
page 1675 } Q. Did you see any one of this group of men  
that came up get up and rub against the Hackworth boys?

A. No, sir; I did not.

Q. Was there anything between those men and the Hackworth men?

A. The two that were over here sawing, no, but the one who was over there with me, we were on the inside of this foundation, Junior and I were.

Q. You and Junior were on the inside of the foundation?

A. We were putting joists across.

Q. How close were you and Junior together?

A. About 14 feet, one at one end of the timber and one at the other.

Q. Did you hear anybody on that occasion threaten to beat or injure or shoot or harm Junior?

A. No, sir; I did not.

Q. Did you hear them threaten to harm either one of his two brothers?

A. No, sir.

Q. Did you see anybody that was drunk?

A. No, sir; not as I could tell.

Colonel Harris: You may take the witness.

page 1676 } CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Higgins, do you hear me or do you read my lips?

A. I have to look. I am pretty hard of hearing.

Q. If you don't see my lips, you cannot hear?

A. Not too good.

Q. When did you arrive in Richmond to attend this trial?

A. Thursday morning.

Q. A week ago, of last week?

A. That is right, sir.

Q. Where are you staying?

A. At the hotel.

Q. Which one?

A. The King Carter.

Q. All the group that came from Kentucky are staying there together?

A. I couldn't say whether they are all there or not.

*Lindon Higgins.*

Q. How many of you are staying there that you know of?

A. Eight or nine.

Q. Have you discussed this case among yourselves since you got here?

A. Yes, sir.

Q. Have you discussed it with any of the lawyers for the Defendants since you got here?

A. Yes, sir.

page 1677 } Q. Are you a member of the United Mine Workers?

A. Yes, sir.

Q. Are you also a member of the United Construction Workers?

A. No, sir.

Q. Are you a member of the A. F. of L.?

A. Yes, sir.

Q. As I understand it, you were at work at the schoolhouse on Tuesday, July 26.

A. The 26th of July. I don't recall whether it was Tuesday or not.

Q. That was the day that Hart and his group of men came by there?

A. Yes, sir.

Q. And you were at that time a member of the United Mine Workers?

A. No, sir.

Q. When did you join the United Mine Workers?

A. The 13th of January, 1951.

Q. You were already a member of the A. F. of L. local at Salyersville, weren't you?

A. Yes, sir.

Q. And you still are a member of the local at Salyersville?

A. So far, yes, sir.

page 1678 } Q. The reason you joined the United Mine Workers was so you could work as a carpenter out in eastern Kentucky, wasn't it?

A. Yes, sir.

Q. Did you go to the tippie on the 26th after you left the schoolhouse?

A. Yes, sir.

Q. How many men would you say were down there at the tippie?

A. I went from where we were down to the office.

Q. To where?

*London Higgins.*

A. The office, the Laburnum office. I didn't go on over to the tipple. I went to the office.

Q. How far is it from the office to the tipple?

A. I would say approximately four or five hundred yards.

Q. You stayed up at the office?

A. Yes, sir. There were 25 or 30 people there.

Q. Why didn't you go on down to the tipple?

A. I didn't have any business down there.

Q. You were scared to go down there?

A. No, sir; I wasn't scared to go down there.

Q. You just didn't think you had any business down there?

A. That is right, at that time I didn't have page 1679 } any business down there.

Q. But you went over there to see what was happening, didn't you?

A. Yes, sir; this group that came up there where we were working asked us to go down there with them.

Q. Do you know whether or not the men were afraid to go back to work on the afternoon of July 26 at the tipple?

A. I couldn't speak that only for myself.

Q. You were not?

A. As far as being personally harmed bodily, no, I was not.

Q. But you don't know about the others?

A. No, sir; I can't speak for them.

Q. Did you go back over there on the 27th?

A. Yes, sir.

Q. How many would you say were there when you got there on the 27th?

A. We didn't get in until late, about 8:30, and there were very few fellows in the office, and the Hackworth boys and I stopped there at the office and then we went on over to the tipple. I would say it was about 15 to 9 or probably 9 o'clock when we got over to the tipple.

Q. You didn't go to work that day?

A. No, sir.

Q. Why?

page 1680 } A. Because nobody wanted to go to work.

Q. Why?

A. I don't know.

Q. Didn't you think if you crossed that picket line it wouldn't be very healthy for you, would it?

A. I wasn't afraid of the picket line.

Q. Sir?

A. I wasn't afraid of the picket line.

*Lindon Higgins.*

Q. But you didn't think it would do you any good to cross it, did you? I mean, you were liable to get hurt if you crossed it?

A. If there was a picket line there, there wasn't any when I went through.

Q. But I say, if there was one there and you tried to cross it, you think you were liable to get hurt, don't you?

A. As being a member of a union I wouldn't like to cross any picket line.

Q. That wasn't exactly what I asked you. I say, leaving all that out, if there was a picket line and you undertook to cross it under the circumstances on that day, you think you are liable to get hurt, don't you?

A. Personally I wouldn't think any one would hurt me myself.

Q. Do you think anybody else would have got page 1681 } hurt who undertook to cross it?

A. I wouldn't think so.

Q. Are you a pretty good shot?

A. I made expert when I was in the service in the Army.

Q. If I was working on the tippie and you were laying out in the woods do you think you could shoot me off?

Colonel Harris: We object to that, if the Court please.

Mr. Robertson: I think that is a proper question, Your Honor. I want to see what the situation was there. I think it is a proper question.

The Court: I will allow it for what it is worth.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. If I was working on the tippie—of course I hope you wouldn't want to—but if I was working on the tippie and you were out in the woods, do you think you could shoot me off?

A. If I wasn't too far away and had a good rifle I probably could, yes. I have killed squirrels.

Q. The woods come down there pretty close, don't they?

A. Yes, sir. The woods come pretty close there.

Q. If I was working on the schoolhouse and page 1682 } you were out in the woods out there near the schoolhouse and you wanted to shoot me off, do you think you could?

A. Why, yes, I could. It could be done.

*Lindon Higgins.*

Q. Mr. Higgins, when you joined the A. F. of L. you took an obligation to the union, didn't you?

A. Yes, sir.

Q. I am going to read an obligation here and ask you if that is the obligation you took.

Mr. Mullen: Is that A. F. of L.?

Mr. Robertson: Yes.

Mr. Mullen: No such evidence has been put in.

Mr. Robertson: I am asking if he took the obligation. I can't ask but one question at a time, Your Honor. We will put it in as an exhibit with this witness' testimony.

The Court: Very well.

By Mr. Robertson:

Q. If I read too fast for you to hear, you flag me down. I will ask you if when you joined the A. F. of L. you took this obligation:

"I (giving your name), of my own free will and accord—in the presence of these members—here assembled—do solemnly and sincerely promise—on my sacred honor—that I will never reveal—by word or deed—any of the business of this United Brotherhood—unless legally authorized to do so.

I promise to abide by the Constitution and Laws  
 page 1683 } —and the will of the majority—observe the local  
 trade rules of this Order—and that I will use every honorable means—to procure employment for brother members. I agree that I will ask for the Union Label—and purchase union-made goods—and employ only union labor—when same can be had. And I further agree that—if at any time it should be discovered—that I have made any misstatements—as to my qualifications for membership—I shall be forever debarred from membership—and donations in this order. I pledge myself to be obedient to authority—orderly in the meetings—respectful in words and actions—and charitable in judgement of my brother members. To all of this I promise and pledge—my most sacred word and honor—to observe and keep—and the same to bind me—as long as I remain a member of this Brotherhood. And I further affirm and declare—that I am not now affiliated with—and never will join or give aid—comfort—or support to any Revolutionary Organization—or to any organization that tries to disrupt—or cause dissention in any Local Union—District Council—State or Provincial Council or the International Body—of the

*John McClellan.*

United Brotherhood of Carpenters and Joiners of America."

Were you under that obligation when you joined the United Mine Workers of America?

A. You don't expect me to remember all that, but if that is the obligation of the A. F. of L., I was.

Mr. Robertson: That is all.

page 1684 } RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. When you were out there on the Laburnum job the question has been asked you if anybody could be shot from the woods if they were working on the schoolhouse, and you said in your judgment if you had a good rifle they could. Or was that the tippie you were talking about?

A. That is correct, either place.

Q. Did you hear of any person that was shot out there either off the schoolhouse or off the tippie?

A. I never have.

Q. Did you hear of anybody that was shot at at the schoolhouse or on the tippie?

A. I did not.

. . . . .

JOHN McCLELLAN

called as a witness in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Colonel Harris:

Q. What is your name, please, sir?

A. John McClellan.

page 1685 } Q. Mr. McClellan, how old are you?

A. 36.

Q. Where were you born?

A. Van Lear, Kentucky.

Q. Were you raised in Kentucky?

A. Yes, sir.

Q. Are you living in Kentucky now?

A. Yes, sir.

Q. Whereabouts in Kentucky do you live?

*John McClellan.*

A. Whittonsville.

Q. How far is that from Paintsville?

A. About seven miles, I think. Between six and seven miles.

Q. How big a place is Whittonsville?

A. There might be half a dozen houses and two stores.

Q. Were you working for the Laburnum Construction Company during the month of July when they were doing some work for the Pond Creek Pocahontas Coal Company?

A. Yes, sir.

Q. In Breathitt County?

A. Yes, sir.

Q. What kind of work were you doing?

A. I was iron worker and working on the high line there to hoist material up the hill.

Q. Were you a member of any union at that time?

A. I was a member of the A. F. of L. My dues page 1686 } were behind in the United Mine Workers.

Q. How far behind were they, do you remember?

A. The last work I done in the mines was—I believe it was the second day of March, and I left there and got the job with the Bristol Iron and Steel at Van Lear and then went to Pond Creek over in Breathitt County.

Q. The work you were doing at Pond Creek was not mine work at all, was it?

A. No, sir.

Q. You say you were working on the high line. Will you tell the jury what you mean by the high line?

A. Well, it was a large cable stretched from one hill to the other.

Q. What was it used for?

A. We hoisted material up on to the tippie and all up and down what we call the button line that brings coal off the hill 918 feet from wheel to wheel, and we hoisted material with this high line up this hill in order to put this button line in.

Q. What wages did you get while working on the high line?

A. I got \$2.25 an hour and all over time was double time, which made \$4.50.  
page 1687 } Q. Did anybody during the month of July ask you to join the United Construction Workers?

A. No, sir.

Q. On the 26th of July, 1949, were you at work when a

*John McClellan.*

group of workers from Codell and Allen-Codell came to the job site?

A. That is right.

Q. Were you where you could see those men?

A. I talked to those men.

Q. Did you hear any cussing?

A. No, sir.

Q. Did you hear anybody make any threats toward anybody else?

A. No, sir.

Q. Did you see any drunks?

A. No, sir.

Q. Did you see any violence take place?

A. No, sir.

Q. Did you see anybody with guns?

A. No, sir.

Q. Did you go to the meeting in the City Hall at Paintsville on the night of the 26th?

A. I was at that meeting in the City Hall, I won't say the 26th, but the night that Bert Preston, Bryan, and the rest of the carpenters were there. Dates I am not  
page 1688 } positive on the dates, but the meeting in the City Hall I was at when them men was present.

Q. All right. Did you hear Mr. Bryan make any talk to those men?

A. Yes, sir.

Q. Tell the jury what you remember of what Mr. Bryan said to the men.

A. It was a carpenters meeting. I was an iron worker and they told me I could come in with them. They seemed scared or something or other. Bryan told them—Bert Preston and Bryan were two of the main ones in the talking. Bryan promised Bert he would put on his overalls, take the sign down, the picket sign down, and lead the men over on to the job.

Q. What did Bert Preston say?

A. Bert told him if he would do that they would go back to work with him.

Q. Were you there the next day?

A. Yes, sir.

Q. Did you see Mr. Bryan take down the picket sign?

A. No, sir; I did not.

Q. Did you see him lead anybody across the picket line?

A. We followed him down the road, but there wasn't no picket sign there when I went down.

*John McClellan.*

Q. What time did you get there?  
page 1689 } A. I was in behind the crowd of carpenters  
that went down. Of course there were a few  
there at the office when I got in.

Q. There were a few at the office then?

A. Yes.

Q. If anybody took down a picket sign, it was taken down  
before you got there that morning?

A. Yes, it was taken down before I got there because I  
never saw it.

Q. You went on behind Mr. Bryan. He led the way. Where  
did you go?

A. We went over to the tipple.

Q. Did you work?

A. I started to work.

Q. How long did you work?

A. I couldn't say that. We were over there maybe an hour  
and a half or two hours or something like that. I got the  
high line started to operating, and I called Dave on top of  
the hill over the phone. We were all sitting there ready and  
I was trying to get the carpenters to hook their lumber on  
so I could start it up the hill for them.

Q. Did they?

A. No. One of them hollered, "Sh-h! trouble, trouble."

Q. Were they out where they could be seen?

A. Well, me and the man I was trying to get  
page 1690 } hooked were the only ones out. The rest of them  
were up at the tipple.

Q. Were you scared?

A. No, I wasn't scared.

Q. It was your job to operate the high line?

A. That is right, to keep the high line moving, and I had a  
man on top of the hill who did the hoisting and I was at the  
bottom of the hill on the phone. I had to keep my eye on the  
load as she went up and down the hill in order to tell my man  
on top of the hill how to handle it, and so forth. He was in  
the blind and couldn't see the hoist or nothing. I would call  
him over the telephone.

Q. How long were you there ready to haul the lumber be-  
fore the carpenters left?

A. I couldn't say the time on that.

Q. Could you give us your best judgment? You don't have  
to be correct to the minute.

A. I would say it couldn't have been over an hour and a  
half at the most.

*John McClellan.*

Q. Did anybody ask you to give any orders over the tele phone to the head house?

A. Yes, they called. They run out there and told me to tell the men on top of the hill that Delinger said to come off and I told them I didn't handle orders like that, to send Dillon or Patrick out there to tell them.

Q. Did you ever carry out Mr. Dillon's order, page 1691 } Mr. McClellan, or Mr. Patrick's order to call them off the job?

A. No, sir; I never did.

Q. Did anybody do it in your presence?

A. Dillon or Patrick one came out there. I sent them word out there if they wanted them men off the top of the hill to come out there and tell them themselves, either Dillon or Patrick one come up there and told them. I would not carry those orders out.

Q. All right. Did you ever talk to any representative of Laburnum or did they ever talk to you about making a statement for them?

A. Yes, sir.

Q. What did you say on that occasion?

A. I told them I wasn't afraid to go over there and work.

Q. Did they take a statement from you?

A. No, sir.

Q. Where was it that that conversation took place?

A. At the Herald Hotel in Paintsville.

Q. Do you recall who it was that you told you were not afraid to go to work?

A. Yes, sir.

Q. Who was it?

A. Ham Bryan, sitting right there.

Colonel Harris: You may take him.

Mr. Robertson: Stand aside.

page 1693 }

JOHN T. ARNETT,  
called as a witness on behalf of Defendants, having been first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Colonel Harris:

Q. Mr. Arnett, what is your full name?

A. John T. Arnett.

Q. Do you spell it A-r-n-e-t-t.

A. Yes, sir.

Q. How old are you, Mr. Arnett?

A. Thirty.

Q. Where were you born?

A. Henrietta, Oklahoma.

Q. Were you raised in Kentucky?

A. Yes, sir. My family moved back to their home after I  
was two years old.

. . . . .

Q. Were you out on the job site of the Labor-  
page 1694 { num Construction Company in Breathitt County,  
Kentucky, in July, 1949?

A. I was.

Q. At that time, were you a member of any union?

A. I was a member of the A. F. of L, Carpenter's Local, at  
Paintsville, Kentucky.

Q. How long had you been a member of the A. F. of L.?

A. Approximately four months.

Q. Are you a member of any union now?

A. Member of the United Mine Workers.

Q. How long have you been a member of the United Mine  
Workers?

A. Since the latter part of August in 1949.

Q. Did you have any sort of conversation with a man named  
Hart on July 26th in the toolhouse at the job site of the La-  
burnum Construction Company?

A. Yes.

Q. Who was in the toolhouse first, you or Mr. Hart?

A. Mr. Hart.

Q. What was your conversation with Mr. Hart?

A. I asked him if he was—I don't know the word for it  
there—implying that that was United Mine Workers, and I  
told him that if he was representing himself to be the United

*John T. Arnett.*

Mine Workers, that it was probably a lie, "a damned lie," is the exact word.

Q. Did you all then get in a fight?  
page 1695 } A. We did not. We were very friendly. Mr. Hart was very nice.

Q. Did he explain to you anything after that?

A. He explained to me all that I asked him, very nicely. I asked him what advantage it would be to join with the United Construction Workers. After, he explained that it was the Construction Workers affiliated with the Mine Workers. They gave us the rate for carpenters and others. He told me he wasn't interested in the carpenters particularly, but he wanted the helpers and laborers.

Q. Was a man by the name of Bert Preston in the toolhouse while you were there?

A. Yes, sir. Mr. Hart and Mr. Preston were in conversation when I entered.

Q. Tell the part of that conversation that you heard.

A. I heard Mr. Preston tell Mr. Hart that if he established a legal picket line, the A. F. of L. members would respect it.

Q. Did he say what would be done if he did not put up a picket line?

A. He said we would sure as hell work.

Q. Did you go to work on the 27th?

A. No, sir.

Q. Did you go to work on the 28th?

A. No, sir, I didn't go to work, but I went back  
page 1696 } to the site, I believe, on the 28th.

Q. When you got up there to the job site, did you see any picket sign?

A. Yes, sir, I did.

Q. Do you recall what happened up there at that time?

A. There was a bunch of us, 7 or 8, were issued new badges, with a work number to identify us. Mr. Bryan told us to go ahead and work; that it was all right.

We started over the hill. There is a bank there, a hill we call it, and I saw this picket sign still there. I turned around and told Mr. Bryan it looked like he was trying to get us to go back to work without any union representation, and I didn't want to work unless it was represented by someone.

Q. What did he say to that?

A. He asked me if I was afraid to work. He said if I was, he would put on his overalls and lead us.

Q. What did you say when he asked you if you were afraid?

A. I told him I wasn't afraid as far as physical fear was

*John T. Arnett.*

concerned; that those people there were my friends and neighbors, but I didn't want to work and violate any union laws.

Q. When those people came over there on the 28th, who were with Hart, did you see any of them?  
page 1697 } A. I did.

Q. Were they a bunch of hoodlums, or were they your friends and neighbors from that part of the country?

A. They were my friends and neighbors and relatives. Part of them were my cousins.

Q. Has Mr. Bryan ever talked to you since then?

A. Yes, sir.

Q. What did you all talk about?

A. He wanted to know if I could be a witness for him in this case.

Q. How long did you talk about that?

A. I wouldn't know the exact length of time.

Sometime after that, he wanted me to give him a statement at Paintsville; and then sometime after that, I believe it was in November of 1950, he came to my house, him and Mr. Sublett, the President of the Paintsville Local, and wanted me to come on up here even then.

Q. Now, let's go back to the statement. Did he ask you to sign a prepared statement?

A. He did.

Q. Had the statement that he wanted you to sign already been written out?

A. Yes, sir.

Q. Typed before he came to you with it?

A. It was.

page 1698 } Q. Did you read any part of it?

A. Yes, sir. Mr. Bryan and I read it together. I told him I didn't want to sign anything in the dark, so to speak.

Q. What took place then, after they brought you this statement already made out and you read it? What happened?

A. We read it together, and each time we came to a paragraph or statement that I couldn't verify, we would check it off. I believe there were approximately two or three small paragraphs left.

Q. Then after he checked it off—you mean he would "X" it out or put a checkmark out at the end of the paragraph?

A. We would run an "X", I believe that is the way he did it, across it.

*John T. Arnett.*

Q. After you had talked to him about the "X's," did you sign?

A. I signed the bottom of the statement, yes, sir.

Q. Do you recall how long ago that was?

A. I do not recall the exact date, but it was shortly after this stoppage of work over there.

Q. Do you recall whether it was in the winter time or in the summer time?

A. I would say in the summer time before we started back to work under the Mine Workers.  
page 1699 } Q. Do you recall when you went back to work with the Mine Workers?

A. Not the exact date. It was approximately three weeks, maybe a month, after we stopped.

Q. Regardless of the date, is your recollection clear about the conversation you had with Mr. Bryan?

A. It is.

Q. On this occasion when you talked to Mr. Hart in the tool-house and immediately before it and immediately after it, did you see any of these friends and neighbors and kinspeople of yours who were drunk?

A. I did not.

Q. Did you hear anybody make any threats to anybody on that occasion?

A. No, sir. They were only talking together like friends will when they meet.

Q. Did you see anybody rub up against this group that came over there? Did you see them rub up against any of the men who were working for Laburnum?

A. No, sir, I didn't.

Q. Did you see any guns on that occasion?

A. I saw no guns, no whisky, no signs of intoxication.

Colonel Harris: You may take the witness.

page 1700 } CROSS EXAMINATION.

By Mr. Robertson:

Q. You say you are 30 years old?

A. I am.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family?

A. One child.

Q. Where do you live?

*John T. Arnett.*

A. At Arthurmabel, in Magoffin County, Kentucky.

Q. That is in Magoffin County?

A. It is.

Q. How far is that from the job site?

A. Eight miles.

Q. These people who were out there on the 26th were people from all through there that are your kinpeople and friends and neighbors?

A. Yes, sir.

Q. It would be very awkward, then, for you to say anything against them, wouldn't it?

Colonel Harris: We object to that as argumentative.

The Witness: No.

Mr. Robertson: I think that is a proper question on cross examination. I think they have the boy on the spot, and I am entitled to show it.

page 1701 } Colonel Harris: We object, and we ask the Court to instruct the jury to disregard the statement of counsel, "We think they have the boy on the spot."

The Court: Gentlemen of the jury, disregard the statement that he thinks they have the boy on the spot; disregard it.

By Mr. Robertson:

Q. John, haven't they got you on the spot?

A. No, sir, they haven't. I won't lie for my friends, my father, or no one else.

Q. When did you join the United Mine Workers of America?

A. I believe it was in the latter part of August in '49, 1949.

Q. Did you join them—are you a carpenter?

A. Yes, sir.

Q. You joined them so you could go to work as a carpenter in Eastern Kentucky, didn't you?

A. I started back to work before I joined, and then, of course, they asked me to sign up with them after I started to work.

Q. But to keep your job, you had to join up with them, didn't you?

A. I don't know about that. I could have worked on with Mr. Hart, of course, or someone else. Our carpenters in the same Local did work there for some time.

page 1702 } Q. They wouldn't let you work out there where you wanted to work unless you joined up with the United Mine Workers of America, would they?

*John T. Arnett.*

A. I started over there with the intention of working there because I lived there. I knew I would join the Mine Workers when I joined this other union.

Q. I am very sympathetic to you, but I will ask you to answer my question. In order to work out there where you wanted to work, you had to join up with the United Mine Workers, didn't you?

A. Well, I wouldn't say that.

Q. What would you say?

A. I could have worked on this carpenter work, but that wasn't what I started there for. I am not a carpenter.

Q. What are you?

A. I am a fireman by trade.

Q. How did you happen to join the United Mine Workers?

A. So that I could work as a United Mine Worker.

Q. As a carpenter?

A. No, sir.

Q. As a fireman?

A. As a tippie mechanic, repairman on the coal tippie.

Q. You couldn't do that work and keep your job unless you joined up with the United Mine Workers?

A. Naturally, you won't work as a tippie mechanic without being a Mine Worker.

Q. You are now an officer of the United Mine Workers Local at Evanston, aren't you?

A. Yes, sir. I am Recording Secretary.

Q. That is that little place there at the job site in Breathitt County where Laburnum was working?

A. Evanston, yes, it is.

Q. You weren't scared on the 26th?

A. I was not.

Q. Why didn't you go back on the 27th?

A. Because we were supposed to have a meeting in Paintsville of union representatives and A. F. of L. The steward told us to meet him there at Salverville at 10 o'clock and decide what we were going to do, the A. F. of L.

Q. The statement that you gave Mr. Bryan, you read it before you signed it, didn't you?

A. I glanced at it over his shoulder, trying to read it with him. He read it aloud.

Q. I thought you said a moment ago you read it together.

A. I was reading it with him, trying to.

(Document exhibited to Defendants' counsel.)

*John T. Arnett.*

By Mr. Robertson:

Q. I am going to ask you to look at that and see if that is the statement you signed.

A. (Examining document.) This is definitely page 1704 } not the same statement, because there are no markings on it. Of course, this is my signature, I expect, on the bottom of the sheet.

Q. You think that has been changed since you signed it?

A. Yes, sir. There were pencil marks on the one I signed, except maybe the back sheet, and there was just a small paragraph on that.

Q. What is the date of that statement?

A. I do not remember the exact date when I met Mr. Bryan.

Q. What date has it got on it?

A. It isn't dated. It just says "of August, 1949." It doesn't say what date.

Q. If it was in August, it was before you joined the United Mine Workers, wasn't it?

A. Yes, it was.

Q. So whatever statement you gave Mr. Bryan, you gave him before you joined the United Mine Workers?

A. Oh, yes, sir.

Q. I am going to read the statement and ask you to stop me when we come to anything that is wrong.

Mr. Mullen: May I see it a moment before you read it?

(Document handed to Mr. Mullen.)

Mr. Mullen: Go ahead.

page 1705 } By Mr. Robertson:

Q. You stop me when I come to anything that is wrong.

"State of Kentucky

"County of Johnson, to-wit:

"This day personally came before me, Jewell Young, Notary Public—"

A. Mr. Bryan was the only one present when I was in there.

Q. —"in and for the County aforesaid in the State of Kentucky, John T. Arnett, who being duly sworn made oath as follows:

*John T. Arnett.*

"That he resides at Arthurmabel, Kentucky, and is a carpenter, being a member of Carpenter's Local Union No. 646, Paintsville, Kentucky, which Local Union is affiliated with the Building Trades Department of the American Federation of Labor.

"That prior to July 26, 1949, he was referred by said Local Union No. 646, Paintsville, Kentucky, to Laburnum Construction Corporation, hereinafter called Laburnum, of Richmond, Virginia, for work as a carpenter on a job then being performed by Laburnum for Pond Creek Pocahontas Company in connection with the construction of a coal preparation plant at the No. 1 Kentucky Mine of Pond Creek Pocahontas Company, Breathitt County, Kentucky.

"That on July 26, 1949, at 7:30 o'clock a. m.,  
page 1706 } he reported to Laburnum for work at the job  
site and was assigned to perform certain work  
on coal preparation plant at foot of mountain.

"That he performed his work to the best of his ability until about 12:30 o'clock p. m., when a group consisting of an estimated 75 to 100 men—"

A. I would say 30 to 40 was my estimate.

Q. —"not employed by Laburnum or Virginia Mechanical Corporation, came to the job site; that said group was headed by William O. Hart of Pikeville, Kentucky, who acted as spokesman for the group, and who announced that he was Field Representative of a labor union known as United Construction Workers, a branch or division of District 50 of the United Mine Workers of America.

"That said William O. Hart stated that he and his group would not permit the employees of Laburnum or Virginia Mechanical Corporation to continue with their work at the job site unless they joined said United Construction Workers.

"That affiant has been advised and believes that with one or two exceptions, all of the employees of Laburnum and Virginia Mechanical Corporation in connection with said work were members of Local Unions affiliated with the Building Trades Department of the American Federation of Labor, or had made application to become members of such Local Union.

"That affiant refused to join the said United  
page 1707 } Construction Workers, and has been advised and  
believes that all other employees of Laburnum  
and Virginia Mechanical Corporation did likewise,"—

*John T. Arnett.*

A. How did you start that that time, that last statement?

Q. "That affiant," that is you, "refused to join said United Construction Workers, and has been advised and believes that all other employees of Laburnum and Virginia Mechanical Corporation did likewise, with the exception of a few laborers, who were surrounded by said William O. Hart and his group and were threatened with violence unless they signed certain blanks making application for membership in said United Construction Workers."

A. I wasn't advised to that effect, that there was any threats or violence.

Q. "That said William O. Hart and his group then advised the employees of Laburnum and Virginia Mechanical Corporation that they could not continue with their work; that a picket line would be established at the job site, and that he and his group would take such steps and do such things as might be necessary to prevent, forcibly if necessary, the resumption of work by employees of Laburnum or Virginia Mechanical Corporation."

A. I don't think he was told it exactly like that. After Mr. Preston told him we would observe a picket line, page 1708 } he said he would establish one.

Q. "That some of the group with William O. Hart appeared to be intoxicated or semi-intoxicated, and that affiant believed that he might be beaten, shot, or otherwise seriously injured by these persons if he continued with his work,"—

A. That should be stricken out. I didn't sign anything to that effect.

Q. —"or resumed work.

"That there was no police protection of any kind at the job site.

"That affiant and many of the employees of Laburnum and Virginia Mechanical Corporation believed that some of the group headed by said William O. Hart might be armed with concealed weapons"—

A. I didn't sign any such statement as that, either.

Q. —"and that these weapons would be used to prevent the resumption of work by employees of Laburnum and Virginia Mechanical Corporation.

"That affiant and others employed by Laburnum and Vir-

*John T. Arnett.*

ginia Mechanical Corporation believed that if they continued to do their work or resumed work, they would run a serious risk of being injured or shot at the job site,"—

A. I didn't make any such statement as that, either.

Q. —"or being shot by persons using high-powered rifles and hiding in the hills, or being shot by persons  
page 1709 } in ambush along the desolate roads leading to and from the job site."

A. I hadn't any such beliefs as those.

Q. "That affiant conferred with other employees of Laburnum and Virginia Mechanical Corporation, and that it was agreed that it would be too dangerous for them to continue with their work, and that because of the threats, intimidations and other actions and tactics of said William O. Hart and his group, affiant and other employees of Laburnum and Virginia Mechanical Corporation have been afraid to perform further work at the job site since July 26, 1949, except that a few men may have performed work for not over one-half hour on the morning of July 27, 1949.

"And affiant further made oath as follows:

"1. That during a discussion in the carpenters' toolhouse, the said William O. Hart advised B. E. Preston, Business Agent of said Local Union No. 646, that he did not expect to have a picket line at the job the following day, July 27, 1949; that in reply, said B. E. Preston then advised Hart that if there was no picket line, the carpenters would work. And that then said Hart stated that if the carpenters and other employees of Laburnum worked, he would bring to the job site 300 men from Beaver Creek who would kick off the job the employees of Laburnum."

A. That was kind of misinterpreted there. It  
page 1710 } doesn't sound like it should be.

Q. "2. That when said William O. Hart and his group came to the site on July 26, 1949, he said, among other things, that the carpenters employed by Laburnum were taking jobs which should be filled by United Construction Workers; that the United Construction Workers' rate for carpenters was \$1.86 an hour; that it would be necessary for the carpenters to join United Construction Workers if they wished to continue with their work."

A. He told us we could work on as we were with the A. F. of L. All he was interested in was the helpers and laborers.

*John T. Arnett.*

Q. "That while he was not requesting the carpenters to get out of their A. F. of L. Local Unions, he did expect them to join the United Construction Workers' Local and receive a card from and commence paying dues to the United Construction Workers.

"Witness my hand this August 6, 1949.

"JOHN T."—

The middle initial?

A. "T."

Q. "John T. Arnett, Affiant,

"Witness: A. Hamilton Bryan."

And I think I ought to call your attention to the fact that there is no Notary's certificate filled in on it.

page 1711 } A. No, there was no Notary there. Mr. Bryan  
was the only one present.

Q. On page 2—

A. Where is the one that I signed that was marked out? There were some pencil markings on almost every page.

Q. I am coming to that in a moment.

On page 2, I call your attention to the fact that the word "many" is inked out, and "some" written in the place of it.

I call your attention, lower down on page 2, that the word "were" is inked out and "might be" is written in.

Those are the only two changes on that paper.

Now, will you explain to the jury wherein that statement is wrong?

A. (Examining document.) All along there where I was objecting as you went along about the drunken men, armed men, and so forth, I didn't say anything like that, just as I said a while ago. It seems that on the back here there has been some typing. Maybe there hasn't, but the best I remember there wasn't that much typing on the bottom of this thing.

Q. Do you claim that that is a different statement from the statement you signed for Mr. Bryan?

A. I think so, because the one that I signed had pencil markings, "Xing" it out, yes, sir.

*John T. Arnett.*

page 1712 } Mr. Robertson: I have no other questions.  
Colonel Harris: May we see that just a second?

(Document handed to Defendants' counsel.)

The Witness: There wasn't but two pages to the one I signed.

Mr. Robertson: I want to ask the witness one more question.

By Mr. Robertson:

Q. That is your signature?

A. It looks like my scratchy signature. I could tell more by checking it closer.

Q. I am going to ask you to check it closer in a moment.

A. Yes, sir, I will. I don't think anyone else can write as awkward as I can, because I had an accident to my hand and I still write left-handed.

Q. Is that or is that not your signature?

A. Yes, that seems to be; yes.

Mr. Robertson: We offer the statement in evidence, and ask that it be marked Exhibit Arnett No. 1.

(The statement referred to was marked Exhibit Arnett No. 1 and received in evidence.)

Mr. Robertson: I have no other questions.

page 1713 } RE-DIRECT EXAMINATION.

By Colonel Harris:

Q. This statement starts off "State of Kentucky, County of Johnson, to-wit: This day personally came before me, Jewel Young, a notary public in and for the County aforesaid in the State of Kentucky, John T. Arnett, who being duly sworn made oath as follows:"

Was there any young lady there?

A. No, there wasn't any young lady there.

Q. Did anybody put you under oath?

A. No one put me under oath unless it was Mr. Bryan and I don't believe he asked me to swear. He said he didn't have any notary public there, unless he himself was one.

Q. This starts off that there was a young lady there, a

*John T. Arnett.*

notary public, but I will ask you to look and see if any young lady signed that as a notary public. Do you see any signature of a notary public down there?

A. I do not.

Q. Do you see any seal of a notary public impressed on that last page?

A. I do not.

Q. I ask you to look at the typing on this last page. Does the typing up at the top which is double-spaced look like it was put on by the same typewriter as that single-spaced stuff?

page 1714 } Mr. Robertson: Wait one minute. If Your Honor please, I don't want to object to anything, but I do recall the attention of the Court to the fact that he is leading the witness in a most outrageous way. That is all I have to say about it.

The Court: Don't lead the witness, Colonel.

Mr. Robertson: He is just telling him what he wants to say and then he says it, but it is all right with me.

By Colonel Harris:

Q. Look at that and tell the Court and jury whether or not that looks to you to be the same typewriting.

A. It doesn't look to be the same to me.

Q. All right, now. Do you notice that the next to the last line and your signature are superimposed one on the other?

A. They are.

Q. Was that the condition in which you signed the paper out there?

A. It must have been if the typing is under, and it seems to be. I didn't think, though, that they were that close. They are related to each other, but they obviously are.

Q. Which looks to you to be on top, the typing or the penmanship?

page 1715 } A. The penmanship is definitely on top.

Q. That is the way it looks to you?

A. It does.

Q. To take your recollection of it, will you look and see if you find any pencil mark on page 1?

A. I don't see any pencil mark on page 1.

Q. Will you look at page 2 and see if you can find any pencil mark.

A. I do not.

Q. What is your recollection about asking Mr. Bryan to "X" out?

*Robert R. Fohl, Jr.*

A. I definitely told him to "X" out some of the statement which I signed. This could very easily be the back sheet of that statement, but I do not believe that that is the front, because he "X'd" out some of the marks that I signed.

Q. You saw him do that?

A. He did right there, yes, sir.

Q. You see no sign of any "X's" on there?

A. There are no signs of any "X's" on this paper.

Colonel Harris: You may take him.

page 1716 }

ROBERT R. FOHL, JR.

called as a witness in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your name.

A. Robert R. Fohl, Jr.

Q. Where do you live?

A. 5701 Bromley Lane, here in Richmond, Virginia.

Q. How old are you, sir?

A. Thirty-seven years old this year.

Q. Married?

A. Yes, sir.

Q. Family?

A. Two children going to Westhampton School out in the West End.

Q. How long have you live here?

A. Four years.

Q. Where were you born?

A. Indiana.

Q. What is your business?

A. Official capacity?

page 1717 } Q. Yes.

A. Here in Richmond, Regional Director for District 50, United Mine Workers of America and United

*Robert R. Fohl, Jr.*

Construction Workers in the western portions of Virginia and North Carolina.

Q. What region is this in?

A. It is Region 19, the number.

Q. How long have you been the Regional Director of Region 19?

A. Four years, since I have been here in Richmond.

Q. Where were you before that?

A. I worked in the Washington office. I also worked as director in Albany, New York. I have worked in Indiana and various parts throughout the United States and Canada.

Q. In 1948 was Hopewell under your jurisdiction?

A. Yes.

Q. Did District 50 or United Construction Workers have any employees of any of the companies over there organized?

A. We had a number of companies in this region, not only here in Richmond but also Hopewell, as you have spoken of, and we have there alone nearly 4,000 members with the Allied Chemical and Dye Corporation, Hercules Powder Company, Celanese Corporation of America, Continental Can, such smaller groups as Coastal Stevedoring and others, and that is in Hopewell alone, the companies I named.

Q. How about Solvay Process Company?  
page 1718 } A. Yes, that is Allied Chemical and Dye, which I mentioned, which is better known as the Solvay Process Division of that company.

Q. Did you in 1948 undertake to organize certain employees of the Laburnum Construction Company who were doing some work for the Solvay Company?

A. Yes, we did, in 1948. I think it was a combination not only of we organizing them but they wanting to organize themselves.

Q. They were the skilled laborers or common laborers?

A. They were the common laborers, it so happened.

Q. When you looked into the matter had they been organized?

A. When you organize workers we take what they say and as far as we could gather from them they had no representation, they had no union, they saw no union, they were paying no dues, the people that we talked to.

Q. Did you proceed to organize them acting there through your Hopewell office?

A. We had a number of representatives. It so happened at that time, in Hopewell—we changed representatives right along at that time—and we had three representatives that

*Robert R. Fohl, Jr.*

were working with those people during that period in 1948, and we did sign up a very considerable number of those workers.

page 1719 } Q. All those men were under your direction?  
A. Yes, they were.

Q. What time in 1948 did you sign them up?

A. Those workers signed membership application cards into this organization originally I believe in April of 1948, and we did not contact Mr. Bryan at Laburnum at that time because I presume we didn't feel we had a majority of them, but later on in October a very substantial number of those workers were signed up, they came to our office there in Hopewell wanting us and urging us to act in their behalf, and at that time we did contact, I contacted Mr. Bryan.

Q. You had signed these men up before you contacted him?

A. Absolutely. There would be no purpose in contacting him otherwise.

Q. Were any of them paying dues or had any of them paid initiation fees?

A. Yes, some of those workers I know had paid initiation fees and dues.

Q. When did you contact Mr. Bryan?

A. I know I saw Mr. Bryan with representatives from Hopewell on October 27 and November first. I believe I first called Mr. Bryan about a week before that first meeting. At that time he told me he was going to be out of town, I believe, and would meet on this first date that I mentioned October 27.

page 1720 } Q. Did you meet with him on that day?

A. Yes. With one of the representatives I went to the Laburnum Office over here on Main Street, up on the second floor, as I recollect, and we sat down and talked with Mr. Bryan at that time.

Q. Did you reach any conclusion or what did he tell you?

A. I think, as usually happens in those first meetings, and I know on the telephone more than likely, indulged in the usual pleasantries and what-not, and tried to get acquainted with him. We also advised him who we were and what the organization was and that we did represent a majority portion of that particular group of his workers in Hopewell. I think the first meeting I met with Mr. Bryan was more or less confined to that type of discussion and the request that we be allowed to bargain and to draw up a contract for wages and working conditions for that particular group of people.

*Robert R. Fohl, Jr.*

Q. Did Mr. Bryan at that time claim they belonged to any other union?

A. He did mention the fact that he operated under an A. F. of L. contract, but there was at that time no proof shown at the meeting nor do I recollect him particularly claiming that the laborers—I am talking about the first meeting—came under any contract. He didn't show any proof of page 1721 } it at any meeting, of course, by way of a signed contract.

Q. Then when did you meet with him again?

A. On the second meeting, November first, he had Mr. Joinville in the meeting with him. Of course that was 1948. I hadn't been here in this region too long and didn't know too many of the other labor leaders in the city. I didn't know Mr. Joinville when I walked in. I assumed he was maybe connected with Laburnum, but as the meeting progressed I did find out he was with the Richmond Building Trades Council. We just pursued the subject further in this second meeting that we did desire, as those workers wanted us to do, to represent them and to draft up working conditions suitable to them for them.

Q. What were you told at that meeting?

A. Again I think we went into it in a little further detail, that particularly their skilled workers were organized under the A. F. of L. I know we walked out with Mr. Joinville after we had the little meeting, and I think it was Representative Shuey and I, we talked with him downstairs. I think he was more or less apologetic that some groups of the A. F. of L. didn't do too good a job in servicing and representing their particular crafts. I think it is more or less notorious that the laboring group in the A. F. of L. are very, very poorly represented.

Q. Did Mr. Bryan at that meeting agree to page 1722 } negotiate with you for those laborers or did he refuse?

A. I did not get any definite answer. Our request stood that we desired to work out an agreement for those laborers there at Hopewell on that job. We were waiting an answer from him as to what he would do.

Q. Did he show you any contract that he had for the laborers?

A. He did not.

Q. Did you find out afterwards what had been done with regard to those laborers after you had contacted Mr. Bryan?

*Robert R. Fohl, Jr.*

A. I didn't talk to Mr. Bryan any more after the November first meeting. I was more or less, as we usually do in those cases, waiting for him to let us know what he might be willing to do. But immediately thereafter I received word from our representatives in Hopewell, many of those laborers came up to the office and advised the representative in Hopewell that a representative of the A. F. of L. had come in to the Solvay Process Plant wearing a Laburnum badge and had gone around and attempted and also succeeded—of course assuming a position of the company I assume—to sign many of those workers on A. F. of L. cards. Whether it was right at that particular time, too, it was within a day or so that we also found out or learned that a 9- or 10-cent wage increase had been granted the laborers. When word came to me that a representative was walking around on the inside of  
page 1723 } the company's premises signing up workers, it *struck* me as something that wasn't too proper and of course it would strike anybody in my position, I presume. I called up the top officials of that company and asked them if they had changed their policies, that certainly this organization would like to be accorded the same courtesies if that was going to be done. I personally called the top officials of the company and asked them if they were aware of the fact that representatives of the A. F. of L. wearing the badge of Laburnum were in the plant signing people into membership. I know the man I talked to said, "We have very good relations with those companies." I usually don't have to call them on things myself between contracts. He said he would check into it immediately. He was trying to explain things to me during the discussion. He said that Laburnum wasn't going to be in there but a very few weeks yet, and they had hoped that the contract would have been finished before it had, and so on. He went into some detail trying, I don't know—He might have thought I was a little vexed at it or what-not, I don't know.

Mr. Mullen: Do you want to look at these cards (handing cards to Plaintiff's counsel)?

Mr. Robertson: I don't object to any of them. I suppose it proves a pattern, Your Honor.

The Court: All right, there is no objection.

Mr. Robertson: I don't object to anything,  
page 1724 } not unless Mr. Bryan objects.

. . . . .

*Robert R. Fohl, Jr.*

Mr. Mullen: If Your Honor please, I wish to offer as Defendants' Exhibit 32 the application card or acceptance of membership of John—I don't know whether it is Moore or Mooney—can you read it?

The Witness: It is Moore, it looks like, but you would have to check that with the file.

Mr. Mullen: I think it is Moore. I had better ask the witness first what it is.

By Mr. Mullen:

Q. Please state what that is.

A. The card, you mean?

Q. Yes.

A. It is a membership application card in District 50, United Mine Workers of America.

Q. Of John Moore?

A. Yes, of John Moore. It is dated 4/28/48. It says plant area. That is the terminology they use in Hopewell for the Solvay plant. They call it the plant area. Hopewell, Virginia. Employed by Laburnum Construction Corporation, Hopewell. The man who signed it put here "page 1725 } borer" as his classification.

Q. Did you take him and the others—did they join District 50 or UCW?

A. Well, in Hopewell it is all District 50 United Mine Workers there, and I know the representatives probably only had District 50 United Mine Workers' cards on hand when those men were in the office, but we did put them in a United Construction Workers local union.

(The document referred to was marked Defendants' Exhibit 32 and received in evidence.)

Mr. Mullen: I now offer as Defendants' Exhibit No. 33 like application and acceptance of membership identical in form with the one previously introduced, of Thomas Jefferson, dated 4-28-48.

The Court: Are you sure that is '48? Are you sure that is Thomas Jefferson in '48?

Mr. Mullen: Yes, 4-28-48. And designated employed by Laburnum Construction Corporation.

(The document referred to was marked Defendants' Exhibit 33 and received in evidence.)

*Robert R. Fohl, Jr.*

Mr. Mullen: Now, Your Honor, we have Washington. James Washington, like request and acceptance of membership, dated April 28, 1948, working at Hopewell, employed by Laburnum Construction Corporation as laborer.

(The document referred to was marked Defendants' Exhibit 34 and received in evidence.)

page 1726 } Mr. Mullen: A like application and acceptance of membership signed by Ashley Robinson, dated April 28, 1948, employed in the Hopewell area by Virginia Mechanical Corporation as laborer. That would be Defendants' Exhibit No. 35.

(The document referred to was marked Defendants' Exhibit 35 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit No. 36 a like membership card signed by Ed Wilson, Jr., dated April 28, 1948, employed by Laburnum Corporation at Hopewell, Virginia as laborer, and showing initiation fee of \$2.00 paid at the time.

(The document referred to was marked Defendants' Exhibit 36 and received in evidence.)

Mr. Mullen: As Exhibit No. 37 a like membership card signed by Joseph Austin, area employed, Hopewell, employed by Laburnum Construction Corporation as laborer, dated April 28, 1948.

(The document referred to was marked Defendants' Exhibit 37 and received in evidence.)

Mr. Mullen: As Exhibit No. 38 a like membership card dated April 28, 1948, signed by Tom McGee, employed by Laburnum Construction Corporation as laborer.

(The document referred to was marked Defendants' Exhibit 38 and received in evidence.)

page 1727 } Mr. Mullen: As Defendants' Exhibit No. 39, a like membership card dated April 28, 1948, signed by George Alexander, employed by Laburnum Corporation as laborer.

*Robert R. Fohl, Jr.*

(The document referred to was marked Defendants' Exhibit 39 and received in evidence.)

Mr. Mullen: Defendants' Exhibit No. 40, a like membership card dated April 28, 1948, signed by W. J. Kimbrough, employed by Laburnum Construction Corporation as laborer, initiation fee of \$2.00 paid.

(The document referred to was marked Defendants' Exhibit 40 and received in evidence.)

Mr. Mullen: As Defendants' Exhibit 41, a like membership card dated April 28, 1948, signed by Cornelius Brown, laborer, Laburnum Corporation.

(The document referred to was marked Defendants' Exhibit 41 and received in evidence.)

Mr. Mullen: A like membership card dated April 28, 1948, signed by Jesse Wyche, Hopewell, employed by Laburnum Construction Corporation as laborer, Exhibit No. 42.

(The document referred to was marked Defendants' Exhibit 42 and received in evidence.)

Mr. Mullen: A like card, Defendants' Exhibit No. 43, dated April 30, 1948, signed by Willis C. Washington, employer, Laburnum Construction Corporation, Department, Solvay, initiation fee \$2.00 paid.

page 1728 } (The document referred to was marked Defendants' Exhibit 43 and received in evidence.)

Mr. Mullen: A like card as Defendants' Exhibit 44 signed by Robert H. Cross, employed by Laburnum Construction Corporation, this card bears no date.

(The document referred to was marked Defendants' Exhibit 44 and received in evidence.)

Mr. Mullen: A like card signed by Irving Davis, employed by Laburnum Corporation. It has no date.

(The document referred to was marked Defendants' Exhibit 45 and received in evidence.)

*Robert R. Fohl, Jr.*

Mr. Mullen: A like membership card signed by David Jamison, employed by Laburnum Corporation as laborer. It has under date the figure 19. It does not have any month or year, apparently.

(The document referred to was marked Defendants' Exhibit 46 and received in evidence.)

Mr. Mullen: The next is Defendants' Exhibit No. 47, a like membership card signed by Roma Little, laborer. Like the previous card, it has the figure 12 under the date, but no month or year.

(The document referred to was marked Defendants' Exhibit 47 and received in evidence.)

Mr. Mullen: Can you read that?

The Witness: It is John H. Ulentte, it looks like.

Mr. Mullen: John H. Ulentle, employed by page 1729 } Laburnum Corporation and the card has no date.

(The document referred to was marked Defendants' Exhibit 48 and received in evidence.)

Mr. Mullen: Defendants' Exhibit 49, a like membership card signed by Donald Reams, employed by Mechanical Corporation. This card has no date.

(The document referred to was marked Defendants' Exhibit 49 and received in evidence.)

Mr. Mullen: A like membership card, Defendants' Exhibit No. 50, dated October 14, 1948, signed by John Lindsey, employed by Laburnum Corporation as laborer at Hopewell.

(The document referred to was marked Defendants' Exhibit 50 and received in evidence.)

Mr. Mullen: The next is Exhibit No. 51, a like card signed by John H. Stith, dated October 13, employed by Laburnum as laborer.

(The document referred to was marked Defendants' Exhibit 51 and received in evidence.)

*Robert R. Fohl, Jr.*

Mr. Mullen: The next card is signed by Chester Barnes, undated, showing payment at the time of signing of initiation fee of \$2.00.

(The document referred to was marked Defendants' Exhibit 52 and received in evidence.)

Mr. Mullen: I had a hard time making out a page 1730 } very simple name. Herman Jones is the next card, employed by Laburnum Corporation, being a like membership card and it is Defendants' Exhibit No. 53. The date is smeared and you can't tell what it is.

(The document referred to was marked Defendants' Exhibit 53 and received in evidence.)

Mr. Mullen: Many of these are signed with pencil.

A like card for Ivey Simpson, employed by Laburnum Construction Corporation, and that is Defendants' Exhibit 54. Under date it has 28, but no month or year.

(The document referred to was marked Defendants' Exhibit 54 and received in evidence.)

Mr. Mullen: The next is a like card dated October 15, for Elias Franklin and El. I don't know what the El stands for, but that is his name, employed by Laburnum. It shows payment of initiation fee of \$2.00 at the time of signing.

(The document referred to was marked Defendants' Exhibit 55 and received in evidence.)

Mr. Mullen: The next is Wesley Lawson, a like membership card, which bears no date, shows payment of initiation fee of \$2.00 at the time of signing.

(The document referred to was marked Defendants' Exhibit 56 and received in evidence.)

Mr. Mullen: A like card for membership, Theodore T. Mitchell, which bears no date.

page 1731 } (The document referred to was marked Defendants' Exhibit 57 and received in evidence.)

*Robert R. Fohl, Jr.*

Mr. Mullen: No. 58 is a like membership card signed on October 11, 1948, by James A. Spratley, employed by Laburnum Corporation as laborer at Hopewell, initiation fee of ninety cents paid. I will ask you if that is initiation fee or monthly dues?

The Witness: That isn't either. The man has 90 cents an hour. He might have put that to be what he was being paid because I think that is about what Laburnum was paying then.

(The document referred to was marked Defendants' Exhibit 58 and received in evidence.)

Mr. Mullen: A like membership card dated October 12, 1948, signed by Alex Coleman, employed by Laburnum, laborer, showing initiation fee of \$2.00 paid.

(The document referred to was marked Defendants' Exhibit 59 and received in evidence.)

Mr. Mullen: A like card dated October 11, signed by Jen-  
nis Jenkins, dated October 11, laborer, showing initiation fee  
of \$2.00 paid.

(The document referred to was marked Defendants' Exhibit 60 and received in evidence.)

Mr. Mullen: The next Exhibit No. 61 is a like card dated  
October 11, 1948, signed by John Edmond San-  
page 1732 } ders, employed by Laburnum at Hopewell as la-  
borer.

(The document referred to was marked Defendants' Exhibit 61 and received in evidence.)

Mr. Mullen: The next is a like card signed by Joseph J. Rodgers, dated October 15, 1948, employed by Laburnum Company at Hopewell, showing initiation fee of \$2.00 paid.

(The document referred to was marked Defendants' Exhibit 62 and received in evidence.)

Mr. Mullen: And the final like card dated October 11, signed by William H. Alexander, Jr., Exhibit No. 63.

*Robert R. Fohl, Jr.*

(The document referred to was marked Defendants' Exhibit 63 and received in evidence.)

By Mr. Mullen:

Q. Mr. Fohl, were all of those cards signed before you contacted Mr. Bryan about October 21?

A. Yes, the vast majority of them. There might have been a straggler or two, but the vast majority if not all of them were signed before I contacted Mr. Bryan.

Q. Did some of these men who signed up in April pay dues between then and the time you contacted Mr. Bryan?

A. There were a number who paid dues and initiation, but I can't say for certain that they paid dues regularly or anything, of those who signed in April.

Q. Did you have a meeting with these men as page 1733 } union members?

A. Yes. We had a number of meetings with those people and I personally attended one meeting the afternoon or early evening of the day I talked with Mr. Bryan the first time. That was October 27. There were 20-some men possibly there at that meeting. We were more or less trying to enlighten them and let them know we were trying to do the best we could for them and we were having an additional meeting with Mr. Bryan on November first.

Q. Did you have any further meeting arranged for the laborers?

A. Other than the October 27 meeting which I attended?

Q. Yes.

A. Yes. I know that representative Shuey had a meeting, which we usually do have after we have a meeting with the company, report back to the people we are trying properly to represent. I know we had a meeting that same evening of November first, but I did not attend that particular meeting. Representative Shuey attended that meeting.

Q. You never got any agreement there from Mr. Bryan to negotiate with you as representing these men?

A. As those things go, it just sat up in the air as far as we were concerned, waiting for some positive commitment from Mr. Bryan to do something with us, because only together could we work out anything for those men.

page 1734 } Q. After you found out that the A. F. of L. had gone on the property and signed them up, did you collect any further dues from them?

A. No, as far as I can recollect we didn't, and the whole situation more or less sort of withered on the vine a little.

*Robert R. Fohl, Jr.*

Q. You didn't engage in any controversy with the A. F. of L.?

A. No, there was no controversy developed from it.

Q. Did you make any trouble for Mr. Bryan?

A. We did not.

Mr. Mullen: The witness is with you.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Fohl, are you related by blood or marriage to John L. Lewis?

A. Well, I would be pleased and happy to say if I was related by blood. My wife is related to John L. Lewis, yes.

Q. In what way?

A. She is a niece of John L. Lewis.

Q. What was her name before you were married?

A. Bell.

Q. Where did she live?

A. She lived in Indiana, the same as I did  
page 1735 } originally. She originally lived in Iowa, I pre-  
sume. I didn't know her quite that early.

Q. Are you related by either blood or marriage to Mr. Willard Owens, that young man over there?

A. Not that I know of.

Q. But you are only a nephew by marriage of John L. Lewis?

A. I presume that is what you would call it.

Q. I notice here from the Richmond Telephone Directory a listing in Richmond, "District 50, United Mine Workers of America, 311 West Grace, 7-7592." That is the address and the telephone number of District 50 which you represent here in Richmond?

A. That is correct.

Q. Then I notice in the Richmond Telephone Directory a listing "United Construction Workers, UMWA, 311 West Grace, No. 7-7592." That is the address and the telephone number of the United Construction Workers, UMWA, in Richmond, is it not?

A. Yes, and as I testified I was director for both those organizations here in Richmond.

Q. If I was a member of the United Mine Workers of America and wanted to join the United Construction Workers,

*Robert R. Fohl, Jr.*

would you take me in? I mean leaving out personalities, of course (laughter)?

page 1736 } A. We might even take you in, if we could properly and ethically help you out. I don't quite grasp what your question is. If you were what? What was that, if you were a mine worker?

Q. If a person is already a member of the United Mine Workers of America and he wants to join the United Construction Workers of America, also, will you take him in?

A. I don't know how such a thing could ever occur. If a man is working and is a member of the United Mine Workers he wouldn't be working in a plant where we would have the United Construction Workers. If he wanted to move from one of those plants to the other we possibly would transfer him. Between District 50 local unions or between United Construction Workers local unions we would respect him.

Q. Suppose a man is a member of the United Mine Workers of America doing mine work, and he wants to leave that job and go to construction work, would you transfer him over to United Construction Workers?

A. Personally I don't know just how they would handle that because it has never occurred in the area where I am working. I presume they would respect a man who came from the mines. We respect them from many categories.

Q. You would expect them to transfer him without the payment of any initiation fee?

A. Possibly so. I don't know. I have never page 1737 } handled a situation such as this.

Q. How long have you been in this labor work. You said you had been all over this country.

A. Since about 1939. I have never had that particular thing occur, I am saying.

Q. Although you have covered the United States and Canada?

A. That is correct.

Q. Suppose a man is a member of the United Mine Workers and he wants to go into the District 50, say he wants to start work as a construction worker, but he says "I would rather go in District 50," would you transfer him into District 50?

A. Yes, we will transfer him I know with District 50.

Q. What is your title here?

A. Regional Director.

Q. For what region?

A. Region 19.

*Robert R. Fohl, Jr.*

Q. Is District 50 a provisional district?

A. It is as far as I know, yes.

Q. That means that John L. Lewis appoints the top man in it, doesn't it?

A. I don't know as far as policy or as far as what they do. I do my work here in my region as I have been delegated to do.

page 1738 } Q. But you don't know what Uncle John does?

A. I don't call Mr. Lewis Uncle John.

Q. Well, you don't know.

Will you tell the jury now that you don't know whether Mr. Lewis appoints the top man in District 50?

A. What was that? Tell them my opinion?

Q. No, I say do you tell this jury that you do not know whether or not John L. Lewis appoints the top man in District 50?

A. Well, I don't know what he is going to do. As far as what has been done, as I understand it, they have been appointed, if that is what you want.

Q. I don't want anything but the fact.

A. Yes.

Q. Do you know whether or not it is a fact that Mr. John L. Lewis has appointed Miss Kathryn Lewis as the money person of the United Construction Workers?

A. I don't know Mr. Lewis did it or whether another officer of the United Mine Workers did it. I just don't know who personally did it. I am not in a capacity to know those things.

Q. What territory does your region cover?

A. Virginia from approximately Lexington and Roanoke, Virginia east, and North Carolina, including possibly High Point, Charlotte, those points east of those locations in North Carolina.

page 1739 } Q. It has included the same territory during all the years you have been here, hasn't it?

A. At one time the North Carolina region during my term here as regional director was placed under a separate region but it was since transferred back under my jurisdiction.

Q. But so far as the Virginia is concerned you have had the same territory under your jurisdiction ever since you have been here?

A. Yes.

Q. So your jurisdiction, then, would include Buchanan County, Virginia?

A. No, that is right on the border. I wouldn't say—You

*Robert R. Fohl, Jr.*

will have to refresh my mind just where it is. I imagine that is just north of Roanoke, is that right?

Q. I am asking you.

A. I don't know.

Q. You don't know whether it is in your region or out of it?

A. Buchanan County is not where we do too much work.

Q. You don't know whether it is in your region or not?

A. I don't right at the moment. I don't know all the counties in Virginia.

Mr. Mullen: If Your Honor please, the witness asked him the geographical location of the place he is asking about.

Mr. Robertson: I have the witness on cross examination, Your Honor, and I am questioning him, not the witness questioning me. If he doesn't know, all he has to do is say so.

The Court: The witness said he didn't know.

page 1741 } By Mr. Robertson:

Q. Is Wise County, Virginia, under your jurisdiction?

A. I doubt it.

Q. Do you know?

A. I am quite sure Wise County is not in my jurisdiction.

Q. Do you know whether Norton, Virginia, is within your jurisdiction?

A. It is definitely not within my region.

Q. Do you know whether Grundy, Virginia, is within your region?

A. It is definitely not within my region.

Q. How do you know so definitely about those—let me finish the question.

Mr. Mullen: Let him finish the answer.

By Mr. Robertson:

Q. If I interrupt you, you stop me; and if you interrupt me, I will stop you.

I don't know whether you can explain this, but why have you got such definite information about the towns, but cannot tell us about the counties?

A. We do have a certain number of representatives located in certain areas where they are working. We don't cover all counties. Some of them are agricultural, and we don't do much work in some counties.

*Robert R. Fohl, Jr.*

page 1742 } Q. Is Dorchester, Virginia, within your jurisdiction?

A. There again, I am not too familiar with where Dorchester is.

Q. And you are not too familiar with what has happened in Wise and Buchanan Counties within the last four years, are you?

A. I know nothing as to what happened in Wise and Buchanan Counties.

Q. Sir?

A. I know nothing as far as the details. I read a little in the paper of course. Nobody consults with me on those things. It is out of my jurisdiction entirely.

Q. I believe that the slogan of District 50, and also of United Construction Workers, is "Organize the Unorganized," isn't it?

A. We attempt to do it.

Q. I say, isn't that the watchword?

A. It is, I hope, the watchword of all labor.

Q. I mean, some people would say, "Upward and Onward," but you say, "Organize the Unorganized."

A. We attempt to do it, and I think you are correct, it is one of our slogans.

Q. You succeed pretty well, don't you?

A. We try to do the best we can in the proper manner.

page 1743 } Q. At this time we are talking about over in Hopewell, was David Hunter working in the Hopewell area?

A. Yes, David Hunter was working in the Hopewell area as a representative. I mentioned there were three at that time, previously.

Q. I was just asking you about one, at the moment.

A. Yes, sir, he was.

Q. Were you his boss?

A. I was.

Q. Was Harvey J. Robinson working in the Hopewell area at that time?

A. No, he was not.

Q. Was William O. Hart working in the Hopewell area at that time?

A. He was not.

Q. I believe you used the expression that you might have gotten a little vexed with Mr. Bryan and Laburnum incidental to your contacts with him over in the Hopewell area, is that correct?

*Robert R. Fohl, Jr.*

A. I try never to get vexed, but naturally, I presume I did when I found out what transpired after I held two meetings trying in a peaceful manner to work out a relationship for those workers who desired us.

Q. You didn't get vexed enough to have Uncle John send David Hunter out to Breathitt County, Kentucky, and see if he couldn't bring Bryan around and make Bryan page 1744 } and Laburnum see the light, did you?

A. I didn't grasp all of that. Did what, now? Did I get David Hunter from where?

Q. I say, you didn't see to it that David Hunter got sent to Breathitt County, Kentucky, after you heard Laburnum was working out there, so he could make them come around and see the light, did you?

A. The first I knew of any occurrence in Breathitt County was when some process server came to my office and gave me some papers. I felt like calling Dave Hunter up, maybe.

Q. You have the utmost confidence in David Hunter?

A. Mr. Hunter is a mighty fine man.

Q. And any report that he made, you would accept it as being a conscientious and correct report?

A. I presume I would, considering the man, as I do all the men that have worked for me, mighty good men.

Q. How long do you keep your office records?

A. It depends on what type of records they are. Usually our records, to keep from cluttering the files up, we keep maybe half a year.

Q. But you keep these applications for membership several years, don't you?

A. We do, because many times we are unsuccessful in organizing a plant at first, and we possibly renew the organization campaign later.

page 1745 } Q. Now, I am referring to memorandums that Mr. Bryan made at the time, and this might refresh your memory a little. It might get the dates a little more accurately, although I don't think it makes very much difference.

When is the first time that you contacted Mr. Bryan? On October 21, 1948, wasn't it?

A. It could have been. I haven't been able to refresh my recollection positively on that date, but I would say that is correct.

Q. That was concerning the work he was doing for the Utilities Engineering and Construction Company and the Coastal Stevedoring Company there in Hopewell, wasn't it?

*Robert R. Fohl, Jr.*

A. I don't know, and I didn't discuss with Mr. Bryan who he was working for or who he had his contracts with. I assumed it was Solvay Process.

Q. You didn't discuss at any time the particular job he was on?

A. Oh, yes, I discussed it with Mr. Bryan, as I have testified.

Q. You mentioned Mr. Joinville here in Richmond.

A. Yes.

Q. Do you know him fairly well?

A. I do not.

Q. Do you know him by reputation?

A. The only association I had with Mr. Joinville is what came up on this Laburnum situation.

Q. I say, you know him by reputation?

A. And very little about that.

Q. Would you be willing to state whether or not you know his reputation for truth and veracity in Richmond is good or bad?

A. I hope I could say it was good, but I really don't know the man too well to make too many commitments at all.

Q. So far as you know, then, it is good?

A. So far as I know, it is, yes.

Q. I am going to ask you if your next contact—was that first contact by telephone or face-to-face?

A. It was by telephone.

Q. And the purpose of that was to make an appointment?

A. That is right.

Q. Then wasn't your next contact with him on October 26, 1948, which would have been just five days later?

A. I don't know. I could ask you a question, but—

Q. You went then to the Laburnum office?

A. On two occasions I went to Mr. Bryan's office.

Q. I mean, you had only two contacts with him during that time?

A. Yes, the telephone conversation and two times that we went to his office.

Q. I believe that the first contact by telephone was on October 21, 1948; and then you went to his office on October 26, 1948; and then you went back to his office on November 1, 1948, didn't you?

A. As I recollect it, it was October 27 and November 1. There could be an error there.

Q. All right. On that last time you went to see him, which,

*Robert R. Fohl, Jr.*

according to the memorandum here, was November 1, 1948, you told him that you had 20 of his laborers already signed up to join District 50, didn't you?

A. We normally, unless we can reach some workable way to handle recognition, don't divulge the total amount or names, either. I can't say whether I did or didn't. Normally we don't do it. I can say that. I did tell him we had a majority signed up. That is the way we usually handle it.

Q. He told you he would investigate it, didn't he?

A. Yes.

Q. To check what you said?

A. Yes, he assured us he would check into the whole matter, as far as I can remember.

Q. And he advised you subsequently that he had checked into it, and your claim was false, didn't he?

A. I don't recollect that, and I don't know how he could, not knowing the number nor the names.

Q. I say, he told you afterwards that he had checked into it, and that your claim that you had 20 people page 1748 } signed up was false, according to his information, didn't he?

A. No, sir, I never remember any such statement of any positive nature from Mr. Bryan.

Q. I will ask you if you deny that Mr. Bryan advised you afterwards that he had investigated your claim and had ascertained to his satisfaction that your claim that you had a majority of his laborers signed up in Hopewell was false?

A. I will definitely say he didn't make any positive statement in that regard, whatsoever.

Q. Was it false or was it true?

A. It was false, as far as I know, if you are saying he said that.

Q. You did have a majority signed up when you talked to him?

A. We assumed we had a majority, from what we could gather from the men that we were working with there the people who were working for Mr. Bryan.

Q. Do you mean you don't know whether you had a majority or not?

A. We never progressed to the point with Mr. Bryan where he would divulge the total number of workers, or anything else, to us. I don't know from facts on his payroll. He wouldn't tell us, or didn't.

Q. I am just going to ask you to answer the question that

*Robert R. Fohl, Jr.*

I ask you: I say, at the time you talked to  
page 1749 } Mr. Bryan and claimed you had a majority of  
his laborers signed up at Hopewell, do you your-  
self know whether you did or whether you didn't?

A. We are quite positive that we did, talking to the workers  
at the plant, who should know.

Q. So, based on what the workers told you, you think you  
had a majority?

A. We were pretty certain we did.

Q. Pretty certain?

A. Yes, sir.

Q. That is as far as you can go, under oath here?

A. I wouldn't want to say anything positively if I didn't  
know. We gathered it from the workers, who should know.

Q. At your last meeting with Mr. Bryan in the offices of the  
Laburnum Company, Mr. Joinville was present, wasn't he?

A. Yes, he was.

Q. You and he left the meeting together, didn't you?

A. After the meeting broke up, we went down the stairs to-  
gether; also with Representative Shuey, the three of us.

Q. And Mr. Bryan was not there, was he?

A. It was his office.

Q. I say, after you left his office and went downstairs.

A. He didn't leave the office at the same time,  
page 1750 } no.

Q. When you got down there, Joinville told  
you for you all to lay off the construction workers, and the  
A. F. of L. would lay off the maintenance work, didn't he?

A. Well, we are happy to talk with anybody to try to settle  
all of these problems. He might have said that. I imagine  
he would want us to do that.

Q. I wish you would answer the question, please, because  
we could move along so much quicker.

A. I don't know exactly what went on. I didn't keep a  
record or notes of what Mr. Joinville said.

Q. Of course you didn't. I will ask you whether you can  
just answer this in a direct way, one way or the other:

After you left that third meeting in the Laburnum offices  
and went downstairs, didn't Joinville say to you, "You lay  
off the construction work, and we will lay off the maintenance  
work," and you agreed to that proposition, and that was the  
last Mr. Bryan ever heard from you?

A. I can say as far as my agreeing to it, you are just ab-

*Robert R. Fohl, Jr.*

solutely wrong; and whether it was discussed or not, I can't say for certain.

Q. But you never had any contact with Mr. Bryan after that date, did you?

A. No, not with Mr. Bryan.

Q. And you never ran him off the job in Hope-page 1751 } well, did you?

A. We certainly did not.

Q. And you never thought it was of enough importance to go back to him and bring the thing to issue one way or the other, after that third meeting?

A. After I talked with Solvay and they more or less said that that contract of his would be done within a few weeks, I did not go back to him.

Q. Why didn't you?

A. A situation like that, and the way it was handled, could cause difficulties there. That Solvay plant, 1,000 or 1,200 of our members in there, we just take our time a little slower when we are prodded by a situation like we were prodded by there.

Q. As the Bible says, you would wait until a more appropriate season?

A. I certainly wasn't waiting for any appropriate season.

Q. But you weren't acting during that season, were you?

A. I hope at all times that we can have good relations, and I always have faith in anyone, even Mr. Bryan.

Mr. Robertson: Stand aside.

The Witness: Thank you.

The Court: Any further questions, gentlemen?

Mr. Mullen: I was going to ask him a few page 1752 } questions. Maybe we had better recess.

The Court: Recess for lunch. Be back at 2:15, gentlemen.

(Whereupon, at 1:00 o'clock p. m., the Court recessed until 2:15 o'clock p. m., of the same day.)

2:15 p. m.

Whereupon,

ROBERT B. FOHL, JR.

the witness on the stand at time of recess, resumed the stand and testified further as follows:

RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Fohl, whom did you state you were employed by?

A. District 50, United Mine Workers of America.

Q. You also serve the United Construction Workers?

A. Yes, sir; I do.

Q. Do you get any instructions from the United Mine Workers?

A. I do not, no.

Q. Are you connected with the United Mine Workers in any way?

A. In no way whatsoever.

Q. All of your instructions come from what source?

A. I take my instructions directly from Mr. A. D. Lewis, who is Chairman of the Organizing Committee of District 50 and also director of the United Construction Workers.

Mr. Mullen: That is all.

RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. If you had a majority of the laborers  
page 1754 } signed up at Hopewell, why didn't you start a  
proceeding before the National Labor Relations  
Board for a certification proceeding—

Colonel Harris: We object to that.

Mr. Robertson: —on the election. I hadn't quite finished the question, please.

The Court: Don't answer the question, Mr. Fohl, until counsel finishes it and Mr. Harris has had an opportunity to make a statement in regard to it.

By Mr. Robertson:

Q. I say if you had a majority of the laborers signed up at

*Robert R. Fohl, Jr.*

Hopewell why didn't you start a proceeding before the National Labor Relations Board for an election so that your people could be certified as the bargaining agent?

Colonel Harris: We object to it as immaterial and irrelevant and incompetent and argumentative.

Mr. Robertson: If Your Honor please, they have put in a lot of grounds of defense here. They have tried to inject questions in here and I think they have made it relevant by their own action, but if they want it all out, it is all right with me.

The Court: Do you withdraw the question?

Mr. Robertson: No, I ask the Court to rule on the question.

The Court: The Court will allow the question page 1755 } for what it is worth.

Colonel Harris: We reserve an exception.

Mr. Robertson: Repeat the question, please, Mr. Reporter.

(The pending question was read by the reporter.)

The Witness: That is not a question for a yes or no answer. If I may go ahead: To begin with, Mr. Bryan at no time ever suggested any manner in which we could gain recognition. That is No. 1. Not even as you have asked why we didn't. Secondly, there are a number of ways you can gain recognition, and the one you state is only one of them. We have gained recognition with companies such as the Koppers Company here in Richmond, the Hyman Veiner & Sons and many others, since the Taft-Hartley Act was instituted through the Virginia State Labor Department and through private elections and through the Federal Mediation and Conciliation Service of the United States Government. In many ways we have gained recognition. You ask us why we didn't take the one course. I can't tell you why we didn't. One reason, of course, is that the United Mine Workers does not deal with, since the Taft-Hartley Act, handle any cases through the facilities of the National Labor Relations Board, for I think obvious reasons, on principle. We are an organization that at least tries to adhere to a certain amount of principle.

We think the principles of that law are wrong, page 1756 } and we have stuck to that. But there are many other ways other than the one you stated that recognition procedures can be worked out, and we were willing, and I presume even the National Labor Relations Act

*Oscar Wireman.*

the only purpose that Mr. Bryan or we either would want to know is if a majority of those people wanted our organization to bargain for them, and there is plenty of facilities to determine that. We were ready and able to prove that.

By Mr. Robertson:

Q. And another reason is that John L. Lewis wouldn't sign the anti-communist act and you had no standing before the Labor Relations Board, isn't it?

Colonel Harris: We object to that as prejudicial, irrelevant, illegal, immaterial and incompetent.

Mr. Robertson: I think it is entirely material after the harangue the witness has given.

The Court: I will sustain the objection.

Mr. Robertson: No further questions.

Mr. Mullen: Stand aside.

(Witness excused.)

Mr. Mullen: Call Mr. Oscar Wireman.

Whereupon,

**OSCAR WIREMAN**

called as a witness in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

page 1757 } **DIRECT EXAMINATION.**

By Mr. Mullen:

Q. Mr. Wireman, what is your full name?

A. Oscar Wireman.

Q. How old are you?

A. Thirty-nine years old, on July 12.

Q. Where do you live?

A. Magoffin County.

Q. What is your present job?

A. Working on a tippie.

Q. What kind of work at the tippie?

A. I am boom man.

Q. Is that for the Pond Creek Pocahontas Company?

A. Yes, sir.

Q. Are you a member of any union?

A. Yes, sir; United Mine Workers.

*Oscar Wireman.*

Q. Did you ever work for Laburnum?

A. Yes, sir; I did.

Q. When?

A. I worked through part of 1948 and part of 1949, until the tippie started the 10th day of June.

Q. How did you happen to be working for Laburnum?

A. Well, Mr. Haslam was supervisor in there, and he just loaned me over to Laburnum Construction Company when they came in there.

page 1758 } Q. Mr. Haslam was supervisor for whom?

A. For the coal company.

Q. He loaned you to Laburnum?

A. Yes, sir.

Q. When did you go back to Pond Creek Pocahontas Company?

A. I went back June 10 when the tippie started.

Q. That is when the tippie started shipping coal?

A. June 10, 1949, yes, sir.

Q. Do you know Mr. Delinger?

A. I met him a few times.

Q. Did you tell him that you were sorry to leave Laburnum?

A. No, sir; I never told nobody I was sorry to leave because I knew I was going to get more money when I went for the United Mine Workers, and have more protection.

Q. You were getting how much working for Laburnum?

A. I was getting 90 cents an hour. When I went on the tippie I was drawing \$1.75 and four-tenths.

Q. You were working for Mr. Bryan as a laborer or what?

A. I was working as a laborer.

Q. What do you do on the tippie?

A. I am a boom man. I load coal, they call it.

Q. Were you there on the tippie on July 26?

A. I was cleaning gonds at that time on the page 1759 } railroad.

Q. Where were you cleaning those?

A. What?

Q. Whereabouts were you cleaning those? Where were you located?

A. Just up above the tippie just a little ways.

Q. Did you see a group of men come there with Mr. Hart?

A. No, sir. I didn't see no group of men.

Q. Did you see the group when they gathered near the tippie from where you were?

A. I never saw no group of men whatever, only the working men, those working there for Laburnum.

*Oscar Wireman.*

Q. The working people for Laburnum?

A. Yes, sir.

Q. Did you see any violence take place down there where they were?

A. No, sir; I never seed no violence.

Q. Did you hear any shots?

A. I never heerd no shots.

Q. Did Mr. Hart tell you who he was there to organize?

A. Yes, sir. He said he was there to organize Laburnum Construction Company laborers.

Mr. Mullen: The witness is with you.

page 1760 } CROSS EXAMINATION.

By Mr. Robertson:

Q. How old are you, did you say?

A. I was born July 12, 1912. I will be 39 years old this July coming.

Q. Where do you live?

A. I live in Magoffin County.

Q. How far from the Laburnum job site?

A. About four miles.

Q. On July 26, which would be a Tuesday, the day that Hart came there, you were not working up in the tipple, were you?

A. No, sir. I was down on the ground, on the railroad cleaning gonds. I never do work up in the tipple none nohow. I work under the tipple.

Q. But you know how the tipple is built?

A. Yes, sir, I do.

Q. How far would you say where the coal comes in to the tipple is above the ground?

A. Above the ground?

Q. Yes.

A. It is about 18 feet, and it comes down a chute. You mean the button line?

Q. Yes, I mean the button line brings the coal down to the tipple. From the point where it first reaches the

page 1761 } tipple how far is that above the ground?

A. 18—Well, I suspect it is about 45 or 50 feet.

Q. Are there some men working up there where the coal comes in?

A. The men works, yes, at the table, the slate pickers they

*Oscar Wireman.*

call it, where the coal comes off the button line on to the table.

Q. Then are there some more men who work down lower near the ground?

A. Yes, the boom man who loads the coal works on the platforms on the ground, what you might fall on the ground.

Q. What would you say the biggest chunks of coal that come in the tippie there before they have been broken up would be? Would you indicate it with your hands?

A. Well, I couldn't say for sure because they break them up up in the tippie before they come down to where we are, and they are run through the churner.

Q. But when they come into the tippie how big are they?

A. The biggest ones I ever seed was about 3-foot one way and maybe about 20 inches another.

Q. If I was working up there where it came in and Mr. Mullen was working down toward the ground, I could drop one of those chunks down on his head, couldn't I?

A. What is this floor and stuff here for but to  
page 1762 } catch that if it falls?

Q. I say if he was down below there and I didn't like him I could just tip one of those over on him, couldn't I?

A. No, you couldn't, because there is a floor there to catch it.

Q. It would catch it?

A. There is a floor there. If it was to come off the shaker, there is a floor to catch it, and it can't go down any lower.

Q. So it wouldn't be possible to hit him?

A. No, sir; it wouldn't hit him without you was to get out on one of them booms and throw it off on him.

Q. Suppose I had it in for him and wanted to hit him, could I do that?

A. If you did, you might hit him some way or other. If I wanted to hit a man I would manage to hit him some way or another.

Q. Are you a pretty good shot?

A. Well, I have been known to kill a few rabbits, a few squirrels.

Q. If Mr. Mullen was on the tippie and you were out in the woods and wanted to take a crack at him, do you think you could hit him?

A. I don't want to do that.

Q. But if you got mad enough to try it?

page 1763 } A. My desire is not to hurt any man what-ever.

*James H. Salyer.*

Q. If you got mad enough.

A. I don't get mad enough.

Mr. Robertson: All right, Mr. Wireman.

The Court: Gentlemen, excuse me about two or three minutes, will you. I have to make a telephone call.

.(Brief recess.)

Whereupon,

JAMES H. SALYER  
called as a witness in behalf of Defendants, having been first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. What is your full name, please?

A. James H. Salyer.

Q. How old are you?

A. I am 32.

Q. Where do you live?

A. I live in Salyersville, Kentucky.

Q. Were you living there in July, 1949?

A. Yes, sir; I was.

Q. Are you a member of a union?

A. Yes, sir; I am.

Q. What union?

A. I am a member of the A. F. of L.

page 1764 } Q. What local union?

A. I am in 697—no, at the present time I belong to the Ann Arbor Local in Ann Harbor, Michigan.

Q. Were you a member of the Salyersville Local in 1949?

A. Yes, sir; I was.

Q. Did you hold any office in it?

A. Yes, sir; I was financial secretary.

Q. Did Mr. Robert Poe turn in to the union office any signed card by laborers of Laburnum after you had joined the Salyersville Carpenters Union in 1949?

A. No, sir; as far as I know he did not.

Q. They would be the official records of the office there, wouldn't they?

A. Yes, sir; they should be the official record of the office.

*James H. Salyer.*

Q. Did you furnish him any papers to be used in that connection?

A. Yes, sir; I did. I furnished him receipts to take—I mean for the purpose of obtaining those applications.

Q. The receipts were for any money they would pay when the application was taken?

A. That is right.

Q. Did he ever bring any back to you?

A. No, sir; as far as I know he never brought page 1765 } any back.

Q. You were the treasurer at that time?

A. No, sir; I wasn't the treasurer. I was financial secretary.

Q. Did Mr. Delinger live at Salyersville while he was superintendent of the job there?

A. Yes, sir; it is my understanding that he did live in Salyersville.

Q. Did the Salyersville Union make any effort to get a contract with Laburnum Carpenters for the work there at Evanston?

A. Yes, sir. We sent out a delegation, I would say on several occasions to contact Mr. Delinger and other officials of the company to try to obtain that contract.

Q. Did you know when the contract they had with the Paintsville Union was going to end?

A. Yes, sir, we had been told that that contract was about to end and that a new contract was to be let.

Q. Did you get any satisfaction from Mr. Delinger?

A. No, sir; no satisfaction whatsoever.

Q. Did any one express any regret at seeing him leave?

A. Well, yes, sir. I mean no regret. I meant it was the general opinion there that most of the people were rather glad to see him leave because we felt like we should have at least some work there.

Mr. Mullen: The witness is with you.

page 1766 } CROSS EXAMINATION.

By Mr. Robertson:

Q. Are you a member of the United Mine Workers?

A. No, sir; I am not.

Q. Have you ever been?

A. No, sir; I have not.

*James H. Salyer.*

Q. Is that why you left eastern Kentucky to go out to Michigan so you could get a job?

A. No, sir. I am working for the United Mine Workers at this time, but I have an application to become a member but as yet that hasn't come through.

Q. You have an application in and you are going to jine?

A. I think so.

Q. Why?

A. I find the fellows are nice to work for. I have worked near them and I have worked for them, and I find they treat you nice.

Q. It makes pleasanter working conditions in eastern Kentucky, too?

A. Yes, sir; so far I have found the conditions very pleasant.

Q. When you work in eastern Kentucky as a member of the United Mine Workers?

A. Would you repeat that for me, please?  
page 1767 }

Q. I say, if you are a member of the United Mine Workers it makes it pleasanter to work in eastern Kentucky, doesn't it?

A. Well, sir, I have worked in eastern Kentucky before. In fact, I have worked there most of my life. I haven't worked for the United Mine Workers before I would say a year ago, and I have always found conditions pleasant to work in eastern Kentucky.

Q. But I am asking you this: Aren't they more pleasant to work in eastern Kentucky if you belong to the United Mine Workers?

A. No, sir; I haven't found that to be true.

Q. You have not?

A. I have not found that to be true.

Q. Which is stronger in eastern Kentucky, say around Salversville, would you say the A. F. of L. or the United Mine Workers?

A. I would say the United Mine Workers were.

page 1768 }

## LEE ALLEN

a witness in behalf of Defendants, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By Colonel Harris: .

Q. Are you Mr. Lee Allen?

A. Yes, sir.

Q. How old are you, Mr. Allen?

A. Thirty-eight.

Q. Where were you born and raised?

A. Breathitt County, Kentucky.

Q. Who do you work for now?

A. Pond Creek Coal Company.

Q. What kind of work are you doing?

A. Driving diesel motors.

Q. Are you a member of any union now?

A. Yes, sir.

Q. What union do you belong to now?

A. United Mine Workers.

Q. How long have you been a member of the United Mine Workers?

A. About two years.

Q. Were you at the tippie of the Pond Creek Pocahontas Coal Company on the morning of July 26, 1949, page 1769 } when Laburnum Construction Corporation was doing work on the tippie?

A. Yes, sir.

Q. What was the occasion for your going there?

A. I was looking for work.

Q. While you were there did you see any men who were not at work approach the job site? Did any men who were not working on the job come up to the job site?

A. Yes, sir.

Q. How many would you say were in the group that you saw?

A. There were around 50 or 60.

Q. Did you see anything out of the ordinary on that occasion?

A. No, sir; I did not.

Q. Did you hear any loud talk?

A. No, sir.

Q. Did you see any guns?

A. No, sir.

Q. Did you see any drunks?

*Lee Allen.*

A. I did not.

Q. Did you see any knives?

A. No, sir; I didn't.

Q. Did you hear any talk from the laborers on that occasion?

A. No, sir; not as I remember of.

Q. Did you know any of those men that were  
page 1770 } in that group that you said had about 50 or 60  
men in it?

A. Yes, sir; I did.

Q. Were they people from that general neighborhood?

A. Yes, sir.

Q. Did you hear the men that came or any of them talking  
to laborers who worked on the Laburnum job?

A. How was that?

Q. Did you hear any conversation between any of these  
men that came up to the job and men who were already at  
work on the job?

A. Yes, sir; I heard them talking some.

Q. Did you see them talk to any laborers?

A. No, sir; I didn't.

Q. Did you hear them tell anybody they had better sign,  
or words to that effect?

A. No, sir.

Q. How long did you stay there that day?

A. I stayed pretty well all day.

Q. Did you get to see Laburnum or anybody at the Laburnum  
office and talk to them about getting a job?

A. No, sir; I didn't talk to them any.

Q. Did you go back the next day to the job site?

A. Yes, sir; I did.

Q. Did you talk to anybody on that occasion?  
page 1771 } A. Well, I talked to some gentleman there. I

asked about a job. I asked him what he was  
paying, and he said he was paying 90 cents an hour, and I  
just refused to go to work. He asked me to go to work.

Q. Did you see any picket sign that day?

A. Yes, sir; I did.

Q. Were there any other men standing around when you  
were talking about working for 90 cents an hour?

A. Yes, sir; there was a bunch of us there in the road in  
front of the office.

Q. Did any of them agree to go back to work or to go to  
work either one for 90 cents an hour?

A. No, sir; they refused to go to work.

*Lee Allen.*

Q. Did you hear any laborer tell Mr. Bryan or you or anybody else that he signed the card because he was scared?

A. No, sir; I did not.

Q. Did you sign up?

A. Yes, sir; I did.

Q. Were you scared?

A. No, sir.

Q. When you went there the first time to get a job with them were you trying to get a job from the Pond Creek Pocahontas Coal Company or from the Laburnum Construction Corporation?

A. Pond Creek Coal Company  
page 1772 } Q. Was it Laburnum Construction Company  
folks who offered you 90 cents an hour or Pond  
Creek Pocahontas Company?

A. Laburnum Construction.

Colonel Harris: You can take him.

### CROSS EXAMINATION.

By Mr. Robertson:

Q. What part of Breathitt County do you live in?

A. What part of Breathitt County?

Q. Yes.

A. It is the eastern part, I guess.

Q. What is it called, your place?

A. What do they call it?

Q. Yes.

A. Breathitt County.

Q. I mean the place where you live.

A. My post office is Lambric.

Q. How big a place is that?

A. It is just out in the country there.

Q. How far do you live from the job site of Laburnum?

A. Ten miles.

Q. Why do they call Breathitt County "Bloody Breathitt"?

A. I couldn't say whether it goes by that name or not.

Q. You don't know whether it goes by that name?

A. No, sir.

page 1773 } Q. When did you join the United Mine Workers?

A. A couple of years, two years.

Q. Did you already belong to them when you went out there on July 26?

*Lee Bach.*

A. No, sir.

Q. What did you belong to then?

A. I didn't belong to any organization, no union.

Q. Are you a pretty good shot?

A. Well, not so good.

Q. How good?

A. I could kill a squirrel, I guess, if you gave me a shot-gun.

. . . . .

LEE BACH

called as a witness for the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Bach, what is your full name?

A. Lee Bach.

page 1774 } Q. How old are you?

A. Fifty-four.

Q. Where do you live?

A. Breathitt County.

Q. Whereabouts in Breathitt County?

A. Noctor is my address, about eight miles out from the county seat.

Q. Were you born in Breathitt County?

A. That is right.

Q. Lived there all your life?

A. I have.

Q. Are you a member of any union?

A. Yes, sir.

Q. What is it?

A. United Mine Workers.

Q. How long have you been a member of the United Mine Workers?

A. Oh, approximately a year or a little over.

Q. Where are you working now?

A. For Pond Creek Pocahontas Company in Spring Fork, Lambrie I believe is the post office.

Q. Were you working for Laburnum Construction Corporation in July, 1949?

A. I was.

## Supreme Court of Appeals of Virginia

*Lee Bach.*

pages 1775-79 } Q. What was your job with them?

A. Labor foreman.

laborers? Q. You were the foreman in charge of the

A. That is right.

Q. That is the unskilled labor, you mean?

A. Yes, sir.

Q. Were they organized in any union at that time?

A. They wasn't, no, sir.

Q. Do you know Mr. Hart?

A. I do.

Q. Did you talk to Mr. Hart or Mr. Robinson at any time in the summer of 1949?

A. I did.

Q. Do you know about what time?

A. No, I can't state what time.

Q. Do you know whether was in July or August?

A. It was in July, but I don't remember the date.

Q. Early or late in July?

A. I would say somewhere near the middle of July, around the 12th or 15th, something like that.

Q. Did you talk with him then about organizing laborers?

A. I did; Mr. Hart.

Q. Was anybody else with you when you talked to him?

A. I don't remember if there were.

Q. Did he at that time ask you to join the  
page 1780 } United Construction Workers?

A. I can't say he asked us to, but he gave me some cards, you might say cards or memberships, something pertaining to that.

Q. Did you sign one of them?

A. I did.

Q. Did you sign that card of your own free will or were you forced to sign it?

A. My own free will.

Q. Had there been any movement among the common laborers at that time to seek membership in some union?

A. There had.

Q. After you signed that card, later on Mr. Robert Poe had you all sign some cards for the American Federation, the Salyersville Union?

A. That is right.

Mr. Robertson: It is all right to lead him.

Mr. Mullen: Do you want to give me lessons?

*Lee Bach.*

Mr. Robertson: I just said it was all right. I don't think you need any.

Mr. Mullen: Thank you.

By Mr. Mullen:

Q. Did you hear anything further from Mr. Pee about going into the Salyersville Union?

A. I did not.

page 1781 } Q. Were you working on Tuesday, July 26, 1949?

A. I was.

Q. At what point were you working?

A. At the tippie. We call it the No. 1 tippie, the one that was under construction at that time.

Q. What work were you doing there?

A. In charge of the laborers.

Q. Did any men come there at that time who were not working on the job during the day?

A. They did.

Q. With whom were they when they came there?

A. When 11:30 came I and others were around in below the tippie to have lunch. It was a very hot day and there was some shade down around the box cars. When we had finished our lunch we came back and when we came back around there at the side of the tippie were those men.

Q. Did you go in the toolhouse where they had some conversation?

A. No, I didn't.

Q. How many men would you say there were in that group that came in there?

A. In just a rough estimation I would say 20 or 25.

Q. Nothing like 100?

A. No, indeed there wasn't.

page 1782 } Q. Did any of those men seem to be drunk?

A. No, they didn't.

Q. Did you see any guns?

A. No, I didn't.

Q. Did you see any outlines of guns under the men's shirts?

A. I did not.

Q. Did you hear any shooting?

A. No, sir; not that day.

Q. Did you see them—

Mr. Robertson: Excuse me. He said not that day.

*Lee Bach.*

The Witness: I could hear shooting any time as far as that goes.

Mr. Mullen: May I go on now?

By Mr. Mullen:

Q. Were they signing up any of the employees of Labor-  
num at that time, the morning of the 26th?

A. Yes, some signed up.

Q. Did you see whether they were signing willingly or be-  
ing forced to sign?

A. They all seemed to be perfectly willing.

Q. The men knew they were coming over there to sign them  
up, didn't they?

A. I knew they were coming.

Q. Did you or not sign a second time?

A. I did.

page 1783 } Q. Did they set up a picket sign that day or  
not?

A. When we came back from having lunch, the best I re-  
member, here next to the step that goes up in the tipple was  
something like a piece of paper with a picket sign on it. It  
was stationed there when I came back from having lunch.

Q. Did you hear any or see any effort to sign anybody  
else besides the laborers?

A. No, I didn't.

Q. How long did you stay around there?

A. I would say it wouldn't exceed two hours that I stayed  
there and probably not that long.

Q. After the men left did you have any talk with Mr. Delin-  
ger?

A. I did.

Q. What did you do?

A. After the men left—in the afternoon we didn't work any,  
and as usual I made out their time card or sheet, which I  
had been doing at the end of the period of the day, but at  
that time at noon there wasn't any other work and I made  
out the time sheet and took it over to the office and presented  
it to him.

Q. What did he say to you?

A. He said he already had their time.

Q. Did he make any inquiry as to what you had done during  
the day?

page 1784 } A. He did.

Q. What did he ask you?

A. He asked me if I signed those papers, and I answered

*Lee Bach.*

him I did. So his reply was "Well, I guess you have a right to sign what you want to," and I answered, "I think I do." That was the last time I seen Mr. Delinger.

Q. Did he say anything more to you when he told you you had a right to sign?

A. No, that is all he said.

Q. Did you go back there the next day, the 27th?

A. I did, the next morning.

Q. Were any of the laborers over there?

A. I am not sure. It appears to me that there were one or two, but I wouldn't be positive of that.

Q. Did you have any conversation with any of the Laburnum officials that second morning?

A. Well, yes.

Q. With whom did you talk?

A. A man that was directed to me to be Mr. Bryan. That was the first time I had seen him, and that is who I was informed was Mr. Bryan. The timekeeper, Mr. Riggs, offered me my time in full, and Mr. Robinson asked me not to take it, but just to take what was due me.

Q. Did Mr. Bryan say anything to you?

A. No more than asked me if I wanted to go to work.

Q. What did you tell him?

page 1785 } A. I replied no.

Q. Was there any discussion between you and Mr. Bryan about the picket line?

A. No, he never mentioned it to me.

Q. Did you give Mr. Bryan any reason why you wouldn't go to work?

A. I did.

Q. What was the reason you gave him?

A. That I honored the picket line. I wouldn't cross for it.

Q. Was there a picket line there that day?

A. A picket sign was up.

Q. Did you hear any threats made that morning?

A. No, I did not.

Q. Were you or not afraid to go to work?

A. No, sir; I was not.

Q. You gave Mr. Bryan your reason that you wouldn't go to work. I believe you stated it.

A. That is right.

Mr. Mullen: The witness is with you.

*Lee Bach.*

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Bach, which union is stronger in eastern Kentucky, the A. F. of L. or the United Mine Workers?  
page 1786 }

A. I just belong to the United Mine Workers. I can't say about the A. F. of L.

Q. You wouldn't say which one is stronger?

A. No, sir.

Q. When did you join the United Mine Workers?

A. It was three weeks, approximately four, after this happened that I went back to work for Pond Creek Pocahontas Coal Company, and then I joined the United Mine Workers union then. That was in 1949, somewhere along about August or September.

Q. You had never belonged to any union before that?

A. Not there, no, sir.

Q. Why did you happen to join up at that time?

A. As early as I could get in it. I went back to work for Pond Creek Pocahontas then and they were operating under the United Mine Workers Union.

Q. You couldn't go back to work there unless you did join up, could you?

A. I don't know. I didn't ask any questions to know about that, so I don't know.

Q. It is pleasanter to work in Eastern Kentucky if you belong to the United Mine Workers, isn't it?

A. How is that?

Q. I say it is pleasanter to work in eastern Kentucky if you belong to the United Mine Workers, isn't it?  
page 1787 }

A. I can't say exactly pleasant, but if you are a miner more than likely you are going to belong to it.

Q. Why?

A. Well, it calls for it.

Q. Sir?

A. I don't know. On that work they present check-off slips to me which I was glad to sign to belong to it as long as I was producing coal.

Q. You wouldn't want to buck them, would you?

Colonel Harris: We object to that.

Mr. Robertson: I think it is a legitimate question. If you stay in eastern Kentucky and want to work out there you have to jine up. That is what I am trying to develop.

*Lee Bach.*

Colonel Harris: We object.

The Court: I will allow it for what it is worth.

Colonel Harris: We reserve an exception.

By Mr. Robertson:

Q. If you want to go to work in eastern Kentucky you pretty well have to jine up, don't you?

Colonel Harris: Same objection and exception.

The Court: Same ruling. Answer the question.

Mr. Pollard: Exception.

By Mr. Robertson:

Q. I don't want to embarrass you, Mr. Bach.

A. That is all right.

page 1788 } The Court: Read the question.

(The pending question was read by the reporter.)

The Witness: No, sir.

Mr. Mullen: That wasn't the question.

By Mr. Robertson:

Q. I didn't think that was the question I asked.

A. I can't answer that question, I don't know whether you do or not, but I joined willingly. I can't say whether you have to join or whether you have not.

Q. At the time you signed up out there when Hart was there you had already signed up to join the A. F. of L., hadn't you?

A. I can't say which I signed first, sir. I am not positive of that.

Q. You were going to sign them both?

A. I was trying to get something (laughter). Let's just pass that for a joke.

Q. I am speaking seriously. Just between you and me, you were going to join both and play safe, weren't you?

A. No, sir. After I thought I wanted in the United Construction Workers because when that work was over I figured I could transfer over to the United Mine Workers and still work at home and be with my family.

Q. And if you didn't join up with them you couldn't work there close to home?

page 1789 } A. I don't know whether I could or couldn't.

Q. You didn't care to raise the question?

*Lee Bach.*

A. I didn't inquire into that.

Q. You didn't care to raise the question?

A. No, sir.

Q. You knew Mr. Delinger out there, the Laburnum superintendent on the job?

A. I know him, yes, sir.

Q. Do you remember ever telling him that you wanted to join up with the A. F. of L. real quick before the United Construction Workers people began to put the heat on you?

A. No, sir; that is not right.

Q. That is not right?

A. No, sir.

Q. What did you tell him.

A. The only word he said to me, he said, "It is all right to join it," and I said it is a yes or no. He said "You can tell your men it is all right to join." That is as far as we ever discussed the matter.

Q. But you did join them both?

A. That is right, I did sign it. I will admit that.

Q. Why do they call Breathitt County "Bloody Breathitt"?

A. I don't know, it just has the kind of wrong name. People go to church and Sunday school there. It doesn't deserve that name whatever.

page 1790 } Q. Were you working at the tippie or on the ground there on the 26th?

A. Well, I was on the ground. I didn't have no work in the tippie to do. The laborers were on the ground.

Q. When Hart's men were there you never heard any cursing, did you?

A. I can't recall if I did. If I did I don't remember it.

Q. I mean when you had a crowd there of 20 or 30 men like that in Kentucky, Breathitt County, you wouldn't expect any cursing, would you?

A. It is possible they could curse. It could happen you wouldn't hear it, even.

Q. Suppose you had crossed that Picket line, what do you think would have happened to you?

Colonel Harris: We object to that.

The Court: I sustain the objection.

page 1791 } By Mr. Robertson:

Q. Are you a pretty good shot, Mr. Bach?

A. Yes, sir.

*Lee Bach.*

Q. If Colonel Harris was up in the tippie and you were out in the woods, do you think you could shoot him out?

A. I would have to have a pretty high-powered gun if you shot from the woods to where the tippie was.

Q. You wouldn't have any doubt that you could shoot Colonel Harris off the tippie, would you?

A. I figure a man could if he wanted to.

Mr. Robertson: That is all.

#### RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Bach, were you particularly interested one way or the other whether you got in the A. F. of L. or United Construction Workers when you were working there as a laborer with the laborers?

A. I was.

Q. Your aim was to get—

Mr. Robertson: Wait a minute. Let him finish. You asked him, and let him answer. He hadn't finished, I think.

The Witness: My desire was to get in the United Construction Workers union.

page 1792 <sup>1</sup> By Mr. Mullen:

Q. You wanted to see the common laborers organized, or continue as they were?

A. I wanted to see them organized.

Q. You were foreman of those common laborers, you say?

A. That is right.

Q. On the 26th, had you heard anything or not, from Mr. Poe, about the card you signed up with him?

A. I had not.

Q. Then you went ahead and signed up with the United Construction Workers?

A. I did.

Mr. Mullen: That is all.

#### RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. Just one more question. Were you scared to cross that picket line?

*Burl King.*

A. No, sir.

\* \* \* \* \*

BURL KING

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

page 1793 } DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your name.

A. Burl King.

Q. Where do you live, sir?

A. Weeksbury, Kentucky.

Q. What county is that in?

A. Floyd County.

The Court: Talk just a little louder, Mr. King.

By Mr. Mullen:

Q. How old are you?

A. Thirty-seven.

Q. Were you born and raised in Kentucky?

A. Yes, sir.

Q. Where were you born?

A. In Magoffin County.

Q. But you now live in Floyd?

A. Yes, sir.

Q. Are you a member of any union?

A. Yes, sir.

Q. What is it?

A. United Mine Workers.

Q. Were you working for Laburnum Construction Corporation in July, 1949?

A. Yes, sir.

Q. What kind of job did you have there?

page 1794 } A. I was rated as common laborer, but I was driving a truck?

Q. Were the common laborers organized in any union?

A. No, sir.

Q. Do you know whether any effort had been made to organize?

A. No.

Q. Where were you working on the 26th day of July, 1949?

*Burl King.*

A. I was helping build a schoolhouse, hauling some timber for the schoolhouse.

Q. Who else was working there with you?

A. Jerry Barnett.

Q. What were you doing?

A. We were loading some timber on a truck just across the road from the schoolhouse, and hauling it over to where they were building the schoolhouse.

Q. Did you see Mr. Hart and some men come over to the job site on the morning of the 26th?

A. Yes, sir.

Q. About what time?

A. Oh, I imagine around 10 o'clock, sometime. I don't know exactly.

Q. When they got there, what did they do?

page 1795 } A. The guys all began to mix around through each other and talking. That is about all I know.

Q. Who were the carpenters on the job there, do you know?

A. I knew some of them. I didn't know any of them very well, only just by name was all.

Q. Was there any conversation between the carpenters and Mr. Hart or the men with him?

A. They were just talking to each other when I went over there.

Q. You were loading or unloading lumber out on the road?

A. Yes. I was loading it on the truck and hauling it over to the schoolhouse place.

Q. You say you went across to see what they were doing?

A. Yes.

Q. Did you hear any conversation that took place?

A. Nothing only just some of the guys were mixing around through each other, and I knew some of them pretty well that came over there from Magoffin County.

Q. Did you see anybody drunk?

A. No, sir.

Q. Did anybody have guns?

A. No, sir.

Q. Did you hear any threats being made  
page 1796 } against anybody?

A. No, sir.

Q. Did you hear Mr. Hart say what he was there for?

A. No, sir, I never even spoke to him at that time.

Q. You never spoke to him?

A. No, sir.

Q. How many men would you say were with him?

*Burl King.*

A. I would estimate between 20 and 30, maybe.

Q. Did you see any physical contacts, or not, between the carpenters and any of the men with Mr. Hart?

A. No, sir.

Q. How long did they stay there?

A. I don't know just exactly. Not more than half an hour, I don't suppose.

Q. Which direction did they go?

A. They went down the road.

Q. Down the road is toward what?

A. Toward the tipple.

Q. Toward the tipple?

A. Yes, sir.

Q. Did you finish unloading or loading your lumber there?

A. I unloaded the truck and then drove along behind the guys as they went down the road.

Q. You were loading the lumber, you said, to get lumber to bring to the schoolhouse?

page 1797 } A. That is right.

Q. And there you were unloading it, you say?

A. Yes. I had a few pieces already loaded up, you see, where I was loading it, so I just throwed those boards off and followed the guys on down the road.

Q. Did you follow in the truck?

A. Yes, sir.

Q. You were driving the truck?

A. Yes, sir.

Q. Was anybody in the truck with you?

A. There was a guy who was helping me, in the cab with me, and a few of those guys who were walking got on the back end of the truck and rode down.

Q. Whom do you mean by "guys who were walking"?

A. Those guys who were with Hart.

Q. They got on the truck and rode on up with you?

A. Yes, sir.

Q. How far did you go in the truck?

A. I went to the tipple.

Q. What did you do with your truck then?

A. I parked it.

Q. Then what did you do next?

A. I went out where the guys were. One of them asked me if I wanted to sign one of those statements, I mean those cards to join up with the union, and I told him

page 1798 } I did, and I joined it.

Q. You signed one?

*Burl King.*

A. Yes, sir.

Q. Were you forced to sign, or did you sign it voluntarily?

A. I signed it voluntarily.

Q. Did you see anybody else sign them?

A. Yes, sir.

Q. Did you see whether they were being forced to sign, or whether—

A. No, sir, I didn't see anybody forced.

Q. How long did you stay there?

A. I stayed around until the tippie quit running, you see. I was boarding with an old guy who was working on the tippie, and I had to wait until he knocked off from work to go home.

Q. So when he knocked off from work, what did you do; go home with him?

A. Yes, sir.

Q. Did you come back to the job site any more?

A. Yes, sir.

Q. How often did you come back?

A. I come back for about a week after that. I was trying to get on with the Coal Company.

Q. When you came back those days, did you page 1799 } see any picket signs or any people there with the picket signs?

A. I remember seeing the picket sign one time when I came back.

Q. Were Hart and his men friendly or unfriendly with the carpenters at the schoolhouse?

A. They all seemed to be friendly, to me

Mr. Mullen: The witness is with you.

#### CROSS EXAMINATION.

By Mr. Robertson:

Q. When did you join the United Mine Workers?

A. The third day of last May.

Q. That would be May 3, 1950?

A. Yes, sir.

Q. What were you doing between the time Laburnum quit and the time you joined United Mine Workers?

A. I worked for Codell Construction Company at Spring Fork after that for about three months, I guess. Then I was signed up on my unemployment after I got laid off there.

*Burl King.*

Q. You couldn't go to work in Eastern Kentucky without joining up with the United Mine Workers, could you?

A. That is right.

Q. What?

A. They always join up, sign up as soon as they get a job in a coal mine. They hire you, but you have to join the union later.

page 1800 } Q. You also signed an application to join the  
A. F. of L. out there on the Laburnum job, didn't you?

A. Not that I remember of.

Q. I refer now to Plaintiff's Exhibit 57-8, and ask you if that is your signature?

A. (Examining document.) Yes, that is my signature, but I don't remember signing it.

Q. Did Robert Poe ask you to sign up?

A. I don't know Robert Poe.

Q. Did the Hackworth's ask you to sign up?

A. No, sir.

Q. You don't know who asked you to sign up?

A. No, sir. If I signed that, I don't remember who it was.

Q. You don't know Lee Bach's signature, do you?

A. Lee Bach?

Q. Yes.

A. Do you mean do I know his signature?

Q. Yes.

A. No, I don't.

Q. Did you ever tell Mr. Delinger that you wanted to sign up with the A. F. of L. quick before the United Construction Workers turned the heat on you?

A. No, sir.

Q. Did you go back to work for Laburnum  
page 1801 } after the 26th?

A. Yes, sir.

Q. At what rate of pay?

A. Ninety cents.

Q. Do you think there was any need to bring 20 or 30 people there to sign you up, if you wanted to sign willingly?

A. No, sir.

Q. Are you a pretty good shot?

A. Well, I don't know. I have tried to shoot a rifle for a long time. I had quite a little practice when I was in the service.

Q. Did you qualify as an expert marksman?

A. No.

*Ernest Howard.*

Q. How do you rank out in Breathitt County? Are you a pretty good shot or pretty poor shot?

A. I guess I would be pretty good with a shotgun. That is all I use in hunting.

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page 1802 }

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# ERNEST HOWARD

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By Mr. Mullen:

Q. What is your name, please?

A. Ernest Howard.

Q. How old are you?

A. Twenty-nine.

Q. Where do you live?

A. I live in Kentucky, Magoffin County.

Q. How long have you lived there?

A. I have lived there practically all my life.

Q. Born and raised there?

A. Yes, sir.

Q. Married?

A. Yes, sir.

Q. Do you have any children?

A. Three.

Q. Are you a member of any union at this time?

A. United Mine Workers.

Q. How long have you been a member of United Mine Workers?

A. Well, about 9 months, I would say.

page 1803 } Q. Where are you working now?

A. I am working for Pond Creek Pocahontas.

Q. At what point?

A. Breathitt County, Kentucky.

Q. Were you working for Laburnum in 1949?

A. Yes, sir.

Q. How long had you been working for them? When did you go to work for them, do you know?

*Ernest Howard.*

A. I went to work, I believe, sometime in May.

Q. What was your job with them?

A. Laborer.

Q. Were you at that time a member of any labor union?

A. No, sir.

Q. Do you know Robert Poe?

A. Yes, sir.

Q. Did you or not sign an application for the Salyersville Union for him?

A. Yes, sir.

Q. Did anything ever come of that?

A. No, sir.

Q. Did you ever hear anything more about it after you signed?

A. I never heard anything about it.

Q. Did you know Mr. Hart?

A. I knew him when he came in Breathitt page 1804 } County.

Q. Did you first know him or see him on the 26th, or before that?

A. I seen him before that, one time, at a union meeting.

Q. When was that union meeting?

A. I don't remember the date. It was on a Sunday. I believe it was the 24th.

Q. Did Hart ask you to join any union?

A. He asked me if I wanted to join.

Q. What did you tell him?

A. I told him yes.

Q. When did you sign a card for the United Construction Workers?

A. I signed the card on the 26th of July.

Q. Did you know whether or not they were coming over to get the laborers to sign up at that time?

A. Yes, sir.

Q. Where were you when they came over on the 26th?

A. Working on the schoolhouse.

Q. What were you doing on the schoolhouse?

A. I was laboring. I was carrying lumber across from below the road up to the schoolhouse, and helping saw it off.

Q. Carrying it from below the road—was that where it was unloaded?

A. That is where it was unloaded.

Q. And then carried it over to the school-house page 1805 }

A. Yes, sir.

*Ernest Howard.*

Q. And were helping to saw it up?

A. That is right.

Q. Were there some carpenters working there?

A. Yes, sir.

Q. Do you know who they were?

A. Junior Hackworth and Bob Hackworth were two, and that is about all I recall.

Q. When Mr. Hart and the men with him got there, did they come to the schoolhouse or not?

A. Yes, sir.

Q. What occurred then, do you know?

A. They asked the men if they wanted to join the union, and the laborers told him yes, they would like to join, and they all quit work.

Q. Did he say whether or not the carpenters were to join?

A. He told the carpenters if they wanted to join, they could join.

Q. Did he say they would have to join?

A. No, sir.

Mr. Robertson: I am just laughing at your leading him. You don't mind that, do you?

Mr. Mullen: I think the question was framed in the dis-  
page 1806 } junctive.

Mr. Robertson: I don't object.

Mr. Mullen: All right.

By Mr. Mullen:

Q. Were any of the men armed, that you saw?

A. No, sir, not that I saw.

Q. Did you hear any threats, or not?

A. No, sir.

Q. Did you see Junior Hackworth talking with Mr. Hart or with any of the men with him?

A. I didn't see any of them talking to him. He was just talking to the group.

Q. You were working, sawing the lumber on the sawhorse. Which side of the lumber, as it laid across there, was Junior Hackworth on; the side nearest to the schoolhouse or farthest from the schoolhouse?

A. I don't remember.

Q. Where did you sign? Where were you when you signed up?

A. I was at Tipple No. 1.

*Ernest Howard.*

Q. You had left the schoolhouse and gone up to Tipple No. 1?

A. Yes, sir.

Q. Did you sign of your own free will?

A. Yes, sir.

Q. Did you see any others signing?  
 page 1807 } A. No, I don't believe I did.  
 Q. Did you hear any threats up there?

A. No, sir.

Q. Any violence noted?

A. No, sir.

Q. Did the laborers know what Hart was coming there for?

A. Yes, sir.

Q. Did they or not join in the strike when he got there?

A. Sure, they joined in.

Q. You were not in the toolhouse when the discussion occurred there? Were you or were you not?

A. No, sir.

Q. How long did you stay around the tipple?

A. I stayed around a couple of hours, I guess.

Q. What did you do then?

A. I went home.

Q. Did you come back on the 27th or any other day?

A. Yes, sir, I came back the next day.

Q. What happened the next day?

A. Nobody wanted to work.

Q. Did anybody ask you to go to work?

A. Yes, sir.

Q. Who did?

page 1808 } A. Mr. Bryan.

Q. Did he say at what rate he wanted you to go to work?

A. He wanted us to go to work as carpenter's helpers at 90 cents an hour.

Q. What did you say to him?

A. I told him I didn't want to work at that.

Q. Were you then paid up, or not?

A. No, sir.

Q. Did you get any part of your pay that day?

A. Yes, sir, I got the check that was coming to me.

Q. Did you ever get the rest of it?

A. I got it later on.

Mr. Mullen: The witness is with you.

*Ernest Howard.*

CROSS EXAMINATION.

By Mr. Robertson:

Q. Wednesday, the 27th, was payday, wasn't it?

A. Yes, sir.

Q. You are working there for Pond Creek, there where the job site was? You are working there now?

A. No, I am working at No. 3 now.

Q. How far is that from where Laburnum was?

A. That is five miles, I believe they call it.

Q. Where are you living now?

A. Magoffin County.

Q. How far from where you work?

page 1809 } A. Seventeen miles.

Q. Does everybody working on that job where you work, belong to the United Mine Workers?

A. Yes, sir.

Q. You can't work there unless you belong to them, can you?

A. No, sir.

Q. I refer to Plaintiff's Exhibit No. 57-5, and ask you if that is the application you signed to join the A. F. of L.?

A. (Examining document.) Here is my signature, yes, sir.

Q. Did you ever tell Delinger, or anybody else working for Laburnum, that you wanted to join the A. F. of L. quick before the other people turned the heat on, before Hart's people turned the heat on you to make you join them?

A. No, sir.

Q. Did you want to do that?

A. No, sir.

Q. Are you related to the State Trooper, Homer Howard?

A. A distant relation, yes.

Q. What kin is he to you?

A. He is about a third cousin, I think.

Q. Did you and he come in here together from Kentucky?

A. No, sir.

Q. You came in separately?

page 1810 } A. Yes, sir.

Q. What hotel are you staying at?

A. King Carter.

Q. Is he staying there?

A. He was.

Q. Did you all discuss the case at all while you were here staying at the same hotel?

A. No, sir.

*Ernest Howard.*

Mr. Robertson: Stand aside.

RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Was any heat put on you by Mr. Hart to sign?

A. No, sir.

Q. The laborers were not represented by anybody before that; were they or were they not?

A. They were not.

Mr. Mullen: Stand aside.

RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. Did you tell Hart you had already signed up with the

A. F. of L.?

A. No, sir.

Q. Why didn't you?

A. He didn't ask me.

Q. Why didn't you tell him?

page 1811 } A. He didn't ask me.

Q. Did you want to join both?

A. I wanted to join some union to give me more pay.

Q. Did you want to join both of them?

A. Sure I did, or I wouldn't have joined them.

Mr. Robertson: That is all.

RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Did you want to join both at the same time, or either one?

A. I wanted to join either one.

Q. You didn't want to be in both at the same time—

Mr. Robertson: I am going to ask you to stop leading him any more.

Mr. Mullen: I am simply using your question.

Mr. Robertson: I know, but you have your own witness on cross-examination, and stop telling him what you want him to say.

*Jerry Barnett.*

Mr. Mullen: I am not telling him what I want him to say.  
Mr. Robertson: Yes you are, and you know it.  
The Court: All right, gentlemen.  
Any further questions?

Stand aside.

(Witness excused.)

page 1812 } Mr. Robertson: I want you to stop leading  
your witnesses.

The Court: We will recess now.

(Brief recess.)

Mr. Mullen: Call Jerry Barnett, please.

Whereupon,

**JERRY BARNETT**

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Mullen:

Q. Please state your name?

A. Jerry Barnett.

Q. How old are you?

A. Forty.

Q. Married?

A. Yes, sir.

Q. Do you have any children?

A. I have three.

Q. Where do you live?

A. I live in Breathitt County, Kentucky.

Q. Whereabouts in Breathitt County?

A. In the eastern section of Breathitt County.

Q. Are you a member of any union?

A. Sir?

page 1813 } Q. Are you a member of any union?

A. Yes, sir.

Q. United Mine Workers?

A. United Mine Workers.

Q. What is your present work?

*Jerry Barnett.*

A. I work in the mines in Breathitt County.

Q. For what company do you work?

A. Pond Creek Pocahontas.

Q. How long have you lived in Breathitt County?

A. I have lived there all my life.

Q. Did you work for Laburnum Construction Corporation in 1949?

A. Yes, sir.

Q. When did you go to work for them?

A. As well as I remember it, it was in January.

Q. Of what year?

A. Of 1949.

Q. What was your job there?

A. Laborer.

Q. When you went there, were the laborers members of any union?

A. No, sir.

Q. Do you know Mr. Hart?

A. Yes, sir, I do.

Q. When did you first meet him?

A. I am not sure of the day, sir; in the early  
page 1814 } part of July, though.

Q. Where did you meet him then?

A. On the job.

Q. Was anybody with him?

A. Not the first time I saw him, as I remember it.

Q. What did you discuss; anything?

A. Yes, we did. We discussed the business affairs of United Construction Workers, which he was representing.

Q. What was his purpose there?

A. His purpose there was to organize the Laburnum laborers under the United Construction Workers.

Q. What was your attitude toward that purpose?

A. You mean as to whether I wanted to be organized or not?

Q. Yes.

A. I did.

Q. Do you know what the other laborers in your group wanted?

A. Yes, sir, I do.

Q. What did they want?

A. They wanted to be organized.

Q. Did you or did you not sign an application for membership for Mr. Hart?

*Jerry Barnett.*

A. I did.  
 page 1815 } Q. Did Mr. Hart return to the job site any  
 other times between then and the 26th of July,  
 1949?

A. Yes, sir. He was there some 2 or 3 times.

Q. What was he there for, those other times.

A. To hold meetings with the laborers and to explain to  
 us what the United Construction Workers Union represented.

Q. Do you know Robert Poe?

A. Yes, sir.

Q. Is he a representative of any union?

A. My understanding is that he was a representative of the

A. F. of L.

Q. Did Mr. Poe take up with the laborers the question of  
 joining the A. F. of L.?

A. No, sir, he didn't, himself.

Q. Who did?

A. Some of us talked to him about it.

Q. Did you do anything toward getting into the A. F. of L.  
 Union?

A. Yes. We signed applications for membership in the  
 A. F. of L.

Q. What became of those applications?

A. I don't know, sir.

Q. Were you ever taken into the A. F. of L.?

A. No, sir.

Q. Do you know whether any of the other la-  
 page 1816 } borers were taken in?

A. No, sir, I don't.

Q. Did you ask Mr. Poe at any time what he had done?

A. Yes, sir.

Q. What did he say?

A. He said he had done for us all that he could do; that  
 his job was to present the applications, and that was as far  
 as he had anything to do with it; that it was up to their Busi-  
 ness Agent then to carry on from there.

Q. Did you ever hear anything from that Business Agent?

A. No, sir.

Q. Were you at a meeting in Carver?

A. Yes, sir.

Q. On the 24th day of July, 1949?

A. Yes, sir, I was.

Q. Do you know who called that meeting?

A. Yes, sir.

Q. Who?

*Jerry Barnett.*

A. Mr. Hart.

Q. Do you know who he asked to come to the meeting?

A. No, sir, I don't, beyond myself.

Q. Did you get word to come?

A. Yes, sir.

Q. When you were at the meeting, were there any laboreys of Laburnum there?

page 1817 } A. Yes, sir.

Q. Do you know any of the Codell Construction and Allen-Codell people?

A. Yes, sir, I know a few of them.

Q. Were any of them at the meeting?

A. Yes, sir.

Q. What report or discussion was made by Mr. Hart at the meeting?

A. Mr. Hart talked to us concerning the UCW, the United Construction Workers. He told us just what protection it would give us, what our wages would be, and just business matters concerning the United Construction Workers.

Q. Did he discuss the situation with the Codell people at that time?

A. Yes, sir.

Q. What did he say about that?

A. Sir, I don't understand that question.

Q. What did he say about the Codell people; anything about whether he had been working with them?

A. Oh, yes, yes,

Q. Did he make any report to the Laburnum laborers who were present?

A. I don't believe I understand the question.

Q. Did he make any report to the Laburnum laborers who were present at that meeting?

page 1818 } A. On what? Report on what?

Q. On whether he had been able to accomplish anything for them?

A. Oh, yes, he did.

Q. What did he report?

A. He said he hadn't had any luck; that he had contacted Laburnum officials by telephone, and had had no luck.

Q. Mr. Barnett, I want to read to you a list of laborers that it has been testified were in the employ of Laburnum at that time, and ask you which, if any, were present at that meeting, if you know.

You were present, of course.

Was Alvis Salyers present?

*Jerry Barnett.*

A. I don't know the man.

Q. Was Ossie Lovely present?

A. Yes, sir.

Q. Luther Litteral?

A. Yes, sir.

Q. Lee Bach?

A. Yes, sir.

Q. Ernest Howard?

A. Yes, sir.

Q. Dan Combs?

A. Yes, sir.

Q. Green Trusty?

page 1819 } A. I don't know about him.

Q. Donald Trimble?

A. I don't know him.

Q. Matt Miller?

A. Yes, sir.

Q. Green Conley?

A. I don't know about him, whether he was there or not.

Q. Burl King?

A. Yes, sir.

Q. Hargus Howard?

A. I am not sure of him.

Q. John Jordan?

A. Yes, sir.

Q. George P. Miller?

A. I am not sure of him.

Q. Homer Rowe?

A. I don't know him.

Q. How many people were present at that meeting?

A. Does that include the ones that didn't sign with us, or—

Q. I want to know how big a crowd was there, whether they were laborers or whether they were spectators, or what?

A. I would say around 80.

Q. Did they stay there during the whole meeting?

A. They stayed around, yes.

page 1820 } Q. Did the laborers that you have stated were present, take an obligation to the UCW at that time?

A. All that were signed up with Mr. Hart did.

Q. Were they signed up in the presence of the 80 people you said were there? Did they take their obligation in their presence?

A. No, sir.

*Jerry Barnett.*

Q. How did that come about?

A. Mr. Hart asked all that had not signed up and were not taking the obligation to leave the room.

Q. After the obligation was taken, were there any steps taken by Laburnum employees who had obligated themselves, to elect any officers or anybody to represent them?

A. Yes, sir.

Q. Who were elected?

A. Ossie Lovely and myself.

Q. In what capacity were you elected? What was your title?

A. We were elected as a Negotiating Committee to negotiate for a contract with Mr. —I mean to go with Mr. Hart and negotiate with the company for a contract, and higher wages.

Q. Was there any decision made at that meeting as to the steps to be taken to bring about negotiations?

A. Yes, sir.

page 1821 } Q. What were they?

A. The decision was made to call a strike.

Q. Who made a motion to call a strike?

A. I did.

Q. Was there any second to it?

A. Yes, sir.

Q. Who seconded it?

A. Robert Harrison.

Q. Who was he working for?

A. He was working for Allen-Codell.

Q. Did the Codell people also vote to strike?

A. There were two Codell jobs. As I understand it, Codell and Faulconer were already on strike, and Allen-Codell's men did vote for strike at the same time.

Q. Did you then make any plan as to procedure in the strike?

A. Yes, sir.

page 1822 } Q. What was the plan?

A. We agreed to strike on the following day, which would be Monday, provided Mr. Hart could get in to us.

Q. What do you mean by provided he could get in to you?

A. Well, we had newly built roads in there, and it was raining quite a bit, and during rainy weather it was impossible for cars or anything to get in and out.

Q. Did he get in to you on Monday the 25th?

A. No, sir.

Q. When did he get in to you?

*Jerry Barnett.*

A. On Tuesday, the 26th.

Q. To which group of men, that is, Laburnum or Allen-Codell did the plan call for to be first approached?

A. The Codell crews were below us, farther down the road, and Mr. Hart had to come by them first before he got to where I was working, so he came to them first and on to where I was working.

Q. Where were you working that day?

A. I was working about a mile above the No. 1 tipple where a schoolhouse was being built.

Q. Who else was working there with you? That is, among the laborers.

A. Burl King is the only man I am sure of and the laborers.

Q. Were you there at the schoolhouse at the page 1823 } time that Mr. Hart and a group of men came there.

A. I was just across the road from the schoolhouse.

Q. What were you doing?

A. Burl and I were hauling some lumber for the carpenters to use in building the schoolhouse.

Q. How many men would you say were with Mr. Hart?

A. I can only make a guess. I would say 20 or 30.

Q. How were those men dressed?

A. They were just commonly dressed as working men also are.

Q. Did they have on their working clothes, you mean, some of them?

A. Some of them did, yes, sir.

Q. Was it a cool day or a hot day?

A. It was a pretty warm day.

Q. When they reached the schoolhouse did they talk to anybody?

A. Yes, sir.

Q. Who did they talk to?

A. Mr. Hart talked to the Hackworth that we knew as Hack on the job, and to my understanding Hackworth was the job steward for the A. F. of L.

Q. Do you know what was said?

A. No, sir; I do not.

Q. You were not close enough to hear what was said?

A. No, sir.

page 1824 } Q. You didn't go over there, did you?

A. No, sir; I did not.

Q. Did Burl King go over there and ask what they were doing?

*Jerry Barnett.*

A. I don't remember as to whether he did or he didn't.

Q. You say the group of men that came there when they first arrived?

A. Yes, sir.

Q. Did you see any guns?

A. No, sir.

Q. Did you see any drunk men?

A. No, sir.

Q. Did you see any clubs?

A. No, sir.

Q. Did you see any violence take place at that time?

A. No, sir.

Q. How long did Hart and his men stay there?

A. I don't know, 15 or 20 minutes, I should say.

Q. Then did they start somewhere else?

A. They started back down the road.

Q. Down the road meaning—

A. Back down in the direction from which they had come.

Q. And that was in the direction of what?

page 1825 } A. The No. 1 tippie.

Q. What about the men who were at the school-house, that is, the men who were working there before he arrived, where did they go or did they go anywhere?

A. They went on down the road, too, following on with the crew that had come up there and gone back.

Q. Were they walking or riding?

A. Some were walking, some were riding.

Q. What were you doing?

A. I rode the truck that I was working on.

Q. Was anybody else in the truck?

A. Yes, sir.

Q. The Laburnum men who had been on the job at the schoolhouse or other people?

A. Well, I don't know whether they were all Laburnum laborers or whether some were Codell's, but anyway several of the ones that were there did get on the truck and did ride down.

Q. You mean some of the men that came with Hart got on the truck?

A. Yes, sir.

Q. How far did you go on the truck?

A. We went down to the No. 1 tippie.

Q. Did you leave the truck there or what did you do?

*Jerru Barnett.*

page 1826 } A. Burl was driving, and the rest of us un-  
loaded off the truck, and I don't know what Burl  
did with the truck from there.

Q. What did you do?

A. I went in to the tippie.

Q. Did you go in the toolhouse?

A. No, sir.

Q. What were the men who came there with Hart doing  
over at the tippie?

A. They went over there to try to see how many of the other  
boys that hadn't signed up wanted to sign up and organize  
with us, just walking around.

Q. You had already signed, you have testified. Did you  
sign again?

A. I did.

Q. How did you happen to sign again?

A. Sir?

Q. How did you happen to sign a second time?

A. Just unthoughtedness on my part.

Q. Were you signing willingly or were you forced to sign?

A. Yes, sir; I signed willingly.

Q. Did you see them signing any of the other laborers?

A. Yes, sir.

Q. Did you see whether they were using any force to make  
them sign?

A. I didn't see any.

page 1827 } Q. Did or did not the laborers know that Mr.  
Hart was coming over there to sign them up?

A. You mean before he ever came in there?

Q. Before the 26th.

A. Yes, sir.

Q. How long did you stay there that day?

A. On the 26th?

Q. Yes.

A. Just a very short time, just long enough—as I passed  
by, one of the boys called to me, in fact John Jordan, told  
me to come over and sign one of those. Without giving  
thought as to what I was doing, I did walk over and sign one  
of the applications for membership, but I had already signed  
one before.

Q. You had already signed?

A. Yes, sir; and then signed again.

Q. You just signed again. And you had already obligated  
yourself, had you not?

A. Yes, sir.

*Jerry Barnett.*

Q. When did you return, if you did, to the job site?

A. I don't know, not for some two or three days afterward.

Q. You didn't come there on the 27th?

A. No, sir.

Q. When you did return did you see any picket page 1828 } signs or pickets?

A. Yes, sir.

Q. Where were the men on the picket line?

A. I only saw two, and they were in the road right where we leave the main road and turn down to cross the creek to go over to the tippie.

Q. Did you know how the men were selected to act as pickets?

A. Yes, sir.

Q. How was that?

A. They were selected by Mr. Hart. He would choose one or two to stay on the picket line one day, the one or two or three, whatever he felt like would make enough, then to relieve them and be on the next day.

Q. Were you ever present with Mr. Hart or with any one else when Mr. Bryan was present?

A. Yes, sir.

Q. Do you recall when that was?

A. Not the date, no, sir.

Q. Did you talk to Mr. Bryan or did Mr. Bryan make any statement to you or in your presence at that time?

A. Yes, sir; he talked to Mr. Hart.

Q. What did he say?

A. We met in Salyersville, Kentucky, and Mr. Bryan told Mr. Hart that he couldn't negotiate a contract page 1829 } with him on account that his A. F. of L. carpenters would pull all their men off his job.

Q. What did Mr. Hart say to him?

A. Mr. Hart asked him why the A. F. of L. carpenters and the United Construction laborers couldn't work together.

Q. Did you go with Mr. Hart over to Salyersville to meet with a group of A. F. of L. people?

A. Yes, sir.

Q. Were you all admitted to the meeting?

A. No, sir.

Q. Were you at the job site any more after that?

A. Yes, sir.

Q. When was that?

A. As well as I remember, on the Friday after the strike

*Jerry Barnett.*

on the 26th, on Tuesday. It was some two or three days afterward, anyway. I am not sure of the date.

Q. Was that the time whe you saw the picket sign and the men there on the picket?

A. Yes, sir.

Mr. Mullen: The witness is with you.

### CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Barnett, how big a place is Tiptop?

A. It is a very small pace.

Q. Just four or five houses?

A. I would say more than that. I don't know how many.

Q. Would you say it is just a village of 200  
page 1830 } or 300 people?

A. Yes, something like that I suppose.

Q. How far is Carver from Tiptop?

A. I don't know.

Q. It is a mile or so, isn't it?

A. I suppose it is, yes.

Q. That is a place about the same size?

A. All I can say I saw the day I was there was the school-house. That is far as I went.

Q. I am talking about Tiptop and Carver.

A. I don't know. I have not been in—if there is a town of Carver, I haven't been in it.

Q. You have been to Tiptop?

A. Yes, sir.

Q. Was Hart's meeting on the 24th at Tiptop or Carver?

A. It was at the Carver schoolhouse.

Q. Do you know how far Beaver Creek is from there?

A. Sir?

Q. Do you know how far Beaver Creek is from there?

A. No, I don't know where Beaver Creek is.

Q. Hart had another meeting there on Sunday, the 31st of July, didn't he?

A. I don't know.

Q. You were not there?

page 1831 } A. No, sir.

Q. When you were working across the road from the schoolhouse when Hart's crowd came to the schoolhouse, why didn't you go over to the school house to see what was going on?

*Jerry Barnett.*

A. I didn't think it necessary. In fact, I knew what they were there for, and I knew why they had come.

Q. You weren't scared to go over there, were you?

A. No, sir; not by any means.

Q. You just didn't have any business over there?

A. That is right.

Q. You say you had signed this application for the A. F. of L., and I refer to Plaintiff's Exhibit No. 57-2, and ask you if that is your signature.

A. That is.

Q. Did you ever tell any of the Laburnum people that you want to join the A. F. of L. quick before Hart's crowd got to you and put the heat on you to make you join them?

A. No, sir; I did not.

Q. Do you mean that when you signed up the second time for Hart there at the tippie on July 26 that you did not remember that you had already signed for him before?

A. I just didn't give it any thought, sir.

Q. I say, but did you forget that you had signed it?

A. I must have.

page 1832 } Q. You were not conscious the second time that you had already signed for Hart once before?

A. At the time that I signed, no, sir.

Q. When you signed for Hart the second time did you also forget that you had signed up with the A. F. of L.?

A. No, sir.

Q. Did you remember it?

A. Yes, sir.

Q. Why were you signing up for both unions?

A. Because the A. F. of L. didn't give us any action.

Q. And you wanted to sign up—you wanted to join both unions so both of them would leave you alone?

A. No, sir; I did not.

Q. Hart told you that he would give you better protection than the A. F. of L., you say?

A. No, sir; he did not.

Q. You just said something about protection. What did you say?

A. He merely said that he would give us better working conditions and higher wages.

Q. Did he use the word "protection"?

A. No, I don't know about that. If he did, I don't remember it.

Q. How did you happen to use the word protection?

*Jerry Barnett.*

page 1833 } A. Well, I just happened to use it, I suppose.  
Q. You just expressed your thoughts?

A. Yes, sir.

Q. Why didn't you go back to the job site on July 27th?

A. I knew there was no need when we weren't working.

Q. And you also were scared to go back, weren't you?

A. No, sir.

Q. You thought you had plenty of protection?

A. No, sir; I didn't think that.

Q. Did you think you had too little protection?

A. No, sir; I didn't think that.

Q. What did you think?

A. I just knew it wasn't necessary for me to go back because we weren't working?

Q. Where are you staying here in Richmond?

A. The King Carter Hotel.

Q. How many of you people from Kentucky here are also staying there?

A. I don't know, possibly 12 or 15.

Q. Have you all been talking this case over among each other while you have been here in town?

A. No, sir. You mean the ones of us who came here as witnesses?

Q. Yes.

A. No, sir; we haven't been talking it over. It possibly has been mentioned a few times in some way.

page 1834 } Q. But you haven't talked it over about who was going to testify to what?

A. No, sir.

Q. Have you talked it over with your lawyers?

A. Yes, sir.

Q. You have talked it over with them?

A. Yes, sir.

Q. But not among the people over at the hotel.

Hart was also organizing the employees up at the Pond Creek Pocahontas store at Evanston, wasn't he?

A. I beg your pardon?

Q. I say Hart was also during this time we have been talking about organizing the store employees up there at Evanston, wasn't he?

A. I don't know.

Q. When did you join the United Mine Workers?

A. In August, I believe.

Q. Early in August?

A. Yes, sir.

*Jerry Barnett.*

Q. And Laburnum got out of there what time in August?

A. He left out in July.

Q. What time in July? He was there on the 26th. When was it after that that Laburnum pulled out?

A. Some three or four days after we came out on strike on the 26th.

Q. You joined the United Mine Workers four page 1835 } or five days after Laburnum pulled out?

A. Some time in August. I don't remember the exact time.

Q. Did you also join the United Construction Workers?

A. I did.

Q. Did you also join District 50?

A. I don't know what you mean by District 50.

Q. But you did join the United Construction Workers and the United Mine Workers both?

A. Yes, sir.

Q. And signed up to join the A. F. of L. also?

A. Yes, sir.

Q. Are you a pretty good shot?

A. Well, I can make out to kill a squirrel when I am squirrel hunting.

Q. Do you think it would be all right for me to go to Breathitt County after this trial is over?

A. I do, sir.

. . . . .

Mr. Mullen: Your Honor, we have some depositions we would like to read.

Mr. Robertson: I want to see which ones they are. If you are bringing those in where we claim you didn't page 1836 } give us notice, I want to see them before you shoot them in.

Mr. Mullen: You can see them. These, however, are not those. These are the ones that your people were present at the taking of.

Mr. Robertson: I don't object to them, then.

(Discussion off the record.)

Mr. Mullen: Colonel Harris will read the questions and I will undertake to read the answers.

Mr. Robertson: We are not going to make any objections. What are those, Salvati's?

Mr. Mullen: Salvati, Smith, and Haslam.

Mr. Robertson: I withdraw all objections to everything so far as they are concerned.

The Court: Are you ready, gentlemen?

Mr. Mullen: We are ready, if Your Honor please.

Mr. Robertson: I count on you not to leave out anything, Mr. Mullen. I have left my copies at the office.

Mr. Mullen: I won't leave out anything. I didn't follow you when you were reading. I took it for granted.

Mr. Robertson: Yes, you did. You watched me like a hawk. I count on you.

The Court: Go ahead and move on.

page 1837 } (At this point the depositions of Raymond E. Salvati and Hiram L. Smith, were read to the jury, Colonel Harris reading the questions and Mr. Mullen reading the answers, as follows:)

“In the Circuit Court of the City of  
Richmond, Virginia

“Laburnum Construction Corporation,  
a corporation, Complainant,

v.

“United Construction Workers, affiliated with United Mine Workers of America; District 50 United Mine Workers of America, and United Mine Workers of America, Defendants.

### DEPOSITIONS.

“The depositions of Raymond E. Salvati and Hiram L. Smith, taken before me, Betty Bratton, a Notary Public for the County of Cabell, in the State of West Virginia, pursuant to notice hereto annexed, at the offices of Fitzpatrick, Strickling, Marshall and Huddleston, in the First Huntington National Bank Building, Huntington, West Virginia, on the 15th day of June, 1950, between the hours of 10 a. m. and 5 p. m., to be read in evidence on behalf of the defendants, in a certain action at law, now pending in the Circuit Court of the City of Richmond, in the State of Virginia, wherein United Construction Workers affiliated with United Mine Workers of America; District 50 United Mine Workers of America, and United

*Raymond E. Salvati.*

Mine Workers of America are defendants, and  
page 1838 } Laburnum Construction Corporation is com-  
plainant.

“Appearances: For the Complainant: Hunton Williams, Anderson, Gay & Moore (by Francis V. Lowden, Jr., and Lawrence E. Blanchard, Jr.)

“For the Defendants: Fred G. Pollard and James Mullen.”

Mr. Robertson: Excuse me one minute, please. I just want to call attention for purposes of the record that the Plaintiff has already read this deposition and also Mr. Salvati's deposition which was taken for the Plaintiff on a later date, and if they are going to read one, I think they ought to read both of them over again. If they are going to read one over again, they ought to read both over again, but I leave that up to what they think is fair to do.

Mr. Mullen: If Your Honor please, we don't think so. They have already offered their depositions. We are offering ours in due course in the presentation of our own case; and they took our depositions and read them, and we could have objected to it.

Mr. Robertson: But you couldn't have stopped it.

Mr. Mullen: We could have stopped you as long as we were going to offer it ourselves. You had a right to use it if we didn't offer it, but we were going to offer it. We are not forced to read their depositions again.

Mr. Robertson: We don't want you to read it if you don't want to.

page 1839 } The Court: Go ahead, gentlemen.

(The reading of the depositions continued, as follows:)

“RAYMOND E. SALVATI,

“DIRECT EXAMINATION.

“By Mr. Mullen:

“Question: Mr. Salvati, will you please state your name, residence and business?

“Answer: My name is Raymond E. Salvati. I am presently President of the Island Creek Coal Company, Pond Creek Pocahontas Company, Marianna Smokeless Coal Company. I live at 1130 Ritter Park, Huntington, West Virginia.

*Raymond E. Salvati.*

"Question: What is the connection, if any, of the Spring Fork Development Company with the Pond Creek Pocahontas Company?

"Answer: The Spring Fork Development Company is a wholly owned subsidiary of the Pond Creek Pocahontas Company.

"Question: How long have you been President of the Pond Creek Pocahontas Company?

"Answer: One year.

"Question: What was your position prior to that time with them?

"Answer: Vice-President in charge of operations.

"Question: And were you Vice-President in charge of operations in 1948 and 1949?

"Answer: I was in '48 and for the first six months of '49.

"Question: Did the Pond Creek Pocahontas  
page 1840 } Company enter into a contract in 1948 with the  
Laburnum Construction Corporation, a Virginia  
corporation, to have any work done in Kentucky?

"Answer: Well, the Spring Fork Development Company did.

"Question: The Spring Fork Development Company? Didn't the Pond Creek Pocahontas Company also enter into a contract? The plaintiff alleges in their notice of motion that there were two contracts.

"Answer: Yes, that is correct. The Pond Creek Pocahontas Company did enter into an agreement with the Laburnum Construction Company for the erection of the tipple and the Spring Fork Development Company, which is a wholly owned subsidiary of Pond Creek, entered into a contract for the construction of houses.

"Question: Was the work completed under the Pond Creek Pocahontas Company contract by the Laburnum Corporation?

"Answer: No.

"Question: Was the work completed under the Spring Fork Development Company contract?

"Answer: No, sir.

"Question: Were the contracts terminated at any time before the completion of the work?

"Answer: It was.

"Question: Was that by letter?

page 1841 } "Answer: By letter.

"Question: And who prepared that letter?

"Answer: Mr. Macdonald, our attorney.

*Raymond E. Salvati.*

"Question. You signed it?

"Answer: I signed it.

"Question: In the letter terminating each of the contracts, which are filed as exhibits with the notice of motion, this language appears: 'About noon on July 26, 1949, we understand that your men were prevented from continuing to work on the tipple by threats and other action of representatives of the United Construction Workers, a branch of District 50 of the United Mine Workers of America. Since that time no further work has been done on the tipple.' Do you know of your own knowledge of the threats or other action of the representatives of the construction workers or was that on information?

"Answer: Not personal knowledge, only through information.

"Question: The contract with the Pond Creek Pocahontas Company provided for a maximum fee for doing the work of \$12,000. Do you know what part of that fee was paid to the Laburnum Construction Corporation up till the time that the contract was terminated?

"Answer: I do not, and I suggest that in Mr. Smith's testimony he can tell you as to that.

page 1842 } "Question: And the same thing applies to the fee to be paid by the Spring Fork Development Company?

"Answer: Yes.

"Question: Has either of the two companies mentioned let any work to the Laburnum Corporation subsequently to the termination of those two contracts that we have spoken of?

"Answer: Do you mean after—

"Question: After the termination of the contract.

"Answer: No work has been done.

"Question: Subsequent to that time has any work been let by the Pond Creek Pocahontas Company or the Spring Fork Development Company?

"Answer: We had two contracts let since that time.

"Question: About what was the size of those, do you know?

"Answer: Let's see—about forty houses and a schoolhouse and a store.

"Question: Were they let on bids?

"Answer: Yes, they were let on bids.

"Question: Did the Laburnum Company bid on them?

"Answer: They did not.

*Raymond E. Salvati.*

"Question: If the Laburnum Company had bid and had been the low bidder, would the work have been let to them?

"Answer: Yes, it would have been.

"Question: Were you down at the site of the page 1843 } work being done by the Laburnum Construction Company at the time of the trouble there?

"Answer: I was present on an inspection trip on one particular day when trouble did arise.

"Question: Did you see a picket line there at that time?

"Answer: I did.

"Question: Did you note any violence or hear of any threats while you were there?

"Answer: I did not.

"Question: Do you know whose employees composed the picket line?

"Answer: I couldn't—I don't know.

"Question: Did the Pond Creek Pocahontas Company have contracts with the Allen-Codell Construction Company, Incorporated, for work at the site on the property where the Laburnum Construction Company were working at the same time?"

Mr. Mullen: Do you want to reiterate your objection?

Mr. Robertson: No I withdraw all my objections to everything about that entire deposition.

Mr. Allen: Skip over the objection.

(The reading of the depositions continued, as follows:)

"By Mr. Mullen:

"Question: You can go ahead and answer the question.

"Answer: I can answer it?

page 1844 } "Question: Yes.

"Answer: We did have a contract with those two concerns.

"Question: Do you know whether the employees of either of those concerns were on strike at the time, that is, between July 25 and August the 2d, at the time that the Laburnum Corporation terminated their work?

"Answer: I do not know.

Mr. Mullen: And further deponent saith not.  
Now, Hiram L. Smith.

(The reading of depositions continued, as follows:)

“HIRAM L. SMITH,  
the witness, having been first duly sworn, testified as follows:

“DIRECT EXAMINATION.

“By Mr. Mullen:

“Question: Please state your name, residence and business.

“Answer: Hiram L. Smith. I am Vice-President of the Pond Creek Pocahontas Company and various associated companies. I live at 1115 Fifth Avenue, Huntington, West Virginia.

“Question: Mr. Smith, when the contract between Pond Creek Pocahontas Company and the Laburnum Construction Corporation was terminated, what portion of the fee of \$12,000 payable to Laburnum under that contract had been paid

“Answer: It had been paid in full, I believe, page 1845 } at that time. If not, it was paid afterwards. I can't tell you the exact cutoff. There had been enough work done to earn the fee and they received it.

“Question: The full twelve thousand?

“Answer: Yes, sir.

“Question: In the case of the Spring Fork Development Company a maximum fee of \$2,500 was provided for. What part of that had been paid at the time of the termination of the work?

“Answer: My records show \$1,965.81.

“Question: Nothing was paid on that after the termination?

“Answer: Part of that may have been paid after the date of cancellation but the billing had not been in. That was the total amount paid.

“Question: Was \$12,000 the maximum fee that Laburnum Construction Company could receive under the Pond Creek Pocahontas Company contract?

“Answer: I believe it was.

“Question: Have you the original contracts with you here?

“Answer: No, I have not.”

Colonel Harris: Do you want that other conversation read or not, or just the questions.

Mr. Mullen: That is just where we called for the introduction of the contracts.

Mr. Robertson: If you say it is all right, I page 1846 } accept it without question.

Mr. Mullen: All right.

*William A. Haslam.*

Mr. Robertson: I was addressing myself to Mr. Mullen, Colonel Harris.

Colonel Harris: I thought you were.

(The reading of depositions continued, as follows:)

"By Mr. Mullen:

"Question: Is it correct that \$2500 was the maximum that could be received by Laburnum Corporation under the Spring Fork Development Company work?

"Answer: There was the erection of a schoolhouse added to that contract on which Laburnum would receive its five per cent of the cost of that building. They received only \$30.33 on the work that was done on the schoolhouse up to the date of cancellation.

"Question: How near was that work completed?

"Answer: Our cost after that amounted to \$3,338 and some cents.

"Question: And they were to receive a percentage on the cost if they had completed the work?

"Answer: Five per cent."

Mr. Mullen: Further this deponent saith not.

Colonel Harris: I suppose it is not necessary to read the affidavit.

Mr. Mullen: I don't think so.

page 1847 } Colonel Harris: The next one I have is the deposition of Mr. William A. Haslam.

(Off the record.)

Mr. Mullen: It is not necessary to read the certificate of the notary in the beginning.

Mr. Allen: Nor the notice or anything.

(The reading of depositions continued, as follows:)

"WILLIAM A. HASLAM,  
the witness, having been first duly sworn, testified as follows:

"DIRECT EXAMINATION.

"By Mr. Mullen:

"Question: Will you please state your name, residence and business?

*William A. Haslam.*

"Answer: William A. Haslam, Evanston, Kentucky, manager of the Pond Creek Pocahontas Company's Kentucky Elkhorn Division.

"Question: How long have you been manager for that company?

"Answer: Since October of 1948.

"Question: And you have continued from that date to the present as manager?

"Answer: Yes.

"Question: It has been testified that the Pond Creek Pocahontas Company entered into a contract in 1948 with Laburnum Construction Corporation, a Virginia  
page 1848 } corporation, for the construction of the coal preparation plant for the Pond Creek Pocahontas Company at that company's number one coal mine in Breathitt County, Kentucky. It is stated in article five of that contract, 'Pond Creek designates Mr. W. A. Haslam as its representative to act for it in connection with this agreement.' Are you the same W. A. Haslam as mentioned in that contract?

"Answer: I am.

"Question: Was the work under that contract completed?

"Answer: It was not.

"Question: It has further been testified that in 1948 Spring Fork Development Company entered into a contract with Laburnum Construction Corporation for the erection of certain dwellings and so forth at the same place. In that contract it is stated, 'The owner designates Mr. W. A. Haslam as its representative to act for it in connection with this agreement.' Are you the same W. A. Haslam as mentioned in that contract?

"Answer: I am.

"Question: Was that contract completed by the Laburnum Corporation?

"Answer: It was not.

"Question: Were you representing either the Pond Creek Pocahontas Company or Spring Fork Development Company in July and August, 1949, in connection with any  
page 1849 } other contract that was doing work at the same location?

"Answer: I was.

"Question: What were they?

"Answer: Allen-Codell and the Codell Construction Company.

"Question: What work were those companies doing?

"Answer: The Allen-Codell Company was crushing stone and Codell Construction Company was constructing roads.

*William A. Hastam.*

"Question: Did the employees of the Allen-Codell Company go on a strike on or about July 12th, 1949?

"Answer: Yes.

"Question: Were they on strike on or about July 25th and 26th?

"Answer: I do not recall the exact date, but there was some controversy about this time.

"Question: Were you present at the location of this work on Tuesday, July the 26th, 1949?

"Answer: Yes.

"Question: Were you present on July the 27th, 1949?

"Answer: Yes, sir.

"Question: Do you have knowledge of Mr. Hart, representing the United Construction Workers, and certain men with him coming to the work on July 26th, 1949?

"Answer: I do.

"Question: What did they do when they arrived there?

"Answer: I wasn't at the tippie when Mr. page 1850 } Hart and the men arrived at the tippie. I was called to the scene immediately. When I arrived there the Laburnum Construction Workers had ceased working. Mr. Hart and the men with him were around the tippie. At the time I arrived one of the men with Mr. Hart had started up into the tippie. I called for him to come down, which he did, and I called Mr. Hart to one side and told him that the employees of the Pond Creek Pocahontas Company which I represented were members of the United Mine Workers and had nothing to do with the question that was being discussed at this time and I would appreciate it if he and the group of men which he represented would leave the premises of the tippie, that I was afraid that some of the pickets or some of the men with him due to their milling around the tippie, which was in operation, might get hurt due to machinery, moving machinery, or materials falling from the tippie.

"Question: Do you recall how many men were with Mr. Hart at that time?

"Answer: I didn't count them. I would judge in the neighborhood of twenty-five or thirty.

"Question: Did he comply with your request to remove them from the premises of the tippie?

"Answer: He did not immediately. Some five or ten minutes later I walked over to Mr. Hart and told page 1851 } him again that I would appreciate his moving the men from the premises of the tippie, if he did not

*William A. Haslam.*

comply that I was going to call Tom Raney, who is district representative of the United Mine Workers, Pikeville, Kentucky. He stated that he would immediately remove the men, that he did not wish to get in Dutch or get in bad with Mr. Raney, and he immediately moved the men from the vicinity of the tipple.

"Question: Did he then move them?

"Answer: He did.

"Question: Where did he move them to?

"Answer: They went over across the creek to the road.

"Question: Did they at that time establish pickets?

"Answer: They were over there at the road and due to the fact that Mr. Salvati, the Vice-President of operations, at that time was in Evanston, I immediately went to my office, which was a mile, approximately a mile, from the location of the tipple.

"Question: Did they have any picket signs?

"Answer: I didn't see any that day, but there were picket signs the next morning.

"Question: The next morning was the 27th?

"Answer: That's right.

"Question: Did you remain at this location from July the 27th to August the 2d?

"Answer: I was not. I went on my vacation page 1852 } on Wednesday—I assume it is July the 27th—and did not return until two weeks later.

"Question: You were there all day the 27th?

"Answer: I was.

"Question: Did you hear any threats made against the employees of Laburnum by Hart or by the men with him?

"Answer: I did not.

"Question: Did you note any violence during those days?

"Answer: I did not.

"Question: Did you see any firearms?

"Answer: I did not.

"Question: Did you hear any shots being fired?

"Answer: No, sir.

"Question: You were there in charge of the property of the Pond Creek Pocahontas Company, and in case of any violence or danger you would have intervened, would you not?"

Colonel Harris: There was an objection, you changed the question, and here is the changed question.

*William A. Haslam.*

(The reading of depositions continued, as follows:)

“Question: In view of your position with the Pond Creek Pocahontas Company, if any violence was taking place on the property of your company you would have had knowledge of it, would you not?

“Answer: Most likely.

“Question: Was there anything materially  
page 1853 } different in the conduct of these pickets from  
what you had noticed in other cases?

“Answer: Nothing different other than I was standing by as an outsider in this particular case and had no contact with the pickets other than mentioned above.

“Question: You mean you had no conversation with the pickets?

“Answer: That’s right.

“Question: But you were present there if anything had happened?

“Answer: That’s right.

“Question: Did you recognize any of the pickets as employees of Codell or Laburnum?

“Answer: State that again, please.

“Question: Did you recognize any of the pickets as employees of Codell or of Laburnum Company?

“Answer: I did not.

“Question: Among the pickets there could have been employees of Codell and Laburnum without your recognizing them?

“Answer: There could have been.

“Question: For Laburnum employees to continue their work, would they have to cross the pickets?

“Answer: Yes.

“Question: When did the Laburnum employees quit work?

“Answer: They had quit work when I arrived  
page 1854 } at the plant. I don’t recall the hour but it seems  
like to me right around one or two o’clock, somewhere in that neighborhood.

“Question: That was on what day?

“Answer: The 26th.

“Question: Did they work on the 27th?

“Answer: No, they didn’t work on the 27th. As well as I recall it was on the 27th Mr. Bryan and a few of the men came to work and then the men refused to work, stating that they were afraid to, and they went home.

*William A. Haslam.*

"Question: Did you hear any conversation between Burt Preston, stated to be the business agent for the carpenters' local union number 646, A. F. of L., and Mr. Hart?

"Answer: No.

"Question: Did you hear any violent argument between Mr. Hart and any of the representatives or employees of Laburnum?

"Answer: I did not.

"Question: I believe you have stated that you did not talk with any of the employees of Laburnum about this matter.

"Answer: I did not talk to them directly other than the one individual I asked why he wasn't working.

"Question: Going back to the morning of the 27th, was that when you talked to one man?

"Answer: On the 26th.

"Question: Did you talk to any of them on the 27th?

"Answer: If that was the morning that Mr. page 1855 } Bryan and the men came down the track, I talked to two individuals.

"Question: Did they tell you they were afraid to work?

"Answer: They told me—I asked them why didn't they go on to work and they said they were afraid to go to work.

"Question: Those two were the only ones you talked to?

"Answer: Yes.

#### "CROSS EXAMINATION.

"By Mr. Blanchard:

"Question: Mr. Haslam, you testified that after you talked to Mr. Hart he and the group with him withdrew to the other side of the creek away from the tipple. Is the spot to which they withdrew further or closer than the tipple to the camp of Laburnum Construction Company?

"Answer: It was at the camp.

"Question: How far was the camp of the Laburnum Construction Company from the tipple?

"Answer: I would judge 150 to 200 yards.

"Question: Is the tipple in sight from the Laburnum Construction Company camp?

"Answer: It is."

Mr. Mullen: Further deponent saith not.

The Court: Is that all?

Mr. Mullen: Yes, Your Honor.

*William A. Haslam.*

The Court: All right, Sheriff, you may adjourn court until tomorrow morning at ten o'clock.

(Whereupon, at 5:00 o'clock p. m. the court was recessed until 10:00 o'clock a. m., Thursday, February 8, 1951.)

. . . . .

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. . . . .

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on February 8, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

page 1857 } PROCEEDINGS.

(Roll call of the jury.)

The Court: Mr. Mullen?

Mr. Mullen: If Your Honor please, I wish to file as Defendants' Exhibit No. 64 a copy of the charter issued by the International Union, United Mine Workers of America to District 50, under date of the first of September, 1936. I have shown them to Mr. Robertson and he has no objection

(The document referred to was marked Defendants' Exhibit 64 and received in evidence.)

Mr. Mullen: I wish to file as Defendants' Exhibit No. 65 the Charter issued by United Mine Workers of America to

*Jasper Newton Cundiff.*

United Construction Workers Division under date of June 6, 1942.

(The document referred to was marked Defendants' Exhibit 65 and received in evidence.)

JASPER NEWTON CUNDIFF

called as a witness in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your full name.

A. Jasper Newton Cundiff.

page 1858 } Q. Mr. Cundiff, where do you live?

A. Jeffersonville, Indiana.

Q. What business are you engaged in?

A. Contracting.

Q. Did you bid on 15 houses and a store for the Pond Creek Pocahontas Company, to be built at Evanston, Kentucky?

A. I did.

Q. What was your bid on each?

A. \$73,800 was the bid on the 15 houses. \$37,640 was the bid on the store.

Q. Did you get the contract?

A. I did.

Q. Did you accept the contract for both items?

A. No, sir. I accepted the contract for the 15 dwelling houses and rejected the contract for the store.

Q. Did you build those 15 houses?

A. I did.

Q. How long did it take you to complete them?

A. About 7½ months.

Q. You did complete them?

A. They are completed.

Q. Did you work skilled labor and common labor both on the job?

A. I did.

Q. Were your skilled labor members of any union?

A. A. F. of L. union.

page 1859 } Q. Were your common laborers members of any union?

*Jasper Newton Cundiff.*

A. Yes, sir; they were members of the United Construction Workers.

Q. Did you have any friction during the entire course of the work between the employees in the A. F. of L. union and the employees in the UCW?

A. I did not.

Q. It has been shown here that there was a plan to erect various buildings, and so forth, at the site of the work in Breathitt County near Evanston. Among them were 200 houses. Do you know how many of those houses have been built?

A. At the present time they have 40 houses completed ready for dwelling, with people living in them, and 19 frames that are for sale.

Q. They are for sale?

A. That is right. The frames are for sale and were put up for that purpose. They were put up for sale to the miners.

Mr. Mullen: The witness is with you.

CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Cundiff, when did you start the work that you have mentioned?

page 1860 } A. On the 15th day of November, 1949.

Q. Do you happen to know whether that was before or after this suit was started?

A. I don't know about the suit, sir.

Mr. Robertson: Stand aside.

RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. I want to ask you just one question. Of those 40 houses, you built only 15?

A. Right, sir.

Q. And the other 25 were built when you went there?

A. They were there when I went there.

Mr. Mullen: That is all.

Mr. Robertson: I have no further question.

Mr. Mullen: Stand aside.

(Witness excused.)

*C. Howard Holt.*

(Document shown to Plaintiff's counsel.)

Mr. Robertson: We don't object to that.

Mr. Fred G. Pollard: We would like to introduce as Defendants' Exhibit No. 66 a statement showing the alleged items of damages comprising the Plaintiff's claim of \$500,000.

(The document referred to was marked Defendants' Exhibit 66 and received in evidence.)

(Jury examining Defendants' Exhibit No. 66.)

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**C. HOWARD HOLT**

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

By Mr. Fred G. Pollard:

Q. Mr. Holt, will you state your name, please?

A. C. Howard Holt.

Q. And your age?

A. Forty-one.

Q. Have you ever passed the state examination for certified public accountant?

A. I have.

Q. When did you pass that examination?

A. November, 1940.

Q. Are you now a practicing certified public accountant in the City of Richmond?

A. I am.

Q. With what firm are you associated?

A. Elkins, Durham & Kemp.

Q. Did you study at the University of Virginia?

A. I did. I completed my accounting training at the University of Virginia.

Mr. Fred G. Pollard: Your Honor, I submit  
page 1862 } Mr. Holt as an expert on accounting matter.

By Mr. Fred G. Pollard:

Q. Mr. Holt, on the order of this Court has there been made

*C. Howard Holt.*

available to you for examination certain audit reports of Laburnum Construction Corporation?

A. There have.

Q. And have you made a condensed statement of operations of the Plaintiff for the years 1942 to 1948, inclusive?

A. I have.

(Document shown to Plaintiff's counsel.)

Mr. Robertson: If Your Honor please, we interpose the same objection we interposed in Chambers in the introduction of this type of evidence. We call attention to the fact that instead of going from 1940 for a ten-year period it starts in 1942.

The Court: The objection is overruled.

Mr. Robertson: Exception, if the Court please.

Mr. Fred G. Pollard: As Defendants' Exhibit No. 67 Laburnum Construction Corporation, condensed statement of operations for the years indicated.

(The document referred to was marked Defendants' Exhibit 67 and received in evidence.)

(Witness examining Defendants' Exhibit 67.)

Mr. Robertson: Do you have copies of these exhibit for us?  
page 1863 } Mr. Fred G. Pollard: No, sir; we don't have a copy of that exhibit.

Mr. Robertson: Mr. Mullen, can you give us copies of those exhibits?

Mr. Mullen: As I understand it that is the only copy we have. We can have it made up for you.

Mr. Robertson: That is what I want.

Mr. Mullen: We will be glad to do it.

Mr. Fred G. Pollard: You have a copy of the other exhibit.

By Mr. Fred G. Pollard:

Q. Mr. Holt, I refer to Plaintiff's Exhibit 22, which is entitled "Laburnum Construction Corporation, Richmond, Virginia, construction record, May, 1942, to December, 1949." It shows a total for that period, a gross amount of work in the sum of \$20,253,965.49. Have you examined this exhibit?

A. I have.

*C. Howard Holt.*

Q. Is that a correct statement of the gross amount of business done by Laburnum Construction Corporation?

A. No, sir.

Q. What does your figure for the gross amount of construction for the 8-year period from 1942 to 1945 show on your condensed statement of operations?

A. \$14,345,731.79.

Q. How do you account for that difference?

page 1864 } A. This report includes work done by Laburnum Construction Corporation and Laburnum Pettijohn Associates, also work done by Laburnum Construction Corporation and Riggs Distillate Corporation, plus work done by Laburnum Construction Corporation and Virginia Mechanical Corporation.

Q. In other words, that exhibit shows some joint ventures and there is no breakdown to show which part of it is Laburnum and which part of it is the other parts of the joint venture?

A. That is correct.

Q. Does your condensed statement show that Laburnum Construction Company over the 8-year period made a net profit or a net loss on operations?

A. A net loss from operations.

Q. How much net loss?

A. \$46,533.12.

Q. In other words, an average net loss of approximately \$6,000 a year, a little bit less than \$6,000.

A. That is correct.

Q. When you take into consideration other income and other deductions, does it then over that 8-year period show a net profit or a net loss before income taxes?

A. That is correct.

Q. Which does it show?

A. A net income.

page 1865 } Q. Of how much?

A. \$66,481.04.

Q. Or approximately an income before taxes of \$8,000 a year over the 8-year period?

A. That is correct.

Q. Did Mr. Bryan tell you what the other income consisted of?

A. He did.

Q. What did he say it consisted of?

A. The significant items in there were rental from the use of the equipment and cash discount on purchases, and Labur-

*C. Howard Holt.*

num Construction Corporation's share of the net profit from joint ventures, or net loss if there was a loss.

Q. Did Mr. Bryan give you to understand that in connection with the rental income it was equipment that he owned or that Laburnum Construction Corporation owned, and when he was on a job he charged the owner rent for it?

A. That is correct.

Q. It was not a situation where he had equipment that he was not using and renting it from some other construction company?

A. He didn't mention that.

Q. Did he tell you what other deductions consisted of in the main?

A. Mostly interest on borrowed money, plus some contributions.

page 1866 } Q. Mr. Holt, I now refer to Plaintiff's Exhibit

No 21, which is a contract dated December 15, 1948, between Laburnum Construction Corporation and Spring Fork Development Company for the construction of 25 houses in Breathitt County, Kentucky. This contract contains a statement attached to it called, "Statement of Cost of Work," and it defines cost of work for which the contractor is reimbursable. Have you read this definition of what work the contractor is reimbursable for in this contract?

A. I have.

Q. Under this contract, is Laburnum Construction Corporation reimbursable for any of its General Office Expenses?

A. Not its home office expenses, no.

Q. And that is shown on your condensed statement as Administrative Expenses?

A. That is right.

Q. The company was not reimbursable for any of the Administrative Expenses?

A. No, sir.

Q. It has been alleged, Mr. Holt, that if the company had completed this contract, it would have earned a fee of \$534.19, that being 5 per cent of the gross amount due on the job. If this amount were 5 per cent of the total amount it would have taken to have completed the job, and that was the only fee on the job, would he have made a profit or a  
page 1867 } loss on the job?

A. He would have had a loss on the job.

Q. Why do you say that?

A. Because the gross fee of 5 per cent does not take into consideration Administrative and Other Expenses which are

*C. Howard Holt.*

not charged directly to the job; and those expenses, for the year 1949, amounted to approximately 6.63 per cent. In other words, his ratio of indirect expenses amounted to more than the gross fee on the job.

Q. How have you determined what his overhead is for the year 1949?

A. By adding to Sales, as defined on the exhibit, Other Income.

Q. Why did you add Other Income to Sales?

A. Because, from the items which I was told that consisted of, it had a certain relationship to the operations and sales of the company, rental income—used on the job, and cash discount on purchases of material, and so forth.

Q. In other words, that has a direct relation to sales?

A. That is right.

Q. Did you then add Other Deductions to Expenses?

A. I did.

Q. Why did you do that?

A. Because the Other Deductions, I was told, were primarily interest expense on money borrowed for working capital, which has a direct relation to the operation.  
page 1868 } Q. In other words, in your opinion, that is a direct operating cost?

A. That is right.

Q. So you determined your percentage of 6.63 per cent by adding Administrative Expenses and Other Deductions, and finding out what per cent that was of Sales and Other Income?

A. That is correct.

Q. I now refer to Plaintiff's Exhibit No. 34, which is a statement showing contracts with Pond Creek Pocahontas Company, Island Creek Coal Company, and various associated companies; and further, showing job profit or loss of Laburnum Construction Corporation on each contract.

I refer, Mr. Holt, to Job No. 322, wherein the total amount was \$265,370, and the profit is \$10,232.48. You have seen that contract, have you not, and see that the Plaintiff's fee for doing the work was \$12,000?

A. That is correct.

Q. Why is it that he shows a profit of less than \$12,000?

A. There were apparently some direct costs which were not reimbursable and charged against the job.

Q. And these direct costs are not taken care of in the Administrative Costs, are they?

A. No, sir.

*C. Howard Holt.*

Q. What per cent of the total job were these  
page 1869 } direct costs for which the Plaintiff was not re-  
imburSED?

A. Approximately .66 per cent.

Q. Two-thirds of one percent?

A. Two-thirds of one per cent.

Q. So his indirect expenses are 6.63 per cent, and his direct expenses for which he is not reimbursable are two-thirds of one per cent, and his total cost of doing the job is approximately 7-1/3 per cent, is it not?

A. That is right.

Q. If he undertook the work to complete the 25 dwellings on the basis of cost-plus-5%, in your opinion he would lose money?

A. That is correct.

Q. The plaintiff has claimed damages in the amount of \$319.67, being the fee that he says he would have earned at 5 per cent for work in connection with the construction of a schoolhouse. In your opinion, would he lose money if he undertook that job on the basis of cost-plus-5%?

A. He would.

Q. Is that for the reasons already stated?

A. That is right.

Q. The Plaintiff himself claims damages in the amount of \$250, being the fee which he says he would have earned at 5 per cent for putting asbestos shingles on these 25 houses. If he had done that work on the basis of cost-plus-  
page 1870 } 5%, would he have lost money?

A. He would have.

Q. For the reasons already stated?

A. That is right.

Q. And is the same thing true of the fee that the Plaintiff claims, of \$1,250, which would be 5 per cent of the cost of the installation of a concrete foundation for the coal preparation plant for Mine No. 2? Would he have lost money on that job?

A. That is right.

Q. Suppose that the Plaintiff had actually had a valid, binding, and enforceable contract for other additional work in Breathitt County amounting to approximately \$542,500, on which it would have earned a fee of 5 per cent, or \$27,125, would it have made a profit on this job?

A. No, sir.

Q. Why not?

A. For the same reasons stated before.

*C. Howard Holt.*

Q. Suppose the Plaintiff could have undertaken this work for \$542,500 without increasing his overhead or administrative expenses over, say, \$1,000, or .2 of 1 per cent, would his overhead costs still have been in excess of 5 per cent?

A. They would have.

Q. In other words, for the year 1949, which is page 1871 } the year in which he claims that some of this work would be done, suppose he had done it all in that year and had increased his sales of approximately \$1,600,000 by \$542,500, and increased his administrative expenses only \$1,000, would his overhead still have amounted to more than 5 per cent?

A. It would have amounted to more than 5 per cent.

Q. That is not giving any consideration to any direct expenses for which he was not reimbursable, is it?

A. That is right.

Q. Now, refer again to Plaintiff's Exhibit 34, which shows a profit of \$58,000 on certain work done for Pond Creek Pocahontas, Island Creek Coal Company, and other companies. Is that a correct statement of the profit or loss of Laburnum Construction Corporation?

A. No, sir.

Q. Why isn't it?

A. It includes profit and loss of the Virginia Mechanical Corporation, as well.

(Document exhibited to Plaintiff's counsel.)

Mr. Robertson: If Your Honor please, this is a number of sheets. I suggest we take a recess so we can look at it and see whether we object to it or not.

Mr. Fred G. Pollard: Your Honor, I might say that that is a photostatic copy furnished Mr. Holt by the Plaintiff.

. . . . .

page 1873 } Mr. Robertson: We have no objection, Your Honor, to the exhibit.

Mr. Fred G. Pollard: We would like to introduce as Defendants' Exhibit 68 analysis of gross profits for the year ended December 31, 1949, and it is stamped in the corner, Laburnum Construction Corporation. This exhibit consists of six sheets.

(The document referred to was marked Defendants Exhibit 68 and received in evidence.)

*C. Howard Holt.*

Mr. Fred G. Pollard: I would like also to introduce in evidence Defendants' Exhibit No. 69, stamped in the corner Laburnum Construction Corporation, entitled "Analysis of Gross Profit for the Year Ended December 31, 1948," and consisting of six sheets.

(The document referred to was marked Defendants' Exhibit 69 and received in evidence.)

(Jury examining Defendants' Exhibits 68 & 69.)

By Mr. Fred G. Pollard:

Q. Mr. Holt, I again refer to Plaintiff's Exhibit 34, which is a statement showing certain contracts with certain coal companies and shows the amount of work done on the various jobs and the profit or loss on these jobs. These figures have been referred to by the Plaintiff's counsel as net job profit. Are the figures on Exhibit 34, when taken into consideration with the analysis of gross profit for Virginia page 1874 } Mechanical Corporation, the same as the figures in the analysis for gross profit which has just been introduced in evidence?

A. They are.

Q. How are they classified in the analysis of gross profit?

A. As gross profit.

Q. So that actually the figures listed on Exhibit 34 are really the gross profit of the Plaintiff, are they not?

A. That is right.

Q. Exhibit 34 lists four jobs done by the Plaintiff in Breathitt County, Kentucky, namely Job 322 for a coal preparation plant, Job 323 for 25 dwellings, Job 326 for a telephone line, and Job 340 for a school house. Does the analysis of gross profit show a gross profit percentage on Job No. 322?

A. It does.

Q. What was that gross profit on that job?

A. 3.74.

Q. Percent?

A. 3.74 per cent, that is right.

Q. And when you take all four jobs together what was the gross profit of the Plaintiff on all of his work in Kentucky?

A. 3.9 per cent.

page 1875 } Q. On a basis of cost plus 5 per cent, how much additional work would the Plaintiff have to have undertaken in 1949 to have reduced his overhead to 3.9 per

*C. Howard Holt.*

cent, considering that he could do that without increasing his administrative costs at all?

A. Approximately \$1,200,000.

Q. In other words, unless the Plaintiff in 1949 was able to undertake an additional \$1,200,000 worth of work on the basis of cost plus 5 per cent, it couldn't have begun to show a profit, could it, on that work?

A. No, sir.

Q. Then how do you account for the fact that the Plaintiff did make a profit in 1949?

A. The gross profit on other jobs amounted to more than cost plus 5 per cent.

Q. That is, jobs outside of Kentucky?

A. That is right.

Q. Suppose the Plaintiff were to say "I could have undertaken an additional \$100,000 worth of work on the basis of cost plus 5 per cent without increasing my expenses and thereby earned an additional \$500,000 which would have been net profit," would this be a fallacious statement?

A. I believe it would, because in the first instance you are saying your net profit is the same as your gross profit, which isn't true. You have to take into consideration page 1876 } all of your expenses and all of your income before you can arrive at a net profit. Also, on that basis you would have to assume that if he hadn't done the last \$100,000 in 1949 he would have lost \$5,000, and you can continue to reduce on that basis until eventually you reach the point where your gross profit is less than your indirect expenses. You have to consider there all the expenses and all the income in arriving at net profit.

Q. It is your opinion that if the Plaintiff had undertaken to do the work on these first five items in 1949 it would have had a loss on that work?

A. That is correct.

Mr. Fred G. Pollard: Your witness.

Mr. Robertson: If Your Honor please, I have no questions of this witness at this time, but I would like to reserve the right to cross-examine if we deem proper to do so hereafter. My reason for saying that is that I want to confer with my own accountants and know what I am talking about before I embark upon the examination of a certified public accountant.

Mr. Fred G. Pollard: Thank you, Mr. Holt.

(Witness excused.)

. . . . .

*Alexander Hamilton Bryan.*

page 1889 } (The following proceedings were had in open  
court:)

Mr. Mullen: If Your Honor please, on the cross examination of Mr. Bryan he was asked as to the number of common laborers he had on the Solvay job at Hopewell on November 1, 1948, and he stated he would get that information and put it in the record. He was also asked as to whether there was any increase in wages at the time, both of which he was to put in the record. I would like to have that put in the record now.

. . . . .

ALEXANDER HAMILTON BRYAN

recalled as a witness on behalf of Plaintiff, having been previously duly sworn, was examined and testified further as follows:

CROSS EXAMINATION.

By Mr. Mullen:

Q. Please state what was the number of common laborers you had on the job at the Solvay job on November 1, 1948, at Hopewell.

A. Approximately 37. If you want me to give you the exact number I will have—

Q. That is near enough.

A. It might have been 38 and it might have been 36.

Q. That is near enough.

page 1890 } Was or was not the wage increased at that  
time?

A. The wage rate for common laborers was increased from 75 cents per hour to 90 cents per hour on June 4, 1948. There was no further increase in the rate for laborers.

. . . . .

## THOMAS ESTIL RANEY

called as a witness on behalf of Defendants, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By Mr. Mullen:

Q. Please state your full name.

A. Thomas Estil Raney.

Q. How old are you, Mr. Raney?

A. Forty-seven.

Q. Where do you live, Mr. Raney?

A. Pikeville, Kentucky.

Q. What is your work there?

A. I am a representative of the United Mine Workers of America, International Executive Board Member.

page 1891 } The Court: Do you gentlemen hear Mr. Raney? Talk just a little louder, Mr. Raney.

The Witness: Yes, sir.

By Mr. Mullen:

Q. Were you born in Kentucky?

A. Yes, sir. I was born in Laurel County, Kentucky; Pittsburg, Kentucky.

Q. Were you raised there?

A. I moved away from there when I was about three years old.

Q. Where did you go?

A. From there we moved to Tennessee, Westbourne, Tennessee, where I stayed until I was 16 years old and moved back to Kentucky.

Q. How long have you been stationed at Pikeville?

A. Approximately 16 years.

Q. During all that time has your job been with one of the unions?

A. Yes, sir; all during that time I have been a representative of the United Mine Workers of America.

Q. How long have you been a member of the International Executive Board?

A. Since August 1, 1942.

Q. Are you a member of the United Mine Workers of America?

page 1892 } A. Will you state the question again, please?

Q. Are you a member of the United Mine Workers of America?

*Thomas Estil Raney.*

A. Yes, I am.

Q. Are you a member of District 50 United Mine Workers of America?

A. No, sir; I am not.

Q. Are you a member of the United Construction Workers?

A. No, sir.

Q. Do you as a member of the International Executive Board have any jurisdiction over the United Construction Workers or over District 50?

A. None whatsoever.

Q. Can you give any orders to the men either in District 50 or United Construction Workers?

A. No, sir.

Q. Do you give any orders to them?

A. No, sir.

Q. Did you ever give any orders to Mr. W. O. Hart with regard to his effort to organize the Laburnum Construction common laborers at Evanston, Kentucky?

A. I never gave any orders to Mr. Hart at the Laburnum Kentucky job or any other job anywhere in the country.

Q. Did you have any knowledge or information page 1893 } in regard to his organizing, attempting to organize those laborers?

A. I did not know that the Laburnum job existed.

Q. How long after these occurrences did you learn about them?

A. Approximately I believe about three weeks after the strike had occurred I first heard about it.

Q. Were the United Mine Workers members working at the Pond Creek Pocahontas mine connected in any way with the strike there?

A. No, sir.

Q. You have your office whereabouts in Pikeville?

A. It is located in the Soward Building on Main Street in Pikeville.

Q. Does Mr. Hunter have his office there?

A. Yes, sir; in the same building.

Q. Are your offices connected?

A. They are not; no, sir.

Q. Have you ever occupied the same offices?

A. No, sir; we have not.

Q. Who employed Thomas Davis?

A. In so far as I know, it is District 50, and I am not sure about that, possibly the United Construction Workers. I don't know exactly.

*Thomas Estil Raney.*

Q. Is he subject to your orders or not?  
page 1894 } A. Absolutely not; no, sir. I believe Mr. Davis' office is in Knoxville, Tennessee.

Q. Has he any office in the United Mine Workers?

A. Yes, sir; he holds a position as a representative of either District 50 or the Construction Workers, possibly both.

Q. I don't know whether you get my question: Does he hold any office in the International Union, United Mine Workers of America?

A. No, sir; he does not.

Q. Does District 50 pay any part of the dues collected from its local unions to the International Union, United Mine Workers of America for District 50?

A. Does District 50 pay dues?

Q. Pay any part of the dues it collects.

A. I don't think they do, sir. I don't think so.

Q. How about United Construction Workers?

A. I don't believe they pay direct. I am not so sure. I don't know just how they handle it.

Q. You do not handle any of the finances?

A. I don't have anything to do with the finances whatsoever.

Q. You know nothing about that?

A. I would have no way of knowing, sir.

Q. Mr. Raney, does the United Mine Workers  
page 1895 } class the American Federation of Labor unions as dual organizations?

A. No, sir.

Q. Is it a violation of the obligation taken by members of the United Mine Workers of America also to join the A. F. of L. union?

A. There is no violation in so far as I know. We have a lot of men, a lot of members who belong to both unions and work on the same job.

Q. The United Mine Workers at times has been affiliated or not with the American Federation of Labor?

A. Yes, sir; that is correct.

Q. What is the principal industry in eastern Kentucky?

A. There is no other industry except the coal industry in eastern Kentucky, with the exception of the railroads which are located in that area.

Q. Are all of the mines in eastern Kentucky organized under unions?

A. All of the larger mines are organized. However, there

*Thomas Estil Raney.*

are some small truck mines, as we term truck mines, that are not organized.

Q. Do you know a man named Frank Dixon, who represents himself to be some high official in the A. F. of L. working either out of Louisville or out of Cincinnati?

A. No, sir; I do not know that there is such a person.

Q. You never met such a person?

A. I have never met such a person.

page 1896 } Q. Have you ever sent any message to a Frank Dixon that you wanted to meet and confer with him?

A. No, sir; I did not because I did not know that there was such a man as Frank Dixon, until after I read it in the newspapers.

Q. Have you ever requested a meeting with Frank Dixon to see if you could get together on conditions in eastern Kentucky and if you could, to see if he would prevent witnesses from coming here to testify?

A. Absolutely not. I would have more sense, I hope, than to attempt to interfere with a witness, and I would not give such a man as that power. I would have more sense, I hope, than to do that, sir.

Mr. Mullen: The witness is with you.

### CROSS EXAMINATION.

By Mr. Robertson:

Q. Mr. Raney, you are not related by blood or marriage to John L. Lewis, are you?

A. No, sir; not as far as I know.

Q. How many days have you sat in on this trial?

A. I think this is the third day.

Q. During those three days you have heard all the testimony here?

A. Not all of it. I have been out of the room a few minutes at a time, but most of it I have heard, yes, sir.

page 1897 } Q. You have lived in Pikeville how long?

A. Sixteen years, approximately.

Q. How big a town is that?

A. Pikeville is, I believe, the highway signs I noticed after the last census was 7800.

Q. Is that the county seat of Pike County?

A. Yes, sir; it is.

*Thomas Estil Raney.*

Q. How close is Pike County to Breathitt County?

A. Are you speaking of the county seat alone or are you speaking of the county borders?

Q. I am speaking of how close is the nearest county line of Pike County to the nearest county line of Breathitt County, if you know, approximately.

A. Approximately 80 miles, more or less.

Q. How close is your home to the home of the former Sheriff Conway, of Pike County?

A. We live in the same block. I believe there are two or three houses between us.

Q. I believe he has been shot and killed within the last six or eight months, hasn't he?

A. I believe it was some time in early July when he was shot and killed, yes, sir.

Q. The circumstances were that he was shot and killed at night?

A. That is right, he was shot and killed at  
page 1898 } night by bootleggers.

Q. He had gotten a call to go out of his house and as he went out and got in his automobile somebody shot him in the back, didn't they?

A. Yes, sir. He was fixing to get in a truck sitting in front of his house when they killed him.

Q. Right after that you heard somebody run by your house, didn't you?

A. No, sir; that isn't true. My wife heard somebody run by the house. She saw them. She didn't hear them. She saw them. My wife was the third person to him, sir.

Q. How many floors are there to the Soward Building?

A. I believe the first floor is occupied with stores, the second is occupied with offices and the third. There are three floors.

Q. How many different rooms, if you know, are there on the second floor?

A. Well, I have never counted them. I would judge 14  
rooms.

Q. How many offices do you occupy?

A. We have five rooms.

Q. And how long have your offices been on that second floor?

A. I believe that building was built 2½ years ago, ever since it was built. We moved in there first.

page 1899 } Q. How long has the United Construction  
Workers had offices in that building, if you  
know?

*Thomas Estil Raney.*

A. I don't remember just what time of the year it was that the Construction Workers first moved in. We were there first and I don't know just how soon afterwards they moved in.

Q. They are now on the second floor, aren't they?

A. Yes, sir; they are now. They originally were on the third.

Q. How many offices do they now occupy on the second floor?

A. Two.

Q. How close is their closest office to your closest office to them?

A. There is a wall between us.

Q. They are next door?

A. Yes, sir; next door.

Q. Do you know David Hunter?

A. Yes, sir.

Q. Do you call him by his first name?

A. Yes, sir; I call him by his first name.

Q. Does he call you by your first name?

A. Yes, sir; he does. Everybody calls me by my first name.

Q. May I call you by your first name?

page 1900 } A. You may, yes, sir.

Q. Do you know William O. Hart?

A. Yes, sir.

Q. Do you call him by his first name?

A. Yes, sir; I do.

Q. Does he call you by your first name?

A. Yes, sir.

Q. Do you know Tommy Davis?

A. Yes, sir.

Q. Do you call him by his first name?

A. That is right; yes, sir.

Q. Does he call you by your first name?

A. I believe he does; yes, sir.

Q. You are in and out of your office practically every day, aren't you?

A. No, sir. There are periods of times when I am away as much as 30 days at a time and sometimes six weeks.

Q. It was one of those times, I believe, when I was out in Pikeville taking depositions in November?

A. In November. That could be so. I was in West Virginia at that time and had been for some two or three weeks.

Q. And I was unable to get acquainted with you.

*Thomas Estil Raucy.*

A. That is possibly so, if you were there. I didn't know you were there. That is possibly so.  
page 1901 } Q. When you are in Pikeville do you go to your office every day?

A. Yes, sir; I think so. Occasionally maybe not. Most of the time I do, yes, sir.

Q. Does David Hunter go to his office practically every day, or do you know?

A. I don't know.

Q. How often do you see him, would you say, in the Soward Building?

A. Well, I guess, not knowing, it would be purely a guess, when I am there two or three times a week.

Q. The offices that he occupies as the representative of the United Construction Workers are also the same offices which he occupies as the representative of District 50, aren't they?

A. Yes, sir; yes, sir.

Q. How does it happen that you and David Hunter all get your mail out of the same post office box, the United Mine Workers and United Construction Workers and District 50?

A. The post office box 50 has been the box for the United Mine Workers to my knowledge for 16 years, and when Mr. Hunter first come to Pikeville it was difficult then and is now to get a post office box. It is a small post office. They don't have enough boxes to take care of their people. So Mr.

Hunter asked if he could use our box, and I told  
page 1902 } him he could.

Q. That has been continuing how long?

A. Every since that office has been established, 2½—I suppose two or three years, something like that, somewhere in between two and three years.

Q. To use a colloquial expression, you all use the same hole to put your mail in and to take it out.

A. That is correct, and so far as I know that is true. I don't know whether they have another box or not.  
page 1903 }

Q. You became a member of the International Executive Board of United Mine Workers of America in 1942, didn't you?

A. That is right, yes, sir.

Q. At a salary of \$1,000 a month?

A. At that time, no, sir. The salary was \$500 a month. It is now \$1,000 a month.

Q. You were appointed by John L. Lewis, weren't you?

*Thomas Estil Rancy.*

A. That is correct, and approved by the International Executive Board and the International Convention.

Q. You take your orders from John L. Lewis?

A. Yes, sir, that is correct.

Q. You make your reports to John L. Lewis?

A. Such reports as I make, yes, sir. I have never made a report to him yet.

Q. Just tell us what the general nature of your duties is at Pikeville, Kentucky, whereby you earn \$1,000 a month?

A. The work in Pikeville, Kentucky, I supervise the District No. 30 office. I have 8 employees, District Representatives, working out of that office. It is their job, and mine to see that it is done, to supervise and to service all Local Unions in District No. 30, something over 200 Local Unions, large and small. It is for the purpose of settling any and all disputes, if possible, between the management and labor of the mines; also for contract enforcement within the mines, and supervising and directing the work of organizing new  
page 1904 } mines within that territory.

Q. I think you said you knew William O. Hart, and called him by his first name?

A. Yes, sir, I have known Mr. Hart for approximately 14 or 15 years, maybe.

Q. Was he, in the summer of 1949, living in Pikeville?

A. No, sir, I don't think he was.

Q. Have you seen him in and out of the Soward Building there fairly often?

A. I see him occasionally, yes, sir. I wouldn't call it fairly often, but I do see him occasionally.

Q. Among your duties is to help to organize the miners, isn't it?

A. My job is to direct the work of organization in that District.

Q. You are a sort of supervisory official in that territory?

A. That is right, yes, sir.

Q. So what you are trying to help the accomplishment of is to organize the unorganized?

A. That is correct, yes, sir; if there is any unorganized in the section, that is my job, to try to organize and to help do so.

Q. When was it that you first heard of this Laburnum trouble in Breathitt County, Kentucky?

page 1905 } A. Approximately three weeks, more or less, after it occurred.

Q. It occurred on July 26. One week would be August 2.

*Thomas Estil Rancy.*

Two weeks would be August 9. Three weeks would be August 16. You didn't hear about it until about the middle of August?

A. I don't think I did, no, sir. I am not sure, either way, what the date was.

Q. You tell the jury that although you and David Hunter were getting your mail out of the same Post Office box and occupied adjoining offices on the second floor of the same building, and knew each other to call each other by first name, and you saw him in and out of the building in the way you have described, your testimony to the jury is that you didn't mention that Laburnum trouble to him and didn't know anything about it until three weeks after it occurred?

A. That is correct, yes, sir. I was on vacation most of that time, sir. I wasn't even there. I was on a fishing trip.

Q. When you meet him in and out of the office, you don't discuss District 50 affairs with him?

A. Sometimes we do, yes, sir, but most of the times when we do discuss them, it is in the office, not out in the hallways.

Q. But it would be the exception rather than  
page 1906 } the rule when you would discuss the affairs of  
District 50 with him?

A. In the hallways, yes, sir; but in the office, whenever he has something to discuss, he comes in and talks to me about it.

Q. How often do you reckon he is in and out of your office discussing the affairs of District 50?

A. He may have come in once a week, on an average, something like that.

Q. Why does he come in there?

A. To talk to me about the organization affairs, and to get my advice.

Q. To get your advice?

A. Yes, sir.

Q. And to get your help in that way?

A. If he needs it, yes, sir.

Q. You help him whenever it is necessary?

A. Whenever it is necessary, and he asks for it, I help him, yes, sir.

Q. That is one of the duties of your job?

A. That is correct.

Q. Is that the same situation that prevails between you with reference to the United Construction Workers?

A. Well, yes, sir. His work is in the United Construction Workers principally, in so far as I know. What he does in District 50, I don't know too much about it.

*Thomas Estil Raney.*

Q. I believe that also you were there when page 1907 } David Hunter came out there as accounting director of Region 58 of both United Construction Workers and District 50, weren't you?

A. You mean when he first came there?

Q. Yes.

A. I believe that is correct, yes, sir.

Q. You helped him all you could in getting his work set up out there, didn't you?

A. Yes, sir; I assisted him in securing an office and a place in which to move. That is all I did, yes. I remember that very clearly, that I did do that.

Q. And you went around over the territory with him to introduce him to the people around through the region, didn't you?

A. I did not, no, sir.

Q. Have you ever taken any trips with him?

A. Yes, sir; I have.

Q. I will come to those a little bit later. You might be thinking about them.

I believe John L. Lewis also appointed the secretary-treasurer of District 30, didn't he?

A. That is my understanding that he did, yes, sir.

Q. District 50 is a provisional district, isn't it?

A. I think District 50 is what they call a constitutional district.

page 1908 } Q. I know. You are talking about Section 20 of the Constitution, but it is also a provisional district, isn't it?

A. I don't know too much about the administrative affairs of District 50. I have nothing to do with it in my work.

Q. But you do know that John L. Lewis appoints his brother, A. D. Lewis, at the head of the District, don't you?

A. No, sir; I don't know that.

Q. You don't know that?

A. No, sir. District 50 was established I don't know how many years before I became a member of the International Executive Board. How it was established I know nothing about.

Q. As a member of the International Executive Board, that knowledge has never come to your information?

A. I was not a member of the Board at that time, and therefore it would not have come to my attention.

Q. I say, but since you have been a member of the Board

*Thomas Estil Raney.*

now going on nine years, that information has not even to this date come to your knowledge?

A. About the appointment, how it was appointed and when? No, sir, that isn't so. It did not come before me. On several occasions the affairs of District No. 50 have been reported orally by the director, Mr. A. D. Lewis, to the page 1909 } Board, and discussed at the Board meetings.

Q. I suppose you don't know, then, that Mr. Lewis appointed his daughter, Miss Kathryn Lewis?

A. I do not, sir.

Q. To a position either with District 50 or with United Construction Workers.

A. I do not know how Miss Lewis became secretary-treasurer of District 50. I have no knowledge whatsoever of it.

Q. That never came to your knowledge as a member of the Executive Board?

A. It has never come to my knowledge in any way, before I was a member of the board or since.

Q. And you don't know it at this moment?

A. I only know what I read in the paper, and in their journal. I have nothing to do with the financial affairs of the organization.

Q. Mr. David Hunter is a man of high character, is he not?

A. In so far as I know, he is, yes, sir.

Q. If he made a report regarding any of the people working for him or under him, you would have no reason to question the correctness of the report?

A. That of course depends, sir.

Q. Sir?

page 1910 } A. That depends. That depends entirely on the circumstances.

Q. But you would expect him to tell the truth in his report?

A. I would expect any one to tell the truth at all times.

Q. Do you remember a strike where there was a lot of trouble over in Prestonsburg in September, 1949, that involved the Hughes Motor Company over there?

Colonel Harris: We object to that as immaterial and irrelevant to any issues in this case. It is going outside of the transactions on which the Plaintiff bases its notice of motion for Judgment.

Mr. Robertson: It is the same objection which the Court

*Thomas Estil Raney.*

has ruled on time and time again, and the purpose will become apparent in the next question.

The Court: The objection is overruled.

Colonel Harris: We reserve an exception.

The Witness: Will you state your question, please?

Mr. Robertson: Read it, please.

(The pending question was read by the reporter.)

The Witness: I remember a strike occurring there. I don't remember any trouble that you refer to.

By Mr. Robertson:

Q. Do you remember going over there with page 1911 } David Hunter and calling off the pickets?

A. No, sir; I do not.

Colonel Harris: No, sir; I do not. May we have a continuing objection to this entire line of questions and the reservation of an exception to each one?

The Court: You may.

By Mr. Robertson:

Q. Rainier Garage was involved in that same controversy in September, 1949, wasn't it?

A. I don't know what garages were involved, sir. I don't know.

Q. I will ask you if you didn't go to Prestonsburg in September, 1949, with David Hunter and call off the pickets both from the Hughes Motor Company and from Ranier's Garage?

A. No, sir; that is not so.

Q. I will ask you if when David Hunter came to Pikeville as acting regional director of Region 58, you didn't take him over the territory and introduce him to the boys?

A. I took him around the office and introduced him to the district representatives.

Q. Didn't you also take him out through the country?

A. No, sir; I did not.

Q. You said that you did not know Frank Dixon personally?

A. That is correct.

Q. Did you know that there was such a person?

A. I did not, not until I read it in the news- page 1912 } papers and this trial.

Q. You deny, then, that you either directly or indirectly sent word to Frank Dixon about filling him so full

*Thomas Estil Raney.*

of holes that all the sand in the Big Sandy River wouldn't fill him up?

A. I deny that and if such statement was made here, it was a lie, by any one, Frank Dixon or anyone else.

Q. You deny that you directly or indirectly sent him a message to see if you couldn't get together so you all would leave him alone and you would leave each other alone and work in harmony in eastern Kentucky?

A. I deny that, sir, because there is no A. F. of L. within my section of eastern Kentucky. One little local union of carpenters, possibly 30 or 40 people.

Q. And you deny that you ever sent him a message directly or indirectly that unless he acceded to any of those things, you were going to kick his ass out of eastern Kentucky?

A. I deny that I know such a man as Frank Dixon, as I have previously said in the record. I deny ever sending him any kind of word at any time any place and by any one.

Q. And you never sent it to any other representative of the A. F. of L.?

A. I sent it to no one.

Q. Have you ever heard of any other instances page 1913 } in Eastern Kentucky where the United Construction Workers ran people off their jobs?

Colonel Harris: We still have the continuing objection and exception to that line of questions, Your Honor.

The Court: Very well.

The Witness: Did you say answer?

The Court: Answer.

The Witness: No, sir.

By Mr. Robertson:

Q. You never knew of a single one?

A. I don't know of any instances where they ran any one off. From my own personal knowledge you are asking? I do not know.

Q. I mean any kind of knowledge.

A. I have no knowledge of any one being run off by any organization in eastern Kentucky.

Q. I am just confining myself at the moment to United Construction Workers.

A. The United Construction Workers or any other organization.

Q. You don't know of anybody being run off by District 50?

*Thomas Estil Raney.*

A. No, sir; I do not.

Q. And you do not know of anybody being run off the job of course by the United Mine Workers of America?

A. No, sir; I do not. That is correct.

page 1914 } Q. You never heard of any violence being used in Kentucky, I suppose?

A. No, I have known of a lot of violence in Kentucky. I have had it used against me by the coal company gun thugs when they dumped me out into the state of Virginia across the line.

Q. They dumped you in Virginia or out of Virginia?

A. In Virginia, across the Virginia line. After they beat me up, sir.

Q. But you have never used any violence on anybody else, have you?

A. No, sir; I have not.

Q. You are not going to use any on me, are you?

A. I hope not (laughter).

Q. It looked a little like you got a little mad a few minutes ago—

Colonel Harris: We object to the remark.

Mr. Robertson: I withdraw it, Colonel.

By Mr. Robertson:

Q. Now, Mr. Raney, I will ask you if it isn't a fact that you were in Frankfort, Kentucky, with David Hunter on January 12, 1940, to help out in organizing the unorganized.

A. Organizing the unorganized in Frankfort?

Q. Yes.

page 1915 } A. No, sir. I went to Frankfort, Kentucky one time, on two occasions, with Dave Hunter, and we visited I believe it was Commissioner Kech's office in the State Highway Department, and that is the only time I was ever there. It was not to organize the unorganized.

Q. Let's see, then, if he has it substantially correct. I am referring now to the answer of District 50 United Mine Workers of America to summons of the Plaintiff to answer interrogatories, Exhibit 4-1, which is a weekly report for the three weeks ended January 7, 14, 21, 1950, report dated January 23, 1950—

Mr. Mullen: Your Honor, we object for the same reasons heretofore stated and recorded.

The Court: The objection is overruled.

## Supreme Court of Appeals of Virginia

*Thomas Estil Raney.*

Mr. Harris: We reserve an exception.

By Mr. Robertson:

Q. The report is addressed to Mr. A. D. Lewis, Chairman of Organizing Committee, District 50, UMWA and UCW, United Mine Workers of America, signed "Fraternally yours, David Hunter, Acting Director, Region 58," for Thursday, January 12, 1950, as follows:

"I had an appointment in Frankfort, Kentucky with Mr. John A. Kech, Highway Commissioner, relative to increasing the labor rates from 80 cents to \$1.00 within this area. Mr. Tom Raney, International Board Member, was page 1916 } in Lexington, Kentucky and went with me to meet Mr. Kech. Due to illness Mr. Kech was home. Therefore we met with the Deputy Commissioner. The Deputy Commissioner felt sure the labor rates would be increased to some extent. Up to date not one of the contractors have filed a complaint against the rates that we have been able to squeeze out of them above the bid-in rate for this area. He also stated that the Highway Department allowed the contractors above the 80-cent bid-in rate set by the Department when work was to be done within this region. I am expecting to hear from Commissioner Kech when he returns to this office."

Is that report by Mr. Hunter substantially correct or substantially wrong?

A. He is referring to the tip to Mr. Kech and I told you I was there with him in the office.

Q. He was out there as the agent of District 50, wasn't he?

A. Oh, yes, sir. Yes, sir; he was.

Q. He was out there as the agent of the United Construction Workers, wasn't he?

A. Yes, sir.

Q. You and he were out there together?

A. That is correct.

Q. You were out there as a member of the International Executive Board of the United Mine Workers of page 1917 } America, weren't you?

A. That is correct, yes, sir.

Q. You were helping him to put over his deal?

A. I was helping him or attempting to help him to get the rates of labor on this job increased when they made their contract bids. That is correct, yes, sir.

*Thomas Estil Rancy.*

Q. In other words, you as International Executive Board member and he in his capacity were jointly working to get that advance?

A. I don't know what you would call jointly working. I don't know how you would term that. But Mr. Hunter did request me to go there with him. He was a new man, a stranger. I knew Mr. Kech and the other authorities in the State, so I went along with him to help him.

Q. That was what you did, following out what you generally did whenever you could be of assistance?

A. Wherever I could be of assistance to District 50 and the Construction Workers when asked to do so, I did it, and to all other labor unions, sir.

Q. Did Mr. Lewis know about that?

A. I don't know whether he does or not. I never told him.

Q. Did he ever ask you about it?

A. No, sir; he never asked me about it.

Q. Did he ever tell you not to do it?

page 1918 } A. No, he never told me not to do it.

Q. Did you call him by his first name?

A. No, sir; I did not.

Q. Does he call you by your first name?

A. Yes, I believe he does.

Q. Did you meet him when he was down here in Richmond about a week or ten days ago?

A. No, sir; I wasn't here in town then. As far as I know, Mr. Lewis doesn't know that I am here today.

Q. All he knows is what he reads in the paper?

A. Well, I wouldn't say that, but I do know that I don't think he knows I am here today. If he does I don't know anything about it.

Q. Now I will ask you if on Saturday, March 25, 1950, you weren't in Hazard, Kentucky, with Mr. David Hunter.

A. On what date was that, sir?

Q. Saturday, March 25, 1950.

A. I don't remember the dates, but I was there with Mr. Hunter on two occasions, yes, sir. I don't know what dates. Perhaps that could be the date.

Q. What was the occasion of those two times you were there?

A. One time I remember distinctly. The other I don't. Mr. Hunter asked me to go over with him to meet International Representative Reynolds, who was in charge of  
page 1919 } the Hazard office in District 30, and to ask him if I could talk Mr. Reynolds into assisting him

*Thomas Estil Rancy.*

and helping him to organize a job at Toner, Kentucky.

Q. Excuse me, had you finished?

A. Sir?

Q. Had you finished?

A. Yes.

Q. And what you were doing at the time we have already talked about when you were in Frankfort Kentucky and on these other occasions is just generally what you have been doing through all the 16 years you have been in that territory, isn't it?

A. No, that isn't so.

Q. What is the difference?

A. The difference is there has not been a construction Workers all those 16 years and there has not been a District 50.

Q. You have been helping them out ever since District 50 has been out there, haven't you?

A. Ever since the Construction Workers has been in there. District 50 didn't have an office in there until it was established at this time.

Q. But ever since they moved in, you have been helping them in the same way?

A. Yes, sir; whenever they have asked me to page 1920 } do so, I have helped them.

Q. In any way you could?

A. In any way I could do so, yes, sir.

Q. I am referring now to Exhibit 4-8 with the answer of District 50 United Mine Workers of America to summons of the Plaintiff to answer interrogatories, and that also is a report by David Hunter dated March 23, 1950, to Mr. A. D. Lewis, Chairman of Organizing Committee, District 50, UMWA and UMW, United Mine Workers of America, Washington 5, D. C., weekly report for two weeks ended March 11 and 18, 1950, signed—I will stop before I read it—signed "Fraternally yours, David Hunter, Acting Director, Region 58," and the part of the report to which I refer is for Saturday, March 18, 1950.

Mr. Mullen: We object to that, Your Honor, for the reasons heretofore stated with regard to anything out of those interrogatories.

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Robertson: I made the wrong reference. I wanted a report about William O. Hart. If you will scratch that all

*Thomas Estil Raney.*

out I will go to the next one. I referred to the wrong thing.

Mr. Allen: Your objection will apply to the page 1921 } the next one?

Mr. Mullen: Yes.

By Mr. Robertson:

Q. I refer to Exhibit 4-9, which is with the answer of District 50, which is Mr. David Hunter's report to Mr. A. D. Lewis in those two capacities, dated April 7, 1950, weekly report for the two weeks ended March 25 and April 1, 1950, and the part to which I refer is for Saturday, March 25, 1950, as follows:

"In Hazard, Kentucky, with International Board Member Tom Raney. We met Mr. Ed Reynolds in charge of the Mine Workers office in Hazard. We explained to him the program I have worked out relative to organizing the unorganized in that area. He pledged his fullest cooperation in the future. We are not asking the Mine Workers to do our work for us. However, when we asked for a push here or there, we were not getting it. Mr. Raney is of the belief that Mr. Reynolds in the future will cooperate."

A. What were you asking me about the report?

Q. What do you mean about a push here and there that you weren't getting?

A. I don't know what he means about a push. I never heard the expression used before. I couldn't tell you what he means.

Q. You wouldn't have any idea what that meant?

A. No, sir; but I can answer the question about page 1922 } what I was doing there if you would like.

Q. Answer that, if you will.

A. I did a few moments ago. I will repeat again, that I was there at the request of Mr. Hunter to introduce him to Mr. Reynolds and to ask him if he would give him assistance in organizing the Toner job.

Q. But you have no idea what Mr. Hunter meant when he said: "When we asked for a push here or there we were not getting it"?

A. No, sir. I would suggest that you ask Mr. Hunter. I don't know what Mr. Hunter meant by that. I would not be able to know.

Q. "Mr. Raney is of the belief that Mr. Reynolds in the

*Thomas Estil Rancy.*

future will cooperate." How had he failed to cooperate before that?

A. I don't know that he had failed to cooperate. I don't know that he had.

Q. You didn't put the heat on him out there at all, did you?

A. I would have no authority to put heat on an international representative, sir. No, I did not.

Q. I don't know who Mr. Reynolds is. I am just asking, you did not put the heat on Mr. Reynolds on that trip, did you?

A. I explained to you that Mr. Reynolds was page 1923 } an international representative before, in answer to one of your questions.

Q. You didn't put any heat on him?

A. No, sir; I didn't put heat on him. I have no authority to put the heat on any one.

Q. You know what I mean by putting the heat on.

A. I don't know that I do.

Q. I mean, threaten him a little or intimidate him a little.

A. You mean bodily harm to a fellow worker that I work with? If that is what you mean, definitely no, sir.

Q. I mean spiritual harm, then.

A. I don't know what you mean by that.

Q. All right.

A. Certainly I put no heat on him. I don't know what you mean by heat but I didn't put any on.

Q. You mean I don't know what I mean by putting the heat on anybody?

A. I know what I would term it. I don't know what you would term it.

Q. What would you call it?

A. I would term it putting the heat on a person to put pressure on him where you had a club over him to use your influence over him or your authority.

Q. That is what I mean.

page 1924 } A. Well, I did not do that. I did not do that.

Q. I will ask you whether on Friday, June 23, 1950, you were in Lexington, Kentucky with David Hunter?

A. What was the date again, sir?

Q. Friday, June 23, 1950.

A. I was there with him on the two occasions, but again I don't remember what date or even what season of the year that it was.

Q. Maybe this will refresh your memory. I am referring

*Thomas Estil Rancey.*

now to Exhibit 4-17 with the answer of United Mine Workers that I have mentioned, and to report dated June 27, 1950, from David Hunter, Acting Director, Region 58, to Mr. A. D. Lewis, in his two capacities, the weekly report for the week ending June 24, 1950, and I refer to Friday, June 23, 1950, as follows:—

Mr. Mullen: The same objection.

The Court: Same ruling.

Mr. Fred G. Pollard: The same exception.

By Mr. Robertson:

Q. "At the request of Mr. Tom Rancey, I was in Lexington, Kentucky for the purpose of meeting with the President of District 30, Sam Caddy, U'MWA, to obtain the support from the Hazard, Kentucky, office in organizing a large construction job at Toner, Kentucky. However, Mr. Caddy was ill and could not attend. Also Mr. Rancey was late in page 1925 } arriving and had to leave early the next morning for Hillsboro, Kentucky. Had I not been invited to attend a dinner in honor of Mr. Laval Mitch, who is being transferred from District 30 to the Washington office, my trip would have been a total loss. With the exception of Mr. Sam Caddy, Mr. Tom Rancey, and Mr. Joe Davis, the entire staff of District 30 was present at the dinner."

Does that refresh your memory?

A. Yes, sir; it does. It does.

Q. How did it happen that you asked David Hunter to go there?

A. Mr. Laval Mitch, attorney for District 30, who had been an employee for some considerable time, and we all naturally like him, was being transferred or moved to a better job in Washington. The District representatives all got together to give him a little farewell party, and we went there for that purpose. I asked Mr. Hunter to go along with me, to join us in the party.

Q. While you were out there you were going to see if you could do anything about organizing a large construction job at Toner, Kentucky?

A. I don't remember that we discussed that at that time, but I did as I told you a minute ago discuss it with Mr. Reynolds at a later date in his office.

Q. I believe you said that you take your or-  
page 1926 } ders from John L. Lewis?

*Thomas Estil Rancy.*

A. That is correct, yes, sir.

Q. Does he call you by your first name?

A. Yes, sir; I believe he does.

Q. Does he call you Tom or Tommy or what?

A. Tom, I believe.

Q. If he says "Tom, I would appreciate it if you would go out to Hazard and see so and so," you would be pretty apt to go, wouldn't you?

A. Yes, sir.

Q. You would regard that as a nice way of giving an order, wouldn't you?

A. I would, yes, sir.

Q. When you said to David Hunter, "David, I would like for you to go out to that dinner with me, and while we are out there we will just see about organizing this job out here at Toner," you would expect him to go, wouldn't you?

A. No, sir; not necessarily.

Q. You wouldn't?

A. No, I have no right to give him orders.

Q. But he went.

A. He went along to attend the party.

Q. Which has the higher job, a member of the International Executive Committee or the Acting Regional Director?

A. Well, the International Executive Board page 1927 } member I suppose would be termed a superior job. I don't know in the Construction Workers just how they term the regional directors. As I told you in the beginning I don't know too much about the administrative affairs of that organization.

Q. I don't reckon you know how David Hunter's salary compares with yours?

A. No, sir; I do not.

Q. You would expect yours to be a little bigger, wouldn't you?

A. I assume that it is but I don't know what any of the boys of District 50 or the Construction Workers receive.

Q. I believe that David Hunter first arrived in Pikeville along in October or November, 1948, didn't he?

A. I don't remember the date.

Q. The latter part?

A. Of the season that he was there. I don't know, but I believe it was in 1948, yes, sir.

Q. How many trips would you estimate that you and he have taken altogether of the kind of these three or four that you and I have been over here?

*Thomas Estil Rancy.*

A. I would have to think a little.

Q. Do think, won't you?

A. Yes, sir.

I can remember five. There are possibly more. I can remember five, but there are possibly more.

Q. Spread over the period from the time he page 1928 } got there down to the last one I have mentioned here?

A. Until he left the job.

Q. Which was when?

A. I don't remember, but something like 60 days ago, I imagine.

Q. Do you remember why he left?

A. Why he left?

Q. Yes.

A. No, sir; I have no idea why he left.

Q. Did you have an opportunity to tell him goodbye?

A. Yes, sir; I did.

Q. Unless you want me to I won't do it, but the constitution of the United Mine Workers has been introduced here in evidence both by my side and by your side.

A. Yes, sir.

Q. And it refers in there time and again to the one organization. That means United Mine Workers, District 50, and United Construction Workers, doesn't it?

A. I am not a constitutional expert nor authority. It is my understanding—such opinion as I would give you would be strictly an opinion. I am not a constitutional authority whatsoever. But it is my information that every man who is a member of this union or our union, United Mine Workers of America, from top to bottom, who are members page 1929 } of the United Mine Workers of America, are governed by that constitution.

Q. And are members of the one organization?

A. If they are members of the United Mine Workers of America, yes.

Q. And if they are members of the United Construction Workers they are members of the one organization, aren't they?

A. Then they are affiliated with the United Mine Workers of America.

Q. And they are members of the one organization, aren't they?

A. No, sir; I don't think so. As I tell you, it is purely an

*Thomas Estil Raney.*

opinion. I am not a constitutional authority, but I don't think so.

Q. You are not a constitutional authority, but you are a member of the International Executive Board?

A. I am, and I am a member of the United Mine Workers of America.

Q. Then would you say that a member of District 50 is a member of the one organization, to-wit, your union?

A. I don't think so, no, sir.

Q. Has John L. Lewis got a right to can you?

A. Yes, sir; he would have a right to discharge me for cause, subject to the approval of the International Executive Board.

Q. Do you know whether he could can Robert Fohl, his nephew-in-law?

A. Robert Fohl?

Q. Yes, sir.

A. I understand Robert Fohl is a representative of and an employee of District No. 50. I don't know what the constitution provides with respect to District No. 50.

Q. You don't know whether he can can him or not?

A. No, sir; I don't know.

Q. But if he would recommend that he be canned, do you think that would have influence?

A. Why, I suppose it would, yes, sir.

Q. Mr. Raney, did you ever hear of any labor trouble at the Link-Belt Company at Wheelwright, Kentucky?

Mr. Mullen: We object, Your Honor, for the reasons heretofore stated with regard to any outside transactions.

The Court: The same ruling.

Mr. Mullen: Exception, please.

The Witness: Would you define what you mean by trouble, sir?

By Mr. Robertson:

Q. What I meant was, if you will excuse me, the United Construction Workers running people off the job there.

A. I do not know.

Q. Either the Link-Belt Company or the Beckett Construction Company?

A. What did you say that job was?

Q. Either Link-Belt Company or the Beckett Construction Company.

*Thomas Estil Rancy.*

A. Where was it located?

Q. Wheelwright. Have you ever heard of that?

A. Yes, sir; but I don't know of them having the job at Wheelwright.

Q. How far is Wheelwright from Pikeville?

A. Thirty-five miles.

Q. Did you ever hear of the United Construction Workers running anybody off a job at Wheelwright?

A. No, sir. I don't know why they would be in Wheelwright. Wheelwright is a mine that is strictly producing coal, and Wheelwright is under the jurisdiction of the United Mine Workers of America. I don't think they have any members in Wheelwright.

Q. They ought to keep out of there, oughtn't they?

A. I don't think they have any one there to keep out.

Q. Do you know a man named Conn, C-o-n-n, in Prestonsburg, Kentucky.

A. What is the name?

Q. C-o-n-n.

A. No, sir; I don't.

page 1932 } Q. I have referred to you about that trouble  
over there with the Hughes Motor Company and  
Rainier's Garage. You said you didn't know anything about  
that.

A. I didn't say I didn't know anything about it.

Mr. Mullen: Objection and exception.

The Court: Same ruling.

The Witness: You asked me one question and I answered, but I didn't say anything like that.

By Mr. Robertson:

Q. I will ask you if you didn't go over to Prestonsburg and talk to that man Conn, and you told him that the pickets should be called off until everything was settled and you had the pickets called off from those two places.

A. I absolutely did not.

Mr. Robertson: Will your Honor take a five-minute recess?

The Court: We will recess until 2:15, gentlemen.

(Whereupon, at 12:45 o'clock p. m. the Court recessed until 2:15 o'clock p. m. the same day.)

*Thomas Estil Raney.*

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AFTERNOON SESSION.

2:15 p. m.

Whereupon,

THOMAS ESTIL RANEY

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

CROSS EXAMINATION (continued)

By Mr. Robertson:

Q. Mr. Raney, I think you testified before lunch that you did not know of any instances in Eastern Kentucky where the United Construction Workers or District 50 or United Mine Workers had run anybody off the job.

A. Yes, sir, and I also said any other labor union.

Q. Let me see if I can refresh your memory at all.

I am referring now to the Answer of District 50, United Mine Workers of America, to Summons of the Plaintiff to Answer Interrogatories, the report made by David Hunter, Acting Director, Region 58, to Mr. A. D. Lewis, Chairman of the Organizing Committee of both District 50 and the United Construction Workers, dated April 7, 1950, for the weeks ending March 25 and April 1, 1950; for Wednesday, March 29, 1950, as follows:—

Mr. Mullen: If Your Honor please, the same objection.

The Court: Same ruling.

Mr. Mullen: And an exception noted.

page 1934 } By Mr. Robertson:

Q. This is Mr. David Hunter reporting to Mr. A. D. Lewis:

“Wednesday, March 29, 1950. Met Mr. D. G. Hughes of the R. H. Hamill Company, Huntington, West Virginia, in Louisa, Kentucky. Their job at Ragland, Kentucky, has been closed down for the past week. Mr. Hughes agreed to our rates and will sign a contract when the job resumes operations in approximately two weeks. This company has been working all A. F. L. labor.”

*Thomas Estil Raney.*

You don't know anything about that?

A. No, sir, I don't know if there is a place called Bagland, West Virginia, or Ragland, Kentucky. I do not know. I never heard of it.

Q. Now I am referring to a report by David Hunter to Mr. A. D. Lewis, in Mr. Lewis' dual capacity, dated May 22, 1950, weekly report for the week ending May 20, 1950, and I refer to May 16, 1950, where Mr. Hunter reports to Mr. Lewis as follows:—

Mr. Mullen: The same objection.

The Court: The same ruling.

Mr. Mullen: Exception.

By Mr. Robertson:

Q. "In Logan, West Virginia, conferring with Mr. Palmer of the Frederick Engineering Company, Huntington, West Virginia. This company is taking over the contract the Hamill Construction Company had with the Island Creek Coal Company, Ragland, West Virginia. The job was closed March 15, 1950. A satisfactory agreement was reached and new wage rates will be negotiated with the Frederick Engineering Company. This company is under contract with the United Construction Workers and is in Local 778-A."

You don't know anything about that?

A. I never heard of it, no, sir.

Q. I refer now to Exhibit 4.22 with the Answer of District 50, United Mine Workers, Exhibit 4.22 being a report by David Hunter to Mr. A. D. Lewis in Mr. Lewis' dual capacity, dated August 5, 1950, weekly report for week ending July 29, 1950, and under "Organizational," I refer to the Hazard, Kentucky area, as follows:

"Representative Fleming is doing a splendid job of organizing, at present"—

Mr. Mullen: Objection, if Your Honor please.

The Court: The same ruling.

Mr. Mullen: Exception.

By Mr. Robertson:

Q. —"contract with the Livingstone Construction Company at Toner, Kentucky. I have been endeavoring to get this job

*Thomas Estil Rancy.*

under contract for the past five months, and until Mr. Fleming went in and refused to scare, and even page 1936 } whipped the bully on the job, we had been unable to touch it. The Livingstone Construction job at Jewel Ridge, Kentucky, is closed down. I am confident that if Representative Fleming keeps up his good work, he will make an A-1 representative."

You don't know anything about that?

A. I don't know Representative Fleming.

Q. I say, you don't know anything about that episode?

A. I do not, no, sir. If I knew anything about that, I would know Fleming.

Q. I refer now to Exhibit 4.28 with the Answer of District 50, United Mine Workers of America, to the Summons of the Plaintiff to Answer Interrogatories, Exhibit 4.28 being a report by David Hunter, Acting Director of Region 58, to Mr. A. D. Lewis in Mr. Lewis' dual capacity, the report being dated September 14, 1950, weekly report for the week ending September 9, 1950, and I refer to Thursday, September 7, 1950,—

Mr. Mullen: Objection.

The Court: Same ruling.

Mr. Mullen: Exception.

[7] [ ] [ ] [ ]  
By Mr. Robertson:

Q. —where Mr. Hunter reported as follows:

"Met with Mr. Page, President of the Associated Construction Company. This company operates from Marion, Virginia, and is erecting a large school building at page 1937 } Jeff, Kentucky. Mr. Page's only objection to signing a contract was the fact that his sub-contractors are all A. F. L., and he felt they may refuse to go along with or sign a contract. I gave Mr. Page a week to think it over, as I intend to close the job at Jeff, Kentucky."

Do you know anything about that episode?

A. Jeff, Kentucky, is 100 miles from Pikeville. I do not know anything about it.

Q. Did you testify before lunch that you didn't know anything about the trouble that the Hughes Motor Company had at Prestonsburg, Kentucky?

A. I believe that my answer to the previous question that you asked, that I asked you to define what you meant by

*Thomas Estil Raney.*

"trouble," and I know nothing of any trouble that existed in Prestonsburg.

Q. It was trouble about picketing that resulted in an injunction proceeding in the State Court out there. Do you remember that?

A. Yes, sir.

Colonel Harris: May we have our continuing line of objections and exceptions to that?

The Court: You may.

The Witness: Yes, sir, I know about that, but there was no trouble.

page 1938 } By Mr. Robertson: -

Q. You went down there and pulled the pickets off, didn't you?

A. I did not.

Would you like me to tell you why I did go?

Q. Yes, I would be glad if you would.

A. Mr. Hunter came to me—

Q. Mr. who?

A. Mr. Hunter, Dave Hunter, came to me at my office. He told me that he had received a telephone call from some gentleman in Prestonsburg. I don't know who. I don't remember. He then told me, of course, but I don't remember who it was.

He also told me that there was an injunction against them down there on some pickets they had, a restraining order, rather, not an injunction. He asked me if I would go to Prestonsburg with him to introduce him to an attorney, in order to defend them in the injunction suit. I told him that I would, and I did go with him, and I did introduce him to an attorney, Mr. Edward Hill, and Mr. Hill did defend him in the court. I know nothing else whatsoever about the case.

Q. That is all you know about it?

A. That is all I know, and that is all I did.

Q. Just let's be sure that we are talking about the same episode. In this case that we are trying now, on page 1939 } the 21st day of November, 1950, the deposition of Charles Spradlin was taken at Prestonsburg in behalf of the Laburnum Corporation. Do you know Mr. Spradlin?

A. No, sir, I don't.

Q. Do you know Mr. Allen there, the editor of the Floyd County News in Prestonsburg?

*Thomas Estil Raney.*

A. I have met him, yes, sir, but I can't say that I know the man.

Q. In the course of his deposition, there was introduced a newspaper article in which Mr. Spradlin reported upon a mass meeting there in Prestonsburg.

Mr. Mullen: If Your Honor please, a newspaper article is not evidence of any fact, except in the case of libel suits, where it is a fact. They propose, I suppose, to introduce a newspaper article, which is simply hearsay and not proper evidence. It is not in any way relevant in this case. They cannot examine a witness on a newspaper article which he had nothing to do with, which was written by some third party; and as I say, newspaper articles are not evidence of facts.

Mr. Robertson: If Your Honor please, I think Mr. Mullen was a little premature. All I propose to do here at this time is to refer to the newspaper article and to read the opening paragraph or the headline to the witness, and ask him if that refreshes his memory, and if that is the episode to which he has referred.

page 1940 } Mr. Mullen: That is exactly what I object to, Your Honor, reading any part of a newspaper article, because it is not proper evidence.

The Court: Your objection is sustained.

Mr. Robertson: We withdraw the offer.

Mr. Mullen: The objection was sustained.

Mr. Robertson: I say, I withdraw the offer, too, so we have it both ways.

Mr. Mullen: I just want it straight that you are not making any gracious gifts.

By Mr. Robertson:

Q. Do you know a man named Harold Conn?

A. Yes, sir, I do.

Q. Who is he?

A. He is a mine guard for the Inland Steel Company at the present time, I believe.

Q. So far as you know, is he a man of good reputation for truth and veracity?

A. I know nothing to the contrary, no, sir.

• • • • •

*Thomas Estil Raney.*

page 1945 }

. . . . .

We have no other questions of this witness.

RE-DIRECT EXAMINATION.

By Mr. Mullen:

Q. Mr. Raney, do you get copies of the reports made by Mr. Hunter for District 50 and the United Construction Workers, made by him to the headquarters in Washington?

A. No, sir, I do not.

Q. Do you have a chance to read them?

A. No, sir, I have no chance whatsoever to read them.

Q. Mr. Raney, in labor matter parlance, in connection with negotiating contracts, what is the meaning of the term, "closed down"?

A. The meaning of the term is when you have a strike, that mine is temporarily down, it is temporarily closed down until such time as the strike is settled or until a contract has been finally consummated.

Q. Does the word "shutdown" have the same meaning?

A. The same meaning, yes, sir. They are commonly referred to as such.

Mr. Mullen: You may step down.

Mr. Robertson: Wait a minute.

page 1946 } RE-CROSS EXAMINATION.

By Mr. Robertson:

Q. As a member of the International Executive Committee, do you know how long A. D. Lewis is required to keep his official reports that are submitted to him by David Hunter?

A. No, sir, I do not, except that I heard it testified to here. That is all I know.

. . . . .

Mr. Mullen: If Your Honor please, with the exception of the reservation that we reached in your office this morning as to certain items we might put in later, the Defendants rest.

Defendants rest.

page 1947 } Mr. Robertson. The first thing we have, Your Honor, is the deposition of a man named Baldridge.

Mr. Fred G. Pollard: Whose deposition did you say?

Mr. Allen: Nelson Baldridge.

Mr. Robertson: Taken at Prestonsburg on November 21, 1950.

Mr. Allen: Page 49, I believe it is, Mr. Mullen.

Mr. Robertson: There is a piece of a newspaper thing there that I of course will leave out in deference to the ruling of the Court.

Mr. Fred G. Pollard: Your Honor, I understand that the Plaintiff is now putting in evidence in rebuttal.

Mr. Robertson: That is right.

Mr. Fred G. Pollard: This seems to be a part of your main case.

Mr. Robertson: No, this is in rebuttal.

Mr. Fred G. Pollard: We object to it on the ground that it is not in rebuttal.

The Court: I haven't read it.

Mr. Robertson: It is in rebuttal of Tom Raney, it is in rebuttal—I haven't the list of their witnesses. It is in rebuttal of everybody who said they didn't know anything about these occurrences. We are going to show right now something about one of them that they are bound to know about, we think.

page 1948 } The Court: You may read it and the Court will see what is in it.

Mr. Allen: Do you want me to go ahead, sir?

Colonel Harris: You are reserving the ruling until later?

The Court: The Court may strike the evidence later. We will see what the evidence discloses.

Colonel Harris: I just wondered if we should take an exception.

The Court: I think so.

Colonel Harris: We note an exception.

(At this point parts of the deposition of Nelson Baldridge was read to the jury, in rebuttal, Mr. Allen reading the questions and Mr. Robertson reading the answers, as follows:)

“NELSON BALDRIDGE.

“Thereupon, the witness, Nelson Baldrige, after being first duly sworn, deposed as follows:

“DIRECT EXAMINATION.

“By Mr. Robertson:

“Question: Mr. Baldrige, your name is Nelson Baldrige?

“Answer: Yes, sir.

“Question: Where do you live?

“Answer: Four miles west of town.

“Question: That is four miles west of Prestonsburg, Kentucky?

page 1949 } “Answer: Yes, sir.

“Question: How long have you lived at your present home?

“Answer: Forty-one years.

“Question: Mr. Baldrige, in May, 1949, and immediately before that, what was your business?

“Answer: I have been in the painting business for several years.

“Question: Is Wheelwright in the State of Kentucky?

“Answer: Yes, sir.

“Question: And in what country?

“Answer: Floyd.

“Question: And at what town or place?

“Answer: Wheelwright.

“Question: Is that near Price?

“Answer: It must be five or six miles.

“Question: Now, at that time were you a member of any labor organization?

“Answer: I wasn't myself.

“Question: The article states you were employing 14 men at that time. Do you know, whether or not, they were affiliated with any labor organization?

“Answer: Yes, sir.”

Mr. Mullen: Where are you?

The Court: The top of page 51 now, Mr. Mullen.

Colonel Harris: If the Court pleases, we want our continuing line of objections to the questions that he is coming to, irrespective of the major objection that it is not in rebuttal.

The Court: That will be understood.

*Nelson Baldrige.*

Colonel Harris: And an exception noted.

Mr. Allen: Continuing the deposition:

(Reading of the deposition continued as follows:)

“Question: What organization was that?

“Answer: A. F. of L.

Mr. Robertson: Now you skip the newspaper.

Mr. Allen: And go down to Question 15.

(Reading of the deposition continued as follows:)

“Question: The Rust Engineering Company, do you know what labor it was employing, whether its employees belong to the A. F. of L. or some other labor organization?

“Answer: I wouldn't say.

“Question: Do you know what labor the Link Belt Company was employing, whether it was A. F. of L. labor or other organized labor?

“Answer: I do not.

“Question: The Beckett Construction Company, do you know what labor it was employing?

“Answer: No, sir.

“Question: How big was this painting job that you had there?

page 1951 } “Answer: It was the entire camp, around 450 or 460 houses.

“Question: How long did you expect to work on that job if it had gone to completion without interruption?

“Answer: Well, I had until October 15th.

“Question: And you had started when?

“Answer: I begun work in April, making preparations. We had a set time to begin painting, and we started on that time.

“Question: Will you state the circumstances under which you stopped working on that job?

“Answer: Yes, sir. After we had started we had probably 25 or 30 houses painted, a fellow, Mr. Hart, and the President of the local at Wheelwright—right now I can't call his name—and another fellow or two, I didn't know them. I think they were a committee, came down there one evening. We were closing up, putting our stuff in the shop, and they said: ‘You fellows are going to have to join the United Construction Workers.’ That was the first I heard of it, and I told Mr.

*Nelson Baldridge.*

Hart and this fellow with him that these fellows were A. F. of L. workers and—”

Mr. Mullen: If Your Honor please, we object to going into other transactions that are foreign to this case. We are not trying what happened in other instances. We are trying this case here. They are between third parties, and page 1952 } it is not proper evidence in this case.

Mr. Robertson: It is the same ruling the Court has made time and again, Your Honor, of course. It is the same thing they have done when they have tried to show and did show what happened over at Hopewell. It is to show the pattern throughout this territory.

Mr. Mullen: Your own man brought in what happened at Hopewell, and simply after he brought it in we questioned him on it.

Mr. Robertson: It is the same thing the Court has ruled on time and again.

The Court: The objection is overruled.

Mr. Fred G. Pollard: An exception is noted.

Mr. Robertson: (Reading of the deposition was continued as follows:)

“—and I didn’t understand why they would have to belong to the United Construction Workers, and he said they had to if they worked in or around the mines, and I told him, I said: ‘Give us a few days to think on this, kindly let us check into this. We want to know if they have that to do.’ I said, ‘It is immaterial with me. The only thing about it is I am working organized labor, I recognize the union.’ So, he said they would have to belong to that union if they done any work in or around the mines. They came back a few days later. We had several more houses painted, and they asked the page 1954 } boys what they were going to do on this particular evening. They didn’t say anything to me, but I had told them I had organized labor. What, I mean by that, union men. So, Hart said: ‘There will be no work here tomorrow, boys.’ We started back to work the next morning following the evening he made this statement, and when we went up by Price we ran into that big crew of men.

“Question: How many men would you say you ran into there at Price?

“Answer: It was a pretty good bunch of men. I under-

*Nelson Baldrige.*

stood they had stopped some other cars or trucks. There was a great big bunch of men there, looked like 200 or 300 men to me. I don't know whether they were all United Mine Workers, or what they was. I knew part of them, some of them were from the camp up there where I was working. Whenever they stopped the truck—I was driving a truck—they were in the road and I heard some fellow say: 'Pull them out,' and Mr. Hart and some other fellow, I don't know who it was, came up to the back end of the truck and said: 'You boys can join the United Construction Workers this morning,' and some of my men said: 'We belong to the A. F. of L.,' and they said: 'All right, unload,' and the boys hit the ground, and I made mention to Hart or some of them that I was going on and some fellow said: 'You are not going on,' and Hart said: 'Baldrige has been nice, he hasn't been dirty as some of them, let him put his tools up,' and I took my  
page 1954 { brushes and tools and put them in a small shop and locked them up because I had several hundred dollars worth of brushes and tools.

"Question: What did the men do when they got out of your truck?

"Answer: I left them there, all of them.

"Question: How long was it before you went back to any of that painting work, if you ever went back to it?

"Answer: It was a month before I went back to work.

"Question: What were the circumstances under which you went back to work?

"Answer: I went to Pikeville, up to Mr. Hunter's office and signed a contract.

"Question: Obligating you to do what?

"Answer: Well, I had to work under that contract.

"Question: Did you thereby recognize the United Construction Workers?

"Answer: I did when I signed that contract.

"Why did you sign that contract?

"Answer: To finish that job which I was bound by contract with the company to finish.

"Question: What company was your contract with?

"Answer: Inland Steel Company.

"Question: Had they said anything to you about going ahead with the job?

page 1955 { "Answer: No. They didn't tell me to go ahead. I went to Mr. Price and I said: 'Mr. Price, it looks like I am between a rock and a hard place,' and

*Nelson Baldrige.*

he said: "There is nothing I can do about it. I am looking to you to have this job done by October 14th."

"Question: Who is Mr. Price?"

"Answer: He is General Manager of Inland Steel Company."

"Question: Do you know a man by the name of Carson Hibbits?"

"Answer: Yes, sir."

"Question: On this morning when they ordered your men out of the truck, did you see Carson Hibbits?"

"Answer: Yes, sir. He was there at Price."

"Question: Was that before or after your men were ordered out of the truck?"

"Answer: Well, that was at the time."

"Question: How far away was he from the place where they were ordered out of the truck?"

"Answer: He was right there, right at the truck."

"Question: How close to it, would you say?"

"Answer: He was right against the back end of it when I got out of the truck."

"Question: Was he on the ground or in an automobile?"

"Answer: He was on the ground."

"Question: Could you see who he was with, if anybody?"

"Answer: I saw Mr. Hart there."

page 1956 } "Question: Did you see David Hunter there?"

"Answer: I didn't see David Hunter there, as I remember."

"Question: As a result of that trouble up there did you quit the painting job?"

"Answer: Well, I haven't been in it since I finished that job. Just a minute, let me make some corrections there. I finished that contract and finished up some touch-up work at Price after my contract was completed. What I mean, I did not quit working until this touch-up work was finished at Price."

"Question: Did you have any difficulty in completing your touch-up work?"

"Answer: No, sir."

"Question: When you were driving that truck up there with the men in it that morning did you know, whether or not, at that time they were members of the A. F. of L.?"

"Answer: Yes, sir, everyone of them."

"Question: Why didn't you and your men go on to work that morning instead of getting out of the truck?"

*Nelson Baldrige.*

"Answer: Well, they told us not to.

"Question: Why didn't you go on, anyway?

"Answer: If somebody would tell you not to do something, what would you do?

"Question: Were you and your men outnumbered?

"Answer: Well, I just had about 14 or 15 page 1957 } men.

"Question: How many would you estimate they had you outnumbered?

"Answer: There must have been 10 or 15 to one. There was a great big bunch of them.

"Question: Was that why you quit?

"Answer: You see, they had told us on the evening before not to report to work, that there would not be any work there the next day. Mr. Hart said, 'We are going to wrap a picket line around this Price work.'

"Question: In your discussions with Hart, about which you have spoken, did he make any statement about any work in Breathitt County?

"Answer: You mean at this particular time?

"Question: At any of these times you have talked about, or at any time.

"Answer: Not at this particular time but I saw Mr. Hart on the street here and I asked him what he was doing, and he said he was trying to, or was going to organize that work in Breathitt County.

"Question: Do you know about when it was that he made that statement to you?

"Answer: It was after I got finished up there at Inland Steel, along about that fall; along about November or December. I know it was cold weather."

page 1958 } Mr. Allen: That is all of that deposition.

Colonel Harris: We make a motion to exclude on all the grounds assigned and all the different objections.

The Court: The motion is overruled.

Colonel Harris: We reserve an exception.

Mr. Robertson: If Your Honor please, we have some matters to take up with the Court in Chambers.

The Court: All right, the Court will recess, gentlemen, to see counsel in Chambers.

(Brief recess.)

page 1959 } (The following proceedings were had in Chambers:)

Colonel Harris: Judge, I have one matter before they take up something.

We would like to add an objection which I hesitated to make in there in front of the jury where they could hear it, to these depositions of other transactions and on other occasions. We would like to add to each of those objections that it is highly prejudicial and inflammatory and is offered for that purpose.

The Court: All right. Is there any objection to that gentlemen? Let the record show accordingly.

Mr. Robertson: If Your Honor please, I want to tell the Court about what our setup is here on rebuttal and suggest a course of procedure that I do not believe will lose any time.

I think we are going to have to put Mr. Delinger back on briefly, but I have to check my memory on that phase of it. We are certainly going to have to put Mr. Bryan back about Arnett's statement, and then of course on this accounting matter that came in here this morning we are going to have to put our accountants on to give our version of that matter. Then we may or may not have to put two Laburnum employees on, which I can check up on very briefly. Of course all of those are very brief matters.

Here is what presents difficulty, and all of us—  
page 1960 } Mr. Allen, Mr. Lowden, Mr. Moore, and I—have given it the best thought we are capable of, regarding this mass of photostats that were put in here Tuesday. We feel compelled to offer them. I regret it just as much as anyone else. All of us have tried to figure how we could get around the drudgery of handling them. The only way I know how to do it is to go through them one by one with the Court. If those on our side go through them by ourselves, we are not going to get anywhere. If the Defendants' counsel go through them by themselves, they are not going to get anywhere. If we go through them together, we are never going to reach any agreement. I think it would be a duplication of effort. I think just to go through it in the way I suggested as quickly as we can and with as little lost motion as we can is the only way I know how to handle it. It certainly will take two days to do it, and maybe three.

My thought is, suppose you adjourn the jury until either Tuesday or Wednesday and let us do it, and by the time we have finished that, I think we would be ready on these witnesses. I told Mr. Mullen that if I were the lawyers on the other side, I wouldn't agree to anything except what suited

my own convenience on that, but my work is just getting in a terrible fix and I will be glad to work Saturday, Sunday, nights, any other time that the Court or anybody else is willing to do it.

page 1961 } Mr. Mullen: As I understand, you yourself don't know what any of these are.

Mr. Robertson: Mr. Bryan knows what is in them. Mr. Bryan is a licensed lawyer. I know what is in some of them.

Mr. Bryan: I think I could expedite the matter a great deal if I would be allowed to take part in that portion of it and explain why I think certain things are relevant.

Mr. Mullen: If Your Honor please—

The Court: You interposed an objection to their introduction.

Mr. Mullen: I will interpose some more. We opposed it.

Mr. Allen: Opposed what?

The Court: The introduction of these exhibits.

Mr. Mullen: Yes, we opposed the introduction of them at the time for reasons then stated, because they were offered *en masse*; we were asked to pass on something that we hadn't read and the Court hadn't read, and it might lead into error unconsciously. We further object to them by reason of the time they were offered. The Plaintiff had rested its case, and then offered after that this great mass of documents, which we understand are nothing more than cumulative.

Mr. Robertson: Of course, you are in the same fix you said I was in. You don't know what they are.  
page 1962 } You are guessing.

Mr. Mullen: From what you said before and from what we discussed about them, I know the point you introduced them on. It is cumulative. It unreasonably encumbers the record, and it comes at a time when it is too late for them to introduce them.

The Court: Gentlemen, I have given consideration to this matter since Mr. Allen offered the same in evidence. At that time they were objected to by counsel for the Defendants, and the Court has concluded to sustain the objection.

Mr. Allen: Then, Your Honor, we mark them excluded and take our exception.

The Court: That is right.

(Plaintiff's Exhibit 93, previously marked for identification, was EXCLUDED.)

Mr. Robertson: That ends it as far as I am concerned, unless you want to add something.

Mr. Allen: I was just stating our exception.

Mr. Robertson: I was passing on to something else.

Mr. Allen: We want the record to show that we except.

The Court: Yes.

Mr. Allen: And we ought to state the grounds. That is what I was doing, stating the grounds.

page 1963 } The Court: All right.

Mr. Allen: That we think they were offered in due time, that is, before we had fully rested our case, and we think they contain material evidence on the question of agency, as we have indicated before, and are proper to be considered as a part of the evidence in the case.

Mr. Robertson: Judge, I don't want to argue against the ruling of the Court. What I was going to say when Your Honor beat me to the draw (I think we are getting into very blood-thirsty terms here in this case) was that, having spent so much time and effort in the trial of this case, now that we have gotten where everybody is tired and anxious to finish, it is a pity to cut off any part of it that might constitute error. You know, if you do consider them and rule on them, that is one possible ground of error that cannot arise.

The Court: Well, that is the ruling of the Court.

Mr. Robertson: All right.

Mr. Bryan: Will you mark each one, Your Honor?

The Court: I understood the other day they were marked one exhibit.

Mr. Bryan: They were all wrapped up in a big brown paper, but there are three hundred and some items there. I think they are not identified in some way—

page 1964 } Mr. Robertson: I think it is up to us to identify them and let the Court put his initials on them. I think Mr. Bryan might identify them and the Court add his initials serially.

Mr. Allen: How shall we identify them, put one exhibit number on the whole batch and let the others be sub-numbers?

Mr. Robertson: What difference does it make? Let it go from one to a million. That will identify them all right. Suppose it is Exhibit 115, sub-1 to a million.

Mr. Allen: Has the Judge got to sign his name on each one or on the whole package? That is what I am talking about.

Mr. Robertson: I think he ought to sign his name on every single one of them. (Laughter.)

Mr. Mullen: I think Mr. Allen's idea was to give them a number, and each of them a sub-number that would identify and keep them from getting mixed up.

The Court: The whole batch was given a number when they

were offered. It strikes me that you could give sub-numbers to them.

Mr. Robertson: Not sub-letters, but sub-numbers.

Mr. Bryan: All of them are set out in a schedule submitted at the same time, but it seems to me that some number should be given to each one of those so they can be referred to intelligently later.

page 1965 } The Court: The Court will be happy to have any suggestion that you gentlemen may have to offer in that regard.

Colonel Harris: I think it is an undue burden on Your Honor to ask Your Honor to sit and sign your name 321 or 315 times. It seems to me that it is unduly prolonging and delaying the case, and you have a special jury of business men whose time is valuable. It just makes me feel that we are engaged in a futile pursuit to spend two or three days either in Court or waiting while that takes place.

Mr. Mullen: I don't understand that that is what it is intended to do at all.

Mr. Allen: I don't think anybody understood the suggestion I made, but His Honor did.

Mr. Mullen: So far, I don't know. I am perfectly willing to let you gentlemen identify them and waive His Honor having to do it.

Mr. Robertson: I would rather for you to do that, Mr. Mullen, in the presence of Mr. Bryan.

Mr. Mullen: Oh, no.

Mr. Allen: I submit, Your Honor, it can be done in a manner that will satisfy our rules, making it a part of the record and requiring Your Honor to sign your name only once. Take the whole batch and let somebody number them, giving them sub-numbers, and then let the certificate show that this is exhibit so-and-so, which includes sub-numbers page 1966 } from one to whatever it is, and sign your name once.

The Court: I think that would be satisfactory.

Mr. Robertson: That is all right with me.

Passing to the next thing, Your Honor, we have got to assemble some accounting data to rebut the accounting data that they put in this morning. It will take more than overnight to do it. It is perfectly obvious that the case is going to run into next week, anyway, and I am going to ask the Court to adjourn over until Monday morning so that we can have the opportunity to get that accounting data and all our rebuttal in shape, and we will be prepared to close our case Monday.

The Court: You don't think you could have that by to-

morrow afternoon, Mr. Robertson? I had hoped that we would get all the evidence in this week.

Mr. Robertson: We can try. I don't know whether we can or not. I can get this part in by tomorrow afternoon.

The Court: How about Mr. Bryan's testimony? Could we get his rebuttal in this afternoon? You said you wanted to put him on.

Mr. Robertson: No, sir, I can't. I have to go through the transcript. On this accounting proposition our accountants are going to be Leach, Calkins & Scott, and T. Coleman Andrews, and I want Mr. Bryan, before he undertakes to testify regarding accounting matters, to have been in  
page 1967 } contact with the accountants and not with me.

(Discussion off the record and brief recess.)

The Court: Gentlemen, we will adjourn, then, until ten o'clock Monday morning.

page 1968 } (The following proceedings were had in open court:)

The Court: Gentlemen of the Jury, at this point in the trial it becomes necessary to adjourn Court until Monday morning at ten o'clock. Monday was to have been a holiday for some of you, and I am sorry we couldn't work it out.

(Whereupon, at 3:30 o'clock p. m., the Court was adjourned until 10:00 o'clock a. m., Monday, February 12, 1951.)

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\* \* \* \* \*

Hearing in the above-entitled matter was resumed, pursuant to recess, at 10:00 o'clock a. m., before the Honorable Harold F. Snead, Judge of the Circuit Court of the City of Richmond, and a Special Jury, on February 12, 1951.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Jr.

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## PROCEEDINGS.

(Roll call of the jury.)

The Court: Mr. Robertson?

Mr. Robertson: If Your Honor please, we wish to read from Interrogatories (4), question 38, and the answer to it.

Mr. Fred G. Pollard: To whom are they addressed?

Mr. Robertson: United Mine Workers.

Mr. Mullen: If Your Honor please, we make the same objections heretofore made to reading without reading the entire interrogatory.

The Court: The same ruling.

Mr. Mullen: Exception.

Mr. Allen: Question 38, on page 20: "With respect to the privileges, powers and duties of the President of the United Mine Workers of America, did the constitution of the United Mine Workers of America at any time between the dates October 28, 1948, and August 4, 1949, and also after August 4, 1949, provide among other things as follows: 'Between sessions of the International Executive Board he shall have full power to direct the workings of the organization and shall report his acts to the International Executive Board for its approval'—"

The Court: One minute, gentlemen.

Colonel Harris: I want to add the additional objection that they introduced all the interrogatories in page 1971 } evidence on their direct case, and therefore it is not in rebuttal to read them at this time.

Mr. Robertson: It is in rebuttal to the testimony of Thomas Raney as to what the one organization meant. I think nothing could be clearer rebuttal, Your Honor. The jury is entitled to know that he is contradicted by the answer of the United Mine Workers of America, he being a member of their Board of Directors.

The Court: I will allow the question.

Colonel Harris: We reserve an exception.

Mr. Allen: "—and if so, state the following: (a) During what period or periods did said constitution so provide—"

Mr. Robertson: "Yes, at all times inquired about."

Mr. Allen: "(b) As used in the language quoted above do the words 'International Executive Board' mean the International Executive Board of the United Mine Workers of America? If not, what do those words mean—"

Mr. Robertson: "Yes."

Mr. Allen: "(c) As used in the language quoted above does

the word 'organization' mean United Mine Workers of America and its districts, subdistricts, branches and subordinate branches including District 50 and United Construction Workers? If not, what does that word mean?

Mr. Robertson: "Yes, but primary power to direct the United Construction Workers and District 50 page 1972  $\frac{1}{2}$  is in the Chairman of the United Construction Workers and Chairman of the Organizing Committee of District 50 respectively."

Mr. Fred G. Pollard: Would you read me the last answer back, please?

(The answer requested was read by the reporter.)

Mr. Fred G. Pollard: Your Honor, I would like to point out to the Court that the answer was not read as written in the answer.

Mr. Robertson: Will you read it, please?

The Court: What is the difference?

Mr. Fred G. Pollard: Mr. Robertson answered "Chairman of the United Construction Workers" and the answer reads "Director of United Construction Workers."

The Court: Let the record show accordingly.

Mr. Robertson: If Your Honor please, the Defendants introduced in evidence as their Exhibit 68 six sheets of tabulated figures entitled "Analysis of Gross Profit for the Year Ended December 31, 1949," and the Defendants introduced as Defendants' Exhibit 69 six sheets of tabulated figures entitled "Analysis of Gross Receipts for the Year Ended December 31, 1948." Those figures were furnished to the Defendant by the Plaintiff upon request under ruling of the Court. At the same time the Defendants requested and were furnished similar figures for the year 1941, '42, '43, '44, '45, '46, '47, and figures entitled "Laburnum-Pettijohn" for '44 page 1973  $\frac{1}{2}$  and '45 and figures for Virginia Mechanical Corporation for the year '47, and Virginia Mechanical Corporation for the year '48, and Virginia Mechanical Corporation for the year '49.

As I have stated they saw fit to introduce no part of that but the two sheets which gives a distorted picture and we ask to put in all the information that they requested. I will read the exhibits accordingly.

Two sheets attached together entitled "Laburnum Construction Corporation, analysis of, for the year ending December 31, 1940. I ask that that be marked Plaintiff's Exhibit No. 95.

Mr. Fred G. Pollard: Will you let us look at that?

Mr. Robertson: You already have copies of them.

The Court: You may show it to Mr. Pollard.

(Mr. Pollard examining exhibit.)

Mr. Fred G. Pollard: Your Honor, Defendants had previously put in evidence this Exhibit No. 34 which shows the gross profit or gross loss on the work which it did in the State of West Virginia and the state of Kentucky, and that does not go back past 1947. For that reason we submit that any figures before 1947 are immaterial. We further suggest that any figures relating to Virginia Mechanical Corporation are immaterial because it is not a party to this suit, and therefore we object to the introduction of any figure prior page 1974 } to 1947 and any figures that do not relate solely to Laburnum Corporation.

Mr. Robertson: If Your Honor please, Virginia Mechanical Corporation is a wholly owned subsidiary of Laburnum Construction Corporation, organized as a matter of convenience as an agency through which Laburnum conducts its plumbing and electrical work, and it is necessary for the overall picture of Laburnum.

These gentlemen under order of this Court required us to get every sheet of this data that I have mentioned, every single sheet of it in addition to that other exhibit which he has talked about, their whole theory being that either our figures are distorted or fallacious or unsound or dishonest. Under Court order they required us to get all this data. Now in order to show a distorted picture they put in two years only. I say that the fair and the correct thing to do is to put them all in so that you get the true picture for the period about which they have asked the information, and not a distorted picture of it.

The Court: The objection is overruled, Mr. Pollard.

Mr. Fred G. Pollard: Note an exception.

(Plaintiff's Exhibit No. 95-1 marked and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence two sheets attached together, tabulated figures entitled "Laburnum Construction Corporation, analysis of, for the year ended December 31, 19..." I will have to do this in detail, Your Honor, to make apparent in the record what it is. Headed across the top "Total Contract

Work completed at December 31, 1942, amount, percentage; at December 31, 1941, amount, percentage; during 1942, amount, percentage," and ask that those two sheets collectively be marked Plaintiff's Exhibit No. 95-2.

(The document referred to was marked Plaintiff's Exhibit 95-2 and received in evidence.)

Mr. Robertson: A single sheet of tabulated figures entitled "Laburnum Construction Corporation Analysis of Gross Profit for the Year Ended December 31, 1943," and ask that that be marked Plaintiff's Exhibit 95-3.

(The document referred to was marked Plaintiff's Exhibit 95-3 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence two sheets of tabulated figures attached together entitled "Laburnum Construction Corporation Analysis of Gross Profit for the Year ended December 31, 1944," and ask that that be marked Plaintiff's Exhibit No. 95-4.

(The document referred to was marked Plaintiff's Exhibit 95-4 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence two sheets of tabulated figures attached together entitled "Laburnum Construction Corporation, Analysis of Gross Profit page 1976 } for the year ended December 31, 1945," and ask that those sheets collectively be marked Plaintiff's Exhibit 95-5.

(The documents referred to were marked Plaintiff's Exhibit 95-5 and received in evidence.)

Mr. Robertson: The Plaintiff offers in evidence three sheets of tabulated figures attached together entitled "Laburnum Construction Corporation Analysis of Gross Profit for the year ended December 31, 1946," and ask that those sheets collectively be marked Plaintiff's Exhibit No. 95-6.

(The documents referred to were marked Plaintiff's Exhibit 95-6 and received in evidence.)

page 1977 } Mr. Robertson: Plaintiff offers in evidence twelve sheets of tabulated figures attached to-

gether, entitled "Laburnum Construction Corporation—Analysis of Gross Profit for the Year Ended December 31, 1947," and asks that they collectively be marked Plaintiff's Exhibit No. 95-7.

(The document referred to was marked Plaintiff's Exhibit 95-7 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence a single sheet of tabulated figures, entitled "Laburnum-Pettijohn—Analysis of Gross Profit for the year ended December 31, 1944," and asks that that sheet be marked Plaintiff's Exhibit No. 95-8.

(The document referred to was marked Plaintiff's Exhibit 95-8 and received in evidence.)

Mr. Robertson: Plaintiff offers in evidence a single sheet of tabulated figures entitled, "Laburnum-Pettijohn—Analysis of Gross Profit for the Year Ended December 31, 1945," and asks that that exhibit be marked Plaintiff's Exhibit No. 95-9.

(The document referred to was marked Plaintiff's Exhibit 95-9 and received in evidence.)

Mr. Robertson: If Your Honor please, I notice that an accountant who is going to testify for the Plaintiff is in the room. I reckon he had better go out.

The Court: He had better leave the room.  
page 1978 } All witnesses who are going to testify should  
leave the room.

Mr. Robertson: The Plaintiff offers in evidence two sheets of tabulated figures attached together, entitled "Virginia Mechanical Corporation—Analysis of Gross Profit for the Year Ended December 31, 1947," and asks that they collectively be marked Plaintiff's Exhibit No. 95-10.

(The document referred to was marked Plaintiff's Exhibit 95-10 and received in evidence.)

Mr. Robertson: The Plaintiff offers in evidence three sheets of tabulated figures attached together, entitled "Virginia Mechanical Corporation—Analysis of Gross Profit for the Year Ended December 31, 1948," and asks that they collectively be marked Plaintiff's Exhibit No. 95-11.

*Monroe Sublett.*

(The document referred to was marked Plaintiff's Exhibit 95-11 and received in evidence.)

Mr. Robertson: The Plaintiff offers in evidence two sheets of tabulated figures attached together, entitled "Virginia Mechanical Corporation—Analysis of Gross Profit for the Year Ended December 31, 1949," and asks that they collectively be marked Plaintiff's Exhibit No. 95-12.

(The document referred to was marked Plaintiff's Exhibit 95-12 and received in evidence.)

Mr. Robertson: Mr. Monroe Sublett.

page 1979 } Whereupon,

**MONROE SUBLETT,**

called as a witness in rebuttal on behalf of Plaintiff, having been previously duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION.**

Mr. Robertson: Mr. Sublett was sworn when he testified before, Your Honor.

The Court: Very well.

By Mr. Robertson:

Q. Mr. Sublett, I will remind you that you are still under the oath that you took when you testified in this case before.

A. Yes, sir.

Q. Do you know Henry Starr, who lived in Paintsville?

A. Yes, sir.

Q. How long have you known him?

A. Ten years.

Q. Do you know what his reputation is for truth and veracity in the community in which he lives?

A. Yes, sir.

Q. What is it?

A. Good.

*Monroe Sublett.*

Q. Have you ever heard anything against him?

A. No, sir.

page 1980 } Q. Are you familiar with the circumstances under which he ended his service as an officer of the Paintsville Local 646 in which he handled the funds of that Local Union?

A. According to the auditing committee and bank receipts, it was good.

Q. When they balanced his books, did he owe the Union money or did the Union owe him money?

A. We owed him some money.

Q. How much?

A. \$113.54.

Q. Did you pay it to him?

A. Yes, sir.

Mr. Robertson: No other questions.

### CROSS EXAMINATION.

By Colonel Harris:

Q. Is Mr. Starr a personal friend of yours?

A. He was a member of Local 646.

Q. And that is the union that you were President of?

A. Yes, sir.

Q. Is he a personal friend of yours?

A. Nothing more than just brothers in the Local, is all.

Q. How long were you and he brothers in the Local?

A. From April—(Witness referring to small book.) —11th day of April in 1941.

page 1981 } Q. Until when?

A. Until the 15th day of—let me see. (Referring to paper.) The 15th day of November.

Q. 1950?

A. That is right.

Q. When you address Henry Starr, do you call him "Brother Henry" or just "Henry"?

A. Part of the time you call him "Brother," and part of the time you call them by their first name.

. . . . .

MAYNARD C. RAGAN,

called as a witness in rebuttal on behalf of Plaintiff, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Ragan, I remind you that you are still subject to the oath you took when you testified previously in this case.

A. Yes, sir.

Q. When you were on the stand before, you page 1982 { testified about what happened at the job site before July 26, 1949, and after that, so far as you know?

A. Yes, sir, I did.

Q. At any time during the period which has been discussed here in your testimony, did you discharge any common laborer?

A. No, sir, we did not; I did not.

Mr. Robertson: No further questions.

CROSS EXAMINATION.

By Mr. Mullen:

Q. You personally didn't discharge them, you say?

A. Mr. Delinger didn't, either, and I didn't, during that time.

Q. Did you pay them off and tell them that was the end, or to go?

A. No, sir. On July 27, which was a normal payday, five laborers came to me and said that they were afraid to go back to work, and requested that we pay them in full. Those men were Lee Bach, Matt Miller, Ernest Howard, Ossie Lovely, and John Jordan. That has been the common practice with us all along, when a man is in bad circumstances, to give him his pay in full; and on this particular day, those five men came and said that they were afraid to work, that they lived some 26 or 30 miles from the job site, and that they didn't want to have to come back for their pay.

page 1983 {

. . . . .

ALEXANDER HAMILTON BRYAN,  
called as a witness in rebuttal on behalf of Plaintiff, having  
been previously duly sworn, was examined and testified as  
follows:

DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Bryan, I remind you that you are still subject to  
the oath which you took when you testified perviously in this  
case.

Did you hear the testimony of John T. Arnett regarding  
the signed statement you took from him?

A. Yes, sir.

Q. Do you recall the circumstances under which you took  
that statement from him?

A. May I see the statement?

Q. Answer my question first.

A. Yes.

Q. I hand you the signed statement which has been intro-  
duced in evidence as Arnett Exhibit No. 1, and ask you to look  
at it and see if that is the signed statement you  
page 1984 } took from him?

A. (Examining statement.) That is the signed  
statement, all right.

Q. State the circumstances under which you took that  
particular statement.

A. After our contracts were terminated by Pond Creek  
Pocahontas Company and Spring Fork Development Com-  
pany, and I was still in Huntington, I decided to go back down  
to Paintsville and try to get some statements from various  
people who worked for us.

Q. Were you doing that under advice of counsel?

A. Before doing that, I had telephoned Norman Flippen,  
and found that he was in Vermont. I talked to your partner,  
Mr. T. Justin Moore.

Q. All right, go ahead.

A. And he suggested that I do it.

I drafted a prepared statement which I believed would fit  
the circumstances for almost everybody, as I understood them,  
and left space for anything extra. That was run off on a  
duplicating machine in Huntington, and I then went down to  
Paintsville. I was in Paintsville on August 6 and on August  
7. As a matter of fact, I spent the night in Paintsville on the  
night of Friday, August 5.

Beginning early in the morning on August 6, I started see-

*Alexander Hamilton Bryan.*

ing people, first in my hotel room. That didn't  
page 1985 } work out so well. I asked Henry Starr if he  
knew where I could get the services of a typist,  
and he took me to the law offices of Meade and Johnson. Mr.  
Billy Johnson was there, and he said that his secretary, Mrs.  
Jewell Young, could help me all day.

We fixed several statements there, which were notarized by  
Mrs. Young, who is a Notary Public. While there, I had a  
portion of this statement fixed out for Mr. Arnett. I thought  
that that would fit what he would say, based on what the others  
had told me.

There was to be a meeting of the Paintsville Carpenters'  
Local that night, and Mr. Bert Preston said that after the  
meeting he would have the men come to my hotel room—

Mr. Mullen: Your Honor, I object to that. This is after the  
happening, and what Bert Preston said to him about holding  
a meeting is immaterial.

Mr. Robertson: Leave out what Mr. Preston said, and tell  
the circumstances.

The Witness: After the Carpenters' meeting was over,  
various men came to my hotel room, and there we went over  
the statement, line by line. I explained to them—

By Mr. Robertson:

Q. I want you to confine yourself to the Arnett statement.  
That is the only one we are now talking about.

A. All right.

John Arnett came in. I went over the thing  
page 1986 } with him, line by line. We read it together. I  
told him that if there was anything down there  
that wasn't right, I wanted it changed.

Everything was O. K. until we got down to the part where  
it stated that, "Many of the group headed by William O. Hart  
appeared to be intoxicated or semi-intoxicated." Johnny  
said he didn't think that was right. I said, "Did some of  
them appear that way?" And he said, "Yes." So I took a  
pen and scratched out the word "Many" and inserted the  
word "Some."

Then we got down a little bit further, where part of the  
statement says that, "Affiant and many of the employees of  
Laburnum and Virginia Mechanical Corporation believe that  
some of the group headed by William O. Hart were armed  
with concealed weapons." Johnny took question at that, and

*Alexander Hamilton Bryan.*

I asked him, "Well, suppose they were armed, do you think they might be armed?" He said yes, he thought they might be armed, but he didn't think he was going to be hurt. So I took my pen and I scratched out the word "were" and inserted the words "might be."

The rest of the statement was signed without change. The portion left in the space for extra things that were not covered in the prepared part of the statement, that was typed beforehand, and Mr. Arnett signed it.

Q. Were any changes in that statement made in pencil?

A. No, sir, I don't know of any.

page 1987 } Q. The statement as introduced here is precisely as it was signed by Arnett?

A. To the best of my knowledge and belief, that is correct.

Q. What time was it when he signed the statement?

A. I would say it was about 8:30 at night. It might have been 9:00 o'clock.

Q. You notice that statement starts out there like it was going to be verified by a Notary Public, and it is not verified by a Notary Public. What is the explanation of that?

A. When I had the statement drafted in Huntington, I had hoped that I would be able to have all of them notarized. It soon became apparent that I just couldn't do it; that a Notary wouldn't always be available. So I didn't undertake to change the form of the statement. When the Notary wasn't there to take the man's oath, that portion of the statement wasn't filled in, and I just signed in as a witness.

Q. Was the Notary present when Arnett gave his statement?

A. No, sir.

The Court: Mr. Robertson, may I ask the witness a question in regard to the typewritten portion of that statement?

You say that was written in before he signed page 1988 } it. When was it written in?

The Witness: That morning.

Mr. Robertson: I was just going to ask him that, Your Honor.

page 1989 } By Mr. Robertson:

Q. Now I call your attention on page 3 of the statement to the paragraphs numbered 1 and 2. Was that space left blank when you had the form of the statement run off on a duplicating machine in Huntington?

A. I didn't follow your question, the first portion of it.

*Alexander Hamilton Bryan.*

Q. I say, I call your attention to paragraphs numbered 1 and 2 on the third page of Arnett's Statement and ask you when the form of the statement was run off in Huntington was that space blank?

A. That space was all blank, and this part in here was typed in Paintsville in Mr. Johnson's office.

Q. Is that the Mr. Johnson who was here in this case?

A. Yes, Mr. Billy Johnson.

Q. Does that explain the difference in the typing of the original statement and paragraphs 1 and 2 on page 3?

A. Yes. This portion was a prepared statement run off on a duplicating machine, mimeograph machine.

Q. Have you doctored that statement in any way since you took it from Arnett?

A. No.

Q. I think you have testified previously that the Virginia Mechanical Corporation is a wholly owned subsidiary of Laburnum Construction Corporation?

page 1990 } A. Yes, sir. I am not sure whether I did or not, but it is.

Q. What is the purpose of that company?

Mr. Mullen: Your Honor, we object to that. That is a separate corporation.

Mr. Robertson: I withdraw it and will reframe the question.

By Mr. Robertson:

Q. What kind of work, if any, does Virginia Mechanical Corporation do for Laburnum Construction Corporation?

A. Virginia Mechanical Corporation has agreements with the plumbers and steamfitters local union, the sheetmetal workers local union, the electricians local union, and they handle mechanical work in which Laburnum Construction Corporation is interested. That is the purpose of it.

Q. Do the profits and losses from Virginia Mechanical Corporation go back eventually to Laburnum?

A. Certainly.

Q. There has been introduced here as Plaintiff's Exhibit No. 22 a booklet entitled "Laburnum Construction Corporation, Richmond, Virginia, Construction Record." Does that influence also the construction records of Virginia Mechanical Corporation?

A. All the jobs that the Virginia Mechanical Corporation

*Alexander Hamilton Bryan.*

has had of any size or consequence have been page 1991 } Laburnum jobs.

Q. Is that why they are included in there?

A. That is right. They are treated as a part of the Laburnum jobs.

Q. Does that booklet show the joint ventures upon which Laburnum was engaged during the period covered by the booklet?

A. During the war we had a partnership arrangement with John T. Pettijohn Company, known as Laburnum-Pettijohn Associates. We performed about 31½ million worth of work together. Laburnum Construction Corporation also engaged in a joint venture with Riggs Distillate Corporation in Baltimore, performing work for American Viscose Corporation at Marcus Hook, Pennsylvania, Lewiston, Pennsylvania, and Martinsburg, West Virginia. That amounted to about a million and a half dollars or \$1,800,000.

Q. Does the booklet disclose the fact that those two jobs were joint ventures?

A. Oh, yes. It is proper to consider them as Laburnum jobs, but it should be shown that other people were interested, too.

Q. Mr. Bryan, you have testified quite fully about the trouble in Breathitt County, Kentucky. At any time during the period that you have testified about in this case did you promise the common laborers on the Breathitt page 1992 } County, Kentucky, job an increase of 10 cents per hour in wages?

A. I never heard anything about an increase of 10 cents an hour until approximately a year after the thing was over.

Q. Did you promise them any such increase?

A. I did not.

Q. When did you first hear of it?

A. When you and I were in Adrian, Michigan talking to Robert Poe.

Q. What did you hear then from him?

A. I asked Bob Poe about getting the laborers to sign the application blanks, what he had done, and he said he just asked them to sign and he told them he hoped to get them an increase of 10 cents an hour. I did not know that Bob Poe was doing that.

Q. During any time while Laburnum was at work in Breathitt County, Kentucky did you ever discharge any common laborer or anybody else on account of union membership?

*Alexander Hamilton Bryan.*

A. I never discharged a soul on account of union membership or non-union membership or for that matter anybody else. The superintendent looks after that.

Q. You testified about your conversation over the telephone with Hart on July 14, 1949, and at subsequent times. Did you ever question Hart's statement that he represented the common laborers?

A. He told me the 14th of July during our page 1993 } telephone conversation that he represented the laborers. Frankly, I didn't believe him. It has turned out from his testimony that at that time he only represented four laborers. The next time I talked to Mr. Hart was on the afternoon of July 26 at the railroad crossing, at the job site, and at that time I told Mr. Hart that all of our laborers, that all of our workers, practically all of our workers, were members of A. F. of L. unions or had made application to become members of A. F. of L. unions. Mr. Hart then said that the laborers were not in the union, and I said, "Well, they have all signed application blanks to get in the union, I understand." Mr. Hart said that didn't make any difference to him, whether they were in the A. F. of L. or not, he was taking over, that we were working in United Mine Workers territory, and he was going to take over the whole show.

\*     \*     \*     \*     \*

Q. Mr. Bryan, you were present in the courtroom when I introduced those various sheets of tabulated figures which you had furnished the Defendants and which they had not put in evidence heretofore.

A. That is right.

page 1994 } Q. In order to point that up, have you prepared another set of figures that more or less summarizes and tabulates those various sheets?

A. Yes, sir. This was prepared in our office under the supervision of our auditors, Leach, Calkins & Scott.

Q. Is it correct?

A. The information is correct.

Mr. Robertson: I offer in evidence 19 sheets of tabulated figures attached together entitled "Laburnum Construction Corporation at Richmond, Virginia, statement of jobs awarded to Laburnum Construction Corporation, to its subsidiary Virginia Mechanical Corporation, to the firm of Laburnum-Pettijohn Associates, and to the joint venture of La-

*Alexander Hamilton Bryan.*

burnum Construction Corporation and Riggs Distillate and Company, Inc., during the period from January 1, 1942, to December 31, 1949," and showing the following with respect to each job: (a) sales or gross income; (b) direct job cost profit; (c) job profit or loss; and ask that that be marked Plaintiff's Exhibit No. 96.

Mr. Fred G. Pollard: No objection.

(The documents referred to were marked Plaintiff's Exhibit 96 and received in evidence.)

Mr. Robertson: The witness is with you.

Mr. Mullen: If Your Honor please, with respect to page 1995, regard to this last statement of course we have had no chance to look at it and we will have to make the same request that they made when they asked for an opportunity to examine it before examining the witness on that statement. We have another complication. Mr. Bryan has just been examined on two things—

Mr. Robertson: I think I will withdraw the statement if you want time for it as everything is in the other statement.

The Court: The statement is withdrawn.

(Plaintiff's Exhibit 96 WITHDRAWN.)

Mr. Robertson: What is your next complication?

Mr. Mullen: That relieves it.

#### CROSS EXAMINATION.

By Mr. Mullen:

Q. Mr. Bryan, when did you say you talked with Mr. Arnett in regard to this statement of his?

Mr. Robertson: Will you give me that back, Mr. Pollard, since we have withdrawn it?

(Document handed to Mr. Robertson.)

By Mr. Mullen:

Q. When did you talk to Mr. Arnett about the statement, about signing it?

A. The first time I saw Johnny Arnett in connection with the statement was on the night of Saturday—I page 1996 I think it was August 6. (Witness referring to calendar.) August 6, 1949.

*Alexander Hamilton Bryan.*

Q. When did he sign this statement?

A. At that time.

Q. When was this additional part on the third page written in?

A. That was written in in the morning.

Q. What morning?

A. August 6.

Q. August 6?

A. Yes.

Q. You saw him the night of August 6 and he signed it?

A. That is right. On the morning of August 6 I talked to Henry Starr, Paris Trimble, Bert Preston, and obtained statements from them. They all gave an account about what had happened, and the portions that I thought there would be no question about I had typed in in advance. I realized that I might have to change it, but it would be easier to do it that way and to make a change than it would be to write the whole thing out later. The wording on that is almost identical to the wording on some of the other statements.

Q. So that all of the language in here is your language and perhaps the language of Henry Starr or some of those people you talked to, and not the language of Arnett?

A. Well, I don't know what you mean by that. page 1997 } I prepared the statement trying to set out accurately what I understood happened. It was typed, it was presented to Johnny Arnett. We read it. I said, "Johnny, I want to be sure this is right and if there is anything here you think is wrong, let me know." We did make several changes. On some of the other statements we made many changes, but this one had only two. He said that he thought that was all right the way it was with these changes. We made the changes then and there and he signed it.

Q. You had a stereotyped form for the first page and a half for everybody to sign, made up from your point of view of what the case was or what you wanted it to be?

A. I don't know what you mean by my point of view. I was trying to set out accurately what I understood happened?

Q. And you did not know of your own knowledge that was what happened, but it was what you understood happened?

A. I wasn't out there at the time, but there were some statements that were made that were completely typed that are a little different from that, but the bulk of the people signed those statements.

Q. All the language in here is your language?

*Hugh H. Baird, Jr.*

A. I drafted it.

Q. You composed all of this?

A. I composed it, I drafted it and presented it to Johnny Arnett and he signed it. It was not altered except page 1998 } except for what is shown there on that statement.

Mr. Mullen: I have no further questions.

Mr. Robertson: No questions.

The Court: Stand aside, Mr. Bryan.

(Witness excused.)

Mr. Robertson: Mr. Hugh H. Baird, Jr.

Whereupon,

HUGH H. BAIRD, JR.

called as a witness for Plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Court: How long will this witness take?

Mr. Allen: It shouldn't take over 15 or 20 minutes.

The Court: We might recess for about five minutes before we take this witness.

(Brief recess.)

#### DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Baird, your name is Hugh Baird?

A. Hugh H. Baird, Jr.

Q. Do you live in Richmond?

A. I work in Richmond and live in Chester.

Q. What is your profession?

A. I am a certified public accountant.

Q. How long have you been a certified public accountant?

A. Since 1942.

page 1999 } Q. What firm of accountants are you with?

A. I am a partner in the firm of Leach, Calkins & Scott.

Q. With headquarters in Richmond?

A. With headquarters in Richmond.

Q. Does your firm do whatever accounting work is done for Laburnum Construction Corporation and Virginia Mechanical

*Hugh H. Baird, Jr.*

Corporation other than the accounting work done within their own organization?

A. We have audited their records for a number of years.

Q. Have you been assigned to that work in recent years?

A. That is right.

Q. At my request have you read the testimony of Mr. C. Howard Holt which was given in this case on February 8?

A. Yes, sir; I have.

Q. And have you collaborated with Mr. T. Coleman Andrews?

A. Yes, sir; I have.

Q. Have you been furnished a copy of Defendants' Exhibit No. 67, which is entitled "Laburnum Construction Corporation, condensed statement of operations for the years indicated"?

A. Yes, sir; I have.

Mr. Robertson: I have a number of copies of that exhibit and I wish to pass out copies to the jury so they page 2000 } may read the figures as we go along.

By Mr. Robertson:

Q. Do you agree or disagree with the testimony of Mr. Holt?

A. I cannot agree with either his computations or his conclusions.

Q. When you set up a tabulation of figures there for given years, as is done in Defendants' Exhibit No. 67 is there necessarily what you might call a slop-over from year to year or is there a clean-cut division from year to year?

A. In any construction accounting it is necessary to estimate the percentage of completion on jobs at the end of the year. For that reason there is a certain amount of estimate involved.

Q. I am going to ask that you discuss Defendants' Exhibit No. 67, item by item, and I suggest that you take the year 1949 for the reason that I believe that that is the year that Mr. Holt used in his discussion of these figures which he compiled. Just explain the tabulation there and why it is that you disagree with Mr. Holt.

A. The figure of sales includes all millings of the company on construction work, which includes not only the billings on lump sum contracts but also the entire billings on cost-plus contracts, cost-plus-fixed-fee or cost plus percentage. The

*Hugh H. Baird, Jr.*

cost of sales includes all costs which are directly chargeable to the job, including in the case of cost-plus contracts not only the actual cost of construction but also the cost of clerical and office expenses in connection with maintaining field offices, which under the terms of these cost-plus contracts are reimbursable 100 per cent plus the fee to the contract.

The gross profit includes all of the gross profit after the deduction of the cost, all cost, including as I said before these office and to some extent administrative expenses.

The administrative expenses include mainly salaries at the home office and other home office expenses and such general and administrative expenses as donations, dues, taxes, business licenses and other expenses which can in no way be charged to a job.

Q. Wait a minute. Before you leave that, why do you say that those administrative expenses cannot be allocated to any particular job?

A. There are a number of reasons. In the first place, the expenses are such that they bear no relationship to the volume of work. By comparing the amount of these administrative expenses for the years shown in Defendants' Exhibit 67 with the amount of sales for the respective years it will be noted that there is no relationship between these amounts. For instance, in 1942 the sales were \$1,800,000, the administrative expenses were \$28,500. In 1943, the sales dropped \$750,000, to \$1,054,000 and administrative expenses actually increased by slightly over \$500. Similarly in 1948 sales were \$3,675,000, and administrative expenses were \$87,765. In 1949 on the other hand sales dropped by \$2 million, and at the same time the administrative expenses went up over \$5,000. So there is no relationship at all between the amount of administrative expenses and the amount of sales.

Q. Do administrative expenses include home office salaries?

A. They do.

Q. If a contractor has a contract for cost-plus 5 per cent, is it to his advantage to allocate all the costs he can to that particular job?

A. It is certainly definitely to his advantage to do that because he can get reimbursed 100 per cent plus a five per cent fee. Not only that, but the actual mechanics of it may result in a reduction in the administrative expense by the fact that personnel who are charged to the administrative payroll may be transferred to the job payroll to keep the records at the

*Hugh H. Baird, Jr.*

job, resulting in a reduction of the administrative payroll and an increase in the job payroll, which is directly reimbursable.

Q. Suppose a construction company has a page 2003 } lump sum contract, do they try to absorb those costs in general overhead or to allocate them all they can to the job?

A. Generally, particularly where the lump sum contract job is located in the vicinity of the home office, it is much more practicable and much more expedient to perform these services at the home office and cut down the overhead on the job in that way. I think that has been done.

Q. Is it or is it not a fact that where you have your general administrative expenses include the home office administrative expenses, that it is possible to take on a largely increased volume of work without a corresponding increase in administrative expense?

A. It certainly is, and that would apply particularly, I believe, to cost-plus work, where these administrative expenses or job expenses are charged directly to the job.

Q. Would that mean for instance that if a man named Delinger had been working in the home office he could be transferred to superintendent at the job site and his salary charged against that particular job?

A. That is correct.

Q. Would it be an illustration of what you are saying to say that if a merchant sold \$100,000 worth of business a year and his administrative expenses were \$5,000, if in the following year he did \$200,000 worth of business his administrative expenses would not go up to \$10,000?

page 2004 } A. I think that is absolutely correct, and I think that is borne out by the ratio shown in Defendants' 67 which I have pointed out. I think it is true generally. I think that is the whole concept of volume production, that is, that a certain basic production or volume of business is required in order to meet the fixed overhead. Once that break-even point has been reached, a substantial amount of the gross profit on additional work becomes net profit because the administrative expenses will not go up in proportion to the gross profit. It seems to me that if Laburnum's gross profit from cost-plus work were increased \$25,000 with no increase in administrative overhead, it is a simple mathematical fact that they would have additional net profit of approximately \$25,000.

Q. From your study of Mr. Holt's testimony did you deter-

*Hugh H. Baird, Jr.*

mine whether or not he allocated general administrative expense to the Breathitt County work at the rate of 6.63 per cent?

A. That was his factor which he used in allocating administrative expenses to the Breathitt County work.

Q. In your opinion, was that sound accounting practice or unsound accounting practice?

A. No, sir. In the first place, as I have said before I don't think there is any way of allocating these expenses to the various jobs. Moreover, I think if any such allocation were attempted to allocate them prorata to all jobs page 2005 } without consideration of the nature of the contracts, which vary widely. Not only that, but in computing this 6.63 factor which Mr. Holt has used, he is by adding the figure of other income to the gross sales in effect duplicating in this gross sales portion of his factor certain rental income which was an internal charge. In other words, the rent was charged to the job and recovered 105 per cent from the job on these cost-plus jobs. So when he added this other income back to the sales, he has duplicated this factor, and it has increased the 6.63 considerably. In other words, a correct computation would show considerably less than 6.63.

Q. Do you mean he has charged rental of equipment into gross sales and charged it also into administrative expense?

A. It is already included in gross sales because on a cost-plus contract the contractor recovers the full amount of the rental in the sales.

Q. Where did he include it the second time?

A. When the contractor charges this rent on his own equipment used on the job, he credits other income and charges the actual cost of the sales. When he bills the contract to the owner he uses his cost of sales and adds five per cent. That includes 100 per cent of the rental charge on which the contractor has a profit. Since that is included in the sales originally, included in this \$1,643,000 for 1949, and of course the corresponding charge is also included in the page 2006 } other income. He has added these two sums together. In other words, if he is going to apply this other income, any other factor, it should be a reduction of the cost of sales or the overhead expense, rather than addition to the gross income.

Q. Does his theory mean in effect that for every dollar of increased business his overhead increases 6.63 per cent?

A. I think that is the impression he tried to convey.

Q. Have you made any computations of your own to figure

*Hugh H. Baird, Jr.*

what would have been realized in profit or loss on these Breathitt County jobs?

A. I have reviewed the computations of the profit on the Breathitt County work, the computations of the amount claimed for loss of profit, and I believe that they are in accordance with the experience on those jobs during 1949.

Q. Have you with you a copy of Defendants' Exhibit 66?

A. I have.

Mr. Robertson: I have some copies that I will pass to the jury.

page 2007 } By Mr. Robertson:

Q. Take the first item there, Damage for Loss of Fee on Contract for Construction of 25 Dwellings—\$534.19. What have you to say about the correctness or incorrectness of that figure, based on your knowledge of Laburnum Construction Company operations and your study of Mr. Holt's testimony?

A. As I understand that figure, that represents the difference between the fee, the contractual amount of the fee on this job, and the amount which had been realized by billings before the job was terminated; and if that is correct, this computation of \$534.19 is correct.

Q. Does what you say about that item apply to the item of \$319.67?

A. It does.

Q. Does it apply to the item \$250.00?

A. That was based on 5 per cent fee on estimated cost of \$5,000, and is mathematically correct.

Q. What about the item \$1,250?

A. That is also based on the 5 per cent fee on work estimated at \$542,500, and is mathematically correct.

Q. What about the item of \$27,125?

A. I would like to correct myself on that last item. I was referring to the \$27,125 item. That is also mathematically correct, based on the estimated cost of completion of this work.

page 2008 } Q. According to Mr. Holt's testimony, does he contend, in substance, that if Laburnum would continue cost-plus-5% contracts in Breathitt County, Kentucky, they would show a loss, until they had a tremendously increased volume, of approximately 1.63 per cent on each contract?

A. That is what he states, yes, sir.

*Hugh H. Beird, Jr.*

Q. So the more business—how high does he figure they would have to increase their volume to break even?

A. I think his figure was \$1,200,000.

Q. Do you agree or disagree with that?

A. I think he has misinterpreted the facts there, because in addition, your gross profit, after you have reached this break-even point in your volume, becomes practically 100 per cent net profit.

Mr. Robertson: The witness is with you.

#### CROSS EXAMINATION.

By Mr. Fred G. Pollard:

Q. As I understand it, Mr. Baird, what you are saying is that in 1949, from experience in previous years, Mr. Bryan or Laburnum Construction Corporation had reached the point where it could do additional work without increasing the overhead to any appreciable extent, and that all the gross profit from the additional business would amount to almost net profit?

A. I think that would depend in large measure page 2009 } on the type of contract. I certainly think on cost-plus-5% contracts they could have expanded their volume tremendously without increasing to any material extent their administrative overhead. Their administrative overhead for the whole period has increased fairly regularly, which reflects, I believe, the economic tendency rather than any increase in volume or variations in volume. The volume varies, as you know, from a low of \$734,000 in 1945 to a high of \$3,675,000 in 1948, without corresponding variations in administrative overhead.

Q. What you are saying, then, is that the work claimed on Defendants' Exhibit 66, which is before the Jury, the first items about which you have just testified, is work that could have been taken on by the Plaintiff without appreciably increasing his overhead, and that the fees on a cost-plus-5% basis from those jobs would have been almost net profit?

A. I think that is correct. I might—

Mr. Robertson: Let him finish his answer.

The Witness: I might point out, too, that these estimates in here do not include any estimate of profit the company would have made by the use of its own equipment.

Mr. Fred G. Pollard: I object to that. Plaintiff is not

*Hugh H. Baird, Jr.*

claiming any loss of profits from anything except that which is shown on that exhibit.

Mr. Robertson: I think he has a right to give his reason, Your Honor, what he is driving at.

page 2010 } The Witness: I think this loss of rental income would more than offset any increase—

Mr. Fred G. Pollard: Did Your Honor rule on that?

The Court: I haven't ruled on that. I would like to hear you on that.

Mr. Robertson: If I am wrong, I will ask the witness to correct me.

As I understand it—I am not an accountant—this witness said that Mr. Holt incorrectly allocated General Administrative costs to a particular job, and that he failed to show the profit on that job from rental of equipment; that he put one item in wrong and left the other item out wrong, and if you make the proper adjustment, they would about counter-balance each other.

Am I right or incorrect?

The Witness: I don't think so.

Mr. Fred G. Pollard: I don't think the witness ought to argue with the attorney. What the witness is trying to say is this—

Mr. Robertson: Suppose you let the witness say it.

The Court: Go ahead, Mr. Pollard.

Mr. Fred G. Pollard: —is that if he had done the work on cost-plus-5%, he would have had some direct expenses which would have brought it down to less than 5 per cent, but that

page 2011 } that would have been offset by a profit which the Plaintiff would have made on the rental of equipment. Anything about profits on rental of equipment is not in issue here. These are the only profits Plaintiff has claimed he has lost, and it is improper to bring anything in about any profit that he may or may not have made on the rental of equipment. Therefore, we ask that his answer be stricken and the Jury be instructed to disregard it.

Mr. Robertson: If Your Honor please, it appears that Mr. Pollard doesn't know what the accountant is talking about; I don't know what the accountant is talking about. It may possibly be that His Honor doesn't know what the accountant is talking about. So I would think that the accountant ought to be allowed to say for the benefit of us all, including the Jury, what he is talking about.

The Court: Read the question and answer.

*Hugh H. Baird, Jr.*

(The record was read by the reporter.)

The Court: Is the company asking for anything for the use of equipment?

Mr. Robertson: I don't know whether we are or not. We are trying to show whether there is a net profit or net loss from those jobs.

The Court: I will overrule the objection and allow the witness to continue.

Mr. Fred G. Pollard: Note an exception.

Mr. Robertson: Now, explain the difference between—

Mr. Fred G. Pollard: Now, listen, Your page 2012 } Honor, this man is not examining the witness.

The Court: You are exactly right. Go ahead, Mr. Pollard.

Mr. Robertson: You are exactly right. I apologize, Mr. Pollard.

Mr. Fred G. Pollard: I accept your apology, Mr. Robertson.

Mr. Robertson: Thank you, Mr. Pollard.

By Mr. Fred G. Pollard:

Q. Now, Mr. Baird, it is the first five items you have just testified—

A. That is correct.

Q. —that come at a time that you said when the overhead has reached a static point, and therefore the fee at 5 per cent on those five items, in your opinion, would be almost net profit?

A. I didn't say that administrative overhead had reached a static point. I say that I think the amount of that is determined lots more by economic conditions than by the volume of work, and particularly where the work is handled on a cost-plus-fixed-fee basis. I think, therefore, so far as the actual addition of this work, disregarding any economic tendencies, inflation, I think this additional work could have

page 2013 } been handled without any appreciable additional administrative expense which would be applicable to this work.

Q. And that, therefore, in your opinion, it is not proper to allocate administrative expenses as part of the cost of doing this work?

A. I don't think you can allocate in any way any administrative expenses to jobs, as I have pointed out in my answers to Mr. Robertson, because the nature of the jobs and the type

*Hugh H. Baird, Jr.*

of the administrative expenses are such that they lend to no basis of allocation.

Q. Do I understand that in your opinion, in 1949 the Plaintiff had about reached the break-even point, and as to these five jobs, in your opinion, any fees on the basis of 5 per cent as to them would have been practically net profit?

A. I think the fact that they had a profit of—what is it, some \$27,000—I think that figure is correct, isn't it; \$27,000 in 1949 on the volume of work which they did would indicate that they had passed the break-even point, and the addition of a greater volume would certainly not increase the administrative expenses proportionately. As a matter of fact, it would increase them very little, and for that reason, the addition of some \$25,000 gross profit would result in practically an increase of \$25,000 net profit.

Mr. Robertson: The figure for 1949 shows \$57,000.

Mr. Fred G. Pollard: I ask the Judge to instruct the Jury to disregard Mr. Robertson's statements.

page 2014 } Mr. Robertson: If Your Honor please, I think that is entirely a proper remark, when the witness is asked to look at figures which are before him.

The Court: Let the witness look at his figures.

The Witness: The correct figure is \$57,000, Your Honor.

By Mr. Fred G. Pollard:

Q. Mr. Baird, the Plaintiff has stated that this work was awarded to him in October of 1948, and that his contracts were cancelled on August 4, 1949. How could he have known back in October, 1948, that the work for which he claims damages is the work which would have been taken on after the break-even point, and that it is for this work that he says it would all have been net profit? How could he have known that back in 1948?

A. He didn't know it, but he can't turn down a job just because he doesn't have enough other jobs to pay his administrative expenses. He has to take every job that comes, until he builds up his volume enough to pay his administrative expenses and pay his overhead. He wouldn't be justified in turning down any work if it is going to produce any gross profit at all, because his administrative expenses are going to continue as long as he stays in business.

Q. Are you familiar with Plaintiff's Exhibit No. 34, Mr. Baird, which is a statement showing the contracts with Pond Creek Pocahontas Company, Island Creek Coal Company, and various associated companies?

*Hugh H. Baird, Jr.*

Mr. Robertson: Wait until I get the exhibit, please.

Mr. Fred G. Pollard: I have it here, sir.

Mr. Robertson: May I pass a copy of this to the Jury so they can look at it while you are examining the witness about it?

Mr. Fred G. Pollard: Yes.

The Witness: Is that the one which shows a profit of \$58,000?

Mr. Fred G. Pollard: Yes.

By Mr. Fred G. Pollard:

Q. Those figures include the statement of Virginia Mechanical Corporation, do they not?

A. Yes, sir.

Q. Have you made a statement up, of any kind, to show just the figures for Laburnum Construction Corporation?

A. I have not prepared any such statement. I think the figures could be determined. I am sure they could.

Mr. Fred G. Pollard: Mr. Robertson, have you the exhibit showing the analysis of gross profit for 1948 and 1949?

Mr. Robertson: It is probably over there.

(Discussion off the record.)

page 2016 } By Mr. Fred G. Pollard:

Q. Mr. Baird, I hand you Defendants' Exhibits 68 and 69, which are the analysis of gross profits of the Plaintiff for the years ended December 31, 1949, and 1948, respectively, and Plaintiff's Exhibit No. 95-7, which is Analysis of Gross Profit of the Plaintiff for the year ended December 31, 1947.

(Document shown to Mr. Robertson.)

Mr. Robertson: If Your Honor please, I think we ought to be heard on this, what they are trying to introduce now as evidence before the Jury.

\* \* \* \* \*

page 2017 } (The following proceedings were had in Chambers:)

Mr. Robertson: If Your Honor please, the Defendants are

*Hugh H. Baird, Jr.*

offering now a tabulation entitled "Laburnum Construction Corporation, Richmond, Virginia, statement showing contracts with Pond Creek Pocahontas Company, Island Creek Coal Company, and various associated companies, and further showing job profit or loss of Laburnum Construction Corporation on each contract."

There are columns entitled "contract date" corresponding with our exhibit No.—

Mr. Fred G. Pollard: I think it is Exhibit 33, but I wouldn't be certain.

The Court: 34, isn't it?

Mr. Robertson: We will supply that.

A column entitled "Job No." corresponding with our Exhibit No. 34, a column entitled "Description" corresponding with our Exhibit No. 34, the column entitled "Amount" corresponding with our Exhibit 34, and the column "Profit or Loss" corresponding with our Exhibit No. 34

Mr. Fred G. Pollard: May I add one other thing, that this statement here in the heading, everything up here, corresponds to that exhibit also.

Mr. Robertson: I understand that all of those figures include the Virginia Mechanical Corporation for the reasons I have stated, because it is a wholly owned subsidiary page 2018 } diary. The Defendants now wish to pull out the part of that done by Virginia Mechanical Corporation and reduce these amounts accordingly and then show a job profit or a job loss and a percentage. We say that if they want to do that, they can make their own tabulation through their own accountant, but that they have no occasion to do it through this witness now on the stand.

Mr. Fred G. Pollard: Are you through, Mr. Robertson?

Mr. Robertson: Yes.

Mr. Fred G. Pollard: Virginia Mechanical Corporation, Your Honor, is not a party to this suit and any profit it may make, in order for it to seek its way to claim it, has to come by way of dividends, and any losses it may have, Laburnum Construction Corporation is not responsible for. It is totally immaterial and improper and not a part of this suit in any way for the profits or losses of Virginia Mechanical Corporation to be brought into the case. They have been brought in and now we want to get them out of the case. The three statements that the Plaintiff was given before we retired, that is the gross profit analysis for 1947, '48, and '49, contained the figures we want which apply solely to Laburnum Construction Corporation. All the witness will have to do is to

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look at the job number for the applicable year and read off the figure and the percentages in the exhibits which were introduced by the Defendant, one of which was page 2019 } introduced by the Plaintiff, and as he reads them off I will write them in and when it is completed we will offer it in evidence as an exhibit.

Mr. Robertson: If Your Honor please, if it is already in evidence, then it is not rebuttal or surrebuttal here.

Mr. Fred G. Pollard: It is in rebuttal to what—

Mr. Robertson: And if they want to make a separate exhibit with their own accountant they can call him back and do it.

Mr. Fred G. Pollard: Your Honor, it is in evidence here. Their exhibit says this shows the job profit or loss of Laburnum Construction Corporation on each contract and that is an erroneous statement.

Mr. Mullen: It is in cross-examination of your witness, and we have a right to go into those matters.

Mr. Robertson: Yes, but haven't a right to make my witness—

Mr. Mullen: It is not in rebuttal. We are simply cross-examining the witness you put on.

Mr. Robertson: You have a right to a fair cross-examination of the witness but you haven't a right to make our witness get up there and paint a mural for you.

Mr. Mullen: Paint a what? We have a right to examine him on the figures and to bring them out and the Virginia

Mechanical Corporation you can't ignore cor-  
page 2020 } porate identity.

Mr. Allen: If Your Honor please, the real situation as I see it here is this: Mr. Bryan testified that the Virginia Mechanical Corporation was a wholly owned subsidiary of Laburnum Construction Corporation and that it was merely a means of doing and carrying on a part of Laburnum Construction's business, that Virginia Mechanical Company did not work on any jobs that were not Laburnum Construction Company jobs. It is settled in the law that one corporation may carry on its business through another corporation which is a separate and distinct entity. There was a recent case here in the United States Circuit Court of Appeals where that identical thing was done. One corporation organized another corporation to carry on a part of its business, and although they were two separate and distinct entities and kept separate sets of books, the Court held that the second corporation was merely carrying on the business of the other and therefore held that service on an officer of the second

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corporation was service on the other because they were all doing the same business and the second was organized for the purpose of carrying on a certain part of the business of the first.

All of this business was Laburnum's business. The subsidiary was organized solely for the purpose of carrying on a part of Laburnum.

If they want to introduce an exhibit or make page 2021  $\frac{1}{2}$  up one, in the first place it is not proper on rebuttal. It is not proper to come from our witness. If they want to claim that we couldn't claim these damages here which they claim ought to be claimed in the name of the Virginia Mechanical Corporation, it was a part of their main defense. We are on our rebuttal, and if they have anything after this it would be merely surrebuttal. They can't take one of our rebuttal witnesses and go into evidence which they should have produced in their case in chief. It is all Laburnum's business. Whether it was or not, at this stage of the case they can't bring it out either from our witness on rebuttal or in surrebuttal.

That is all I have to say.

Mr. Mullen: Is Laburnum liable for the debts of Virginia Mechanical Corporation?

Mr. Allen: Well, I don't think that question is pertinent, but in the case that I am talking about they held the parent corporation liable for the obligations of that subsidiary.

Mr. Mullen: You have to take the facts in each case. Mr. Bryan did not say that Virginia Mechanical Corporation did all its work for Laburnum. He said it did most of it, its principal work.

Mr. Allen: My recollection was—

Mr. Mullen: He said principal work. He said page 2022  $\frac{1}{2}$  mainly contracts.

Mr. Allen: My recollection is that he said that the Virginia Mechanical Corporation worked only on Laburnum jobs. That is the way he expressed it.

Mr. Mullen: Mainly.

Mr. Robertson: Call him in here and ask him. That is my recollection the same as yours, Mr. Allen.

The Court: I believe this matter can be taken care of when we argue instructions. The Court is of the opinion to overrule the objection and allow questions by the Defendants.

Mr. Robertson: Plaintiff excepts for the reasons stated.

Mr. Fred G. Pollard: There is one other thing that should be taken up at this time, we believe. Your Honor has directed

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that witnesses be excluded. The Plaintiff recognized that fact this morning when they called the Court's attention to the fact that Mr. Baird was sitting in the courtroom and asked him to leave. Mr. Baird has testified that he read Mr. Holt's testimony, and it seems to me that circumvents the Court's ruling that the witnesses should be excluded, and his testimony should be stricken for that reason.

Mr. Robertson: If Your Honor please, I never heard such an argument in my life. When you bring a highly technical expert witness to the stand you always have him read the testimony of the other experts to say wherein he  
page 2023 } agrees or wherein he differs. It is just common, ordinary practice. It is very largely the practice in Virginia to allow experts to stay in the courtroom. I didn't know Mr. Baird was in there this morning. I called it to the attention of the Court. He left before we had anything to say about any accounting questions. How could he say wherein he differs or wherein he agrees with Mr. Holt unless he knew what Mr. Holt had been talking about? It is not on the facts of the case. It is on the principles of accounting.

Mr. Mullen: You could have asked him when he was on the stand.

Mr. Robertson: Yes, I asked him on the stand and I am going to ask Coleman Andrews the same thing.

Mr. Allen: I never heard of a rule, Your Honor, that would prohibit a lawyer from talking to another witness whom he proposed to call in rebuttal and relating to him the testimony of the witness whom he expects to rebut. You couldn't have any rebuttal testimony if you couldn't do that.

Mr. Robertson: I would be greatly surprised if these gentlemen here haven't gone over this case very fully with Mr. Holt before they put him on the stand and let him read things and told him about all the testimony. Else how could he have come here and testified as he did. They were very remiss in their duty if they didn't do it. They were bound to have done it or he couldn't have testified.

Mr. Mullen: You are mistaken.

page 2024 } Mr. Robertson: You told him about it.

Mr. Mullen: Not a witness of ours read one line of testimony taken in this case.

Mr. Robertson: Neither have ours, except Baird and Coleman Andrews. I had them read it on purpose.

Mr. Mullen: No two witnesses of ours have ever been questioned by us in the presence of each other.

The Court: Gentlemen, I will overrule the objection.

*Hugh H. Baird, Jr.*

Mr. Fred G. Pollard: Note an exception.

page 2025 } (The following proceedings were had in open court.)

Mr. Fred G. Pollard: Mr. Robertson, did you hand the Jury a copy of Plaintiff's Exhibit No. 34?

Mr. Robertson: Is that the one which shows \$58,000?

Mr. Fred G. Pollard: Yes.

Mr. Robertson: Yes, I did.

By Mr. Fred G. Pollard:

Q. Mr. Baird, I hand you a copy of Plaintiff's Exhibit 34, which states, in part, "And Further Showing Job Profit or Loss of Laburnum Construction Corporation on Each Contract." (Document handed to witness.)

Is that a correct statement in the heading, that it is the job profit of Laburnum Construction Corporation on each contract?

A. You are referring, I take it, to the inclusion of profits of Virginia Mechanical, is that correct?

Q. That is correct.

A. It includes the profits of Virginia Mechanical Corporation.

Q. During the recess, have you filled in on this chart here what the gross profit of the Plaintiff, Laburnum Construction Corporation, is on those jobs, excluding that of Virginia Mechanical Corporation?

A. That is right.

Q. And you have also filled in what should be page 2026 } substantially the percentage of gross profit earned by Laburnum Corporation on those jobs?

A. That is correct.

(Chart shown to Mr. Robertson.)

Mr. Fred G. Pollard: I offer it in evidence, Your Honor, as Defendants' Exhibit No. 70.

Mr. Robertson: No objection, Your Honor.

The Court: There is no objection.

Mr. Fred G. Pollard: Which is entitled, "Laburnum Construction Corporation, Richmond, Virginia—Statement Showing Contracts with Pond Creek Pocahontas Company, Island Creek Coal Company, and various Associated Companies, and Further Showing Job Profit or Loss of Laburnum Construc-

*Hugh H. Baird, Jr.*

tion Corporation on each Contract," and state that this exhibit has been added to by the witness, Mr. Baird, showing the actual amounts of Labarnum Construction Corporation and its gross profit on those jobs after excluding the gross profit of Virginia Mechanical Corporation.

(The document referred to was marked Defendants' Exhibit No. 70 and received in evidence.)

By Mr. Fred G. Pollard:

Q. Mr. Baird, would you refer to Exhibit No. 33—

A. Thirty-three? I don't have that.

Q. Thirty-four—and refer on there to Job No. 322. It has been testified by Mr. Bryan that the Plaintiff's page 2027 } maximum fee under that contract was \$12,000.

A. That is correct.

Q. And that his profit or loss, which shows up in the analysis of gross profit and loss as a gross profit, was only \$10,232.48.

A. That is right.

Q. And that the reason for this \$10,000 figure being less than \$12,000 is that there were certain direct costs on that job for which the Plaintiff was not reimbursed.

Can you tell me whether or not the job costs on that job, No. 322, for which the Plaintiff was not reimbursable, took into consideration the direct job costs for which the Plaintiff was not reimbursable on Jobs 323, 326, and 340?

A. I couldn't answer that, simply because these jobs were operated as a group, and whatever non-reimbursable expenses they may have had out there on a job could hardly be broken down between the several jobs, so they were all charged together to the major job out there.

Q. Mr. Baird, Mr. Holt has testified that when you consider those four jobs together, the gross profit averages 3.9 per cent. You wouldn't dispute that, would you?

A. I wouldn't have any basis for disputing it. I haven't computed it.

Q. But it would simply be a matter of adding up the cost of doing the work on the four jobs, and the gross page 2028 } profit, and finding out the relation?

A. That is true.

Q. You understand, Mr. Baird, do you not, that the Plaintiffs did not complete their work on Job No. 322?

A. No, I didn't understand that. I understood he didn't complete the work on Job 340. I am not familiar with the status of Job 322.

*Hugh H. Baird, Jr.*

Q. Is it your understanding that on these four jobs, the basis of the contracts was cost-plus-5%?

A. It was a maximum of \$12,000 in the case of Job 322, that is right.

Q. The figures that you filled in as gross profit are simply the gross profit which the Plaintiff had on that job, percentage of gross profit?

A. That is right. You are speaking of the 4.76 in the case of those last three jobs?

Q. Yes.

I refer now to Plaintiff's Exhibit No. 33, which I hand you. (Document handed to witness.)

Mr. Fred G. Pollard: Mr. Robertson, this is a copy of Plaintiff's Exhibit No. 33. Have you any objections if I use it?

Mr. Robertson: No.

By Mr. Fred G. Pollard:

Q. Mr. Baird, the Plaintiff has claimed damage 2029  $\frac{1}{2}$  ages on work which it says it would have gotten, which Mr. Salvati said he would give Mr. Bryan, in the amount of \$542,500. Mr. Salvati has testified that this work amounted to \$617,500. There is a difference in the figures on which the Plaintiff claims damages and the list that Mr. Salvati gave, of \$75,000. Mr. Bryan testified that he took off \$50,000 because he built 25 of the 200 houses, and the other item to make up the \$75,000 is the damages which the Plaintiff says that it would have gotten if it had built the installation of the concrete foundation at Coal Plant No. 2. It claims a fee of \$1,250 on the 5 per cent basis, if that job had been done for \$25,000. It is listed on page 23, and it has been deleted from Mr. Bryan's claim for damages.

I refer to the Machine Shop, for which the estimated cost is \$60,000. There has been no testimony in this case that the machine shop was built. Is there any way you could determine what Mr. Bryan would have made on that job if he had taken it, in view of the fact that there is no testimony that the shop has been built?

A. I am afraid I don't follow your question. It is a mathematical certainty that if he took a \$60,000 job at cost-plus-5%, he would have a gross profit of \$3,000. More than that, I don't know.

Q. If the job had been built, you couldn't say that he would have gotten that, though, could you?

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page 2030 } A. No, I can't say that he would or would not  
have gotten this work. That is outside of my  
knowledge.

Q. What I am saying is, if there is no evidence that it has  
been built, you couldn't testify what profit he would have  
made on it?

A. I can testify that if he got \$542,000 worth of work at 5  
per cent gross profit, he would have made 5 per cent of the  
\$542,500. I can't testify that he would have gotten the work.

Mr. Robertson: Let him finish, please, before you inter-  
rupt.

Mr. Fred G. Pollard: I beg your pardon. Are you  
through?

The Witness: Yes.

By Mr. Fred G. Pollard:

Q. You say if he built the machine shop at \$60,000 on the  
basis of cost-plus-5%, he would have had a gross profit of  
\$3,000?

A. That is right.

Q. Is there any way you can estimate, from that \$3,000  
gross profit, what his net profit would have been, with any  
reasonable certainty?

A. I can estimate that it would be substantially \$3,000.  
There might be other non-reimbursable costs, such as in the  
case of Job 322, but the chances are they would be minor.

Q. But you don't know whether they would be  
page 2031 } minor. You don't know what those direct costs  
might be, do you?

A. No, I have no way of ascertaining them.

Q. You can't say, then, with any reasonable certainty what  
they would be.

A. I can say that he would have a gross profit of \$3,000,  
and based on past experience and on the fact that his adminis-  
trative costs were already covered by his earnings on past  
contracts and there is no reason to expect any substantial in-  
crease in them, that in all probability his net profit would be  
substantially \$3,000.

Q. You say that in spite of the fact that his previous work  
in Kentucky, from Mr. Holt's testimony, averaged a gross  
profit of only 3.9 per cent, which would be approximately  
\$2,300?

A. That is true, but your principal amount of non-reim-  
bursable costs are included in the first job, in the major job.

*T. Coleman Andrews.*

We have no reason to believe that any further non-reimbursable costs would come up. There might be. There is no way in the word for anyone to tell.

Q. So you can't tell with respect to that job whether or not there would be any reimbursable costs.

A. No, sir.

Q. Does the same apply to the warehouse at \$12,000?

A. Certainly.

page 2032 } Q. And the warehouse building at \$2,500?

A. Certainly.

Q. And to all of the rest of the jobs listed in Plaintiff's Exhibit No. 33?

A. Certainly.

Q. But if this work has not been done and you don't know what the cost was or what it would be, you of course could not determine even the gross profit, could you?

A. You can estimate your gross profit based on the terms of the contract. That is as far as you can go.

Q. How can you estimate the gross profit on buildings on which there is no evidence they were ever built?

A. You can estimate it by the terms of the contract.

Q. If they were never built, there is no contract, is there?

A. Whether or not there is a contract is something beside my knowledge of the affair. I understood that this matter was already decided on the amount of the prospective additional work. I don't see why I should be asked to testify to support that.

Q. Mr. Baird, you do all of the accounting work for the Plaintiff?

A. That is correct.

Q. Do you prepare its tax returns?

A. That is correct.

page 2033 } Q. Have you ever prepared a tax return for the State of Kentucky for the work that the Plaintiff did in Kentucky in 1948 and 1949?

Mr. Robertson: We think that is directly against the former rulings of the Court, Your Honor. Kentucky taxes are not involved in this damage suit.

Mr. Pollard: Your Honor's ruling was that we were not entitled to see the tax return. That is the only extent to which Your Honor has ruled.

The Court: What is the question?

Mr. Robertson: They are trying to do indirectly what the Court said they couldn't do indirectly.

*T. Coleman Andrews.*

The Court: Don't answer the question until I pass on it.

Mr. Pollard: What I am leading up to, I am going to ask this witness, if the Court will allow it, if the Plaintiff reported any income tax return in Kentucky, and if so what it was, because he had only four jobs in Kentucky and if he didn't report any taxes out there, then it means he didn't make any profit out there. I think we are entitled to show that to the jury, that he hasn't made any profit out there, if that is the case.

Mr. Robertson: If Your Honor please, that is exactly against the rulings of the Court in chambers time and again throughout the case, because what the tax situa-  
page 2034 } tion is in Kentucky nobody in this room knows so far as I am concerned, and it hasn't anything to do with it, any more than these figures have anything to do with the Virginia tax return or the federal tax return. That is an entirely different matter, and all sorts of entirely different matters come into tax returns.

The Court: The objection is sustained.

Mr. Pollard: Note an exception.

No further questions.

Mr. Robertson: Stand aside.

(Witness excused.)

Mr. Robertson: T. Coleman Andrews.

Do you want Mr. Baird to stay in or go out?

The Court: I reckon you had better let him go out.

(Mr. Baird left the courtroom.)

page 2035 } Whereupon

#### T. COLEMAN ANDREWS

a witness called in rebuttal for Plaintiff, having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION.

By Mr. Robertson:

Q. Mr. Andrews, your name is T. Coleman Andrews?

A. That is right, sir.

Q. Are you the senior partner of the accounting firm of T. Coleman Andrews & Company of Richmond and other places?

A. Richmond and Roanoke.

*T. Coleman Andrews.*

Q. Are you a certified public accountant?

A. Yes, sir.

Q. How long have you been a certified public accountant?

A. Since 1921.

Mr. Robertson: Unless anybody desires me to qualify this witness further, I offer him as a first-class certified public accountant.

The Court: Mr. Andrews, speak a little louder. I think the jury is having difficulty hearing you.

Mr. Mullen: We raise no question as to his qualifications.

By Mr. Robertson:

Q. Are you at this time president of the American Institute of Accountants?

page 2036 } A. Yes, sir.

Q. Mr. Andrews, at my request have you read the testimony which Mr. Holt gave in this case?

A. Yes, sir.

Q. Have you collaborated in your consideration of his testimony with Mr. Hugh Baird, who just testified?

A. Yes, sir.

Q. Have you before you a copy of Defendants' Exhibit No. 67, which is this one (showing document)?

A. I don't know what the number of it is. I have a statement which is similar in appearance to that. You better let me check it to see if they are the same.

This appears to be a duplicate of that Exhibit 67.

Q. If Virginia Mechanical Corporation is a wholly owned subsidiary of Laburnum Construction Corporation, through which agency Laburnum Construction Corporation does its plumbing and electrical work, do you think it is permissible accounting practice to consolidate the financial statements of those two companies if you want to?

A. In the matter of accounting of a wholly owned subsidiary of a corporation you do put the two together for accounting purposes usually.

Q. Have you analyzed Defendants' Exhibit No. 67 in the light of Mr. Holt's testimony regarding it?

A. Yes, sir.

Q. What do you think of it?

page 2037 } A. Well, that puts it rather bluntly. I disagree with Mr. Holt's analysis, and I disagree in this respect: As I get Mr. Holt's testimony it is in effect that if the ratio percentage of overhead—and I would like to

*T. Coleman Andrews.*

discuss overhead in relation to this question later—if that percentage of overhead remains constant, and if that percentage of overhead is in excess of the amount of fee added to work done, then no matter how much fee you add you would be losing more and more money. That is the understanding I get from his testimony. In other words, to reduce it to specific terms, I believe Mr. Holt figured that the overhead in this case was 6.63 per cent. I believe Mr. Baird said yesterday he had come to some other conclusion, some small difference. I think Mr. Holt figured, as I recall his testimony, there is a question of 5 per cent fees on work that this company did not do but might have done under certain circumstances. Mr. Holt testified that in as much as the overhead rate was 6.63, the company would have lost money even if it had gotten this business which it says it would have done under some circumstance or other.

I don't agree with that point of view. I say I don't agree with it. I think as a hypothesis perhaps that is a correct statement, but I think the hypothesis is wrong, seriously wrong.

In the first place, to grant that hypothesis page 2038 } would be to say that overhead moves up and down with the volume of business. That isn't true. The amount of business that a given volume of overhead will carry varies greatly. For instance, this morning I went back to a case that I had recently, and this occurred, to illustrate the point: In one year the volume of business rose 65 per cent. In that same year the overhead rose only 10 per cent. In other words, it is conceivable that a plant or a business can operate at 80 per cent of its capacity on the same overhead that it would cost it to operate at 40 per cent. So overhead is flexible in percentage while it is inflexible in amount. Therefore, to say that this situation here would have produced a loss, that is, this additional business that this company says it didn't get would have produced a loss, in my opinion is a wholly incorrect conclusion.

I think the principle that I have in mind and have explained here is very clearly illustrated by this Exhibit 67. For instance, in 1948 the company did \$3,875,000 worth of business on an overhead or administrative expense, whatever you are calling it here, of \$87,765, whereas in 1949 it did less than half of that amount of business and its overhead was still \$92,000. So I think it is perfectly obvious from this statement itself that this company might have taken on a very substantial amount of business above the \$1,643,000 that it

*T. Coleman Andrews.*

actually did according to this exhibit, without page 2039 } having increased its overhead at all, and it might conceivably have reached the point where its overhead ratio instead of being 6.63 would have been a great deal less than that, perhaps not over half of that figure.

In other words, it is a case of simple arithmetic. You have two factors in the calculation of a percentage relationship, and if one factor moves upward while the other remains constant, that is, if the amount that you are dividing into another amount moves upward, then your resulting percentage is going to move downward, for the simple reason that 50 divided into 100 gives you 2. If you increase the 50 to 100, 100 divided into 100 gives you 1. So as you move your factors your percentage is naturally affected.

That is the situation here as I see it.

I say, therefore, that I think that the conclusion drawn by Mr. Holt in his testimony is unrealistic. Perhaps it might be well to go on further with some further illustrations. Take a lawyer, for instance, or an accountant, they can probably double the volume of the business they handle through the office without increasing their overhead. The banks might do the same thing. They might not double the volume but they certainly wouldn't double their overhead. If they did, they wouldn't stay in the banking business very long.

I think another illustration, another thing we page 2040 } might use to illustrate the point is that as a matter of investments, banks vie with each other for a different one-eighth or a quarter of a per cent in interest. That doesn't mean if they make only a quarter of one per cent or a half of one per cent or one per cent on a loan, it doesn't mean that they are going to lose money because their overhead is 20 per cent. It doesn't add up that way. That isn't the mathematics of it. So it is perfectly possible in this situation for this company to have taken on additional business without increasing its overhead. In any event, no businessman should ever look at his overhead as being something that is inflexible as to ratio. Unhappily, it is inflexible as to amount and that is what has broken an awful lot of business in this country, and that is what every business man is doing, struggling to get enough gross profit to cover that overhead. There are a lot of cases on record where people apparently have sold goods for less than it cost them to produce them and still they made money, and the reason for that is that they sold them for more than the direct cost of production, thereby giving themselves a margin for over-

*T. Coleman Andrews.*

coming the overhead cost of the business and producing some profit.

Q. As I understand Mr. Holt's testimony, he said that general overhead, for instance, in the operation of Laburnum's home office for its activities generally should be allocated to the work in Breathitt County, Kentucky. Is that page 2041 } sound accounting principle and practice or not?

A. May I hear the question again, please?

(The pending question was read by the reporter. )

The Witness: In my opinion it is not sound and moreover it just isn't done. In a contracting business you figure up the direct costs of your job and you charge those to the job, and you figure up what the billing price is and you mill your customer with it. It would be somewhat difficult for any contractor to figure on how much overhead to add to a particular job when he doesn't know how much volume he is going to do. He knows he has to recover something over and above his direct costs, but he is in a competitive market. He can't recover any more than his competitors are going to let him recover. Therefore, he is going to have to get enough business so that the volume of dollars of profit is going to exceed the volume of dollars of his overhead. In this case here it would accomplish no purpose to add a part of overhead to the business done in Kentucky because if there is a gross profit in business that could be had, then that gross profit is going to add to the margin by which the total gross profit exceeds the amount of so-called overhead.

In other words, to put it more simply, the overhead is not affected by the amount of revenue involved in these so-called Kentucky jobs. If that money comes in, it is just that much more money to cover the overhead. If it doesn't page 2042 } come in, the overhead is going to be there anyhow. So the argument, it seems to me, is about the amount of gross profit involved in these jobs.

Q. Mr. Andrews, I refer you to Defendants' Exhibit No. 66. I don't know whether you have a copy of that or not.

A. I do not have (handed to witness).

Q. As I understand Mr. Holt's testimony, it was that if Laburnum had completed the first five items, I think it was, that Laburnum would have lost money because it was cost-plus 5 per cent, and the way he allocated the general overhead to the construction work was 6.67 per cent. Therefore, the more work he did, he would keep on losing 1.67 per cent and

*T. Coleman Andrews.*

therefore the quicker he got out of business and folded up the more money he would make. Is that sound accounting theory, I mean?

page 2043 } A. I think that it is rather an unsound theory for the simple reason that the overhead is going to be there anyhow, whether he does this business or whether he doesn't. If he does the business, he would be that much better off. If he doesn't, he would be that much worse off. The overhead does not depend upon his completing these jobs. He already has it. It is one of those things that is as inexorable as death and taxes. It is there, and you can't get away from it. If he finishes the business and makes whatever amount of fee or profit there is in that, he is that much better off. If he doesn't get it, he is that much worse off because the overhead is going to be the same anyhow.

Mr. Robertson: The witness is with you.

Mr. Pollard: No questions.

Mr. Robertson: Stand aside.

(Witness excused.)

Mr. Robertson: We rest.

Plaintiff rests.

Mr. Mullen: We may have an additional stipulation to offer.

Mr. Robertson: If we object to the admissibility of it, we will take it up with the Court.

Mr. Mullen: If Your Honor please, I notice it is about a quarter to one. We would like to confer a few minutes about whether there is anything else we want to do.

page 2044 } The Court: We will recess for five minutes.

(Brief recess.)

The Court: Let the record show that this stipulation is filed, and I will mark it filed.

Mr. Mullen: Defendants rests.

Defendant rests.

The Court: Sheriff, you may adjourn Court until Thursday morning at ten o'clock.

(Whereupon, at 12:45 o'clock p. m. the jury was excused until 10:00 o'clock a. m., Thursday, February 15, 1951, following which there was an unreported conference in chambers, at which it was agreed that the Court and counsel would meet at 10:00 o'clock a. m., Tuesday, February 13, 1951, to discuss instructions to the jury.)

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(End of Volume III.)

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Supreme Court of the United States

RECORDED HERE, 1912

No. 185

UNITED CONSTRUCTION WORKERS, AFFILIATED  
WITH UNITED MINE WORKERS OF AMERICA,  
ET AL., PETITIONERS,

LABURNUM CONSTRUCTION CORPORATION

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF APPEALS OF  
THE COMMONWEALTH OF VERMONT

RECORDED FOR THE COMMONWEALTH FILED JULY 12, 1912

RECORDED FOR THE COMMONWEALTH JANUARY 12, 1913

BLEED THROUGH

BLURRED COPY

## Vol. IV

page 2045 }

. . . . .

City Hall,  
Richmond, Virginia  
Tuesday, February 13, 1951

Met in chambers, pursuant to agreement, at 10:30 a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Willard P. Owens.

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### PROCEEDINGS.

(There was discussion off the record in the absence of the reporter. At 11:50 o'clock a. m. the reporter was summoned and the following proceedings were had:)

. . . . .

(Plaintiff's requested Instruction No. 2 follows:)

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of United Construction Workers, or District 50, or United Mine Workers of America without threats of violence or acts of violence against such men, or intimidation of such men by Hart and his men to induce such men to join United Construction Workers."

Mr. Pollard: Your Honor, I think if you are going to award this instruction certainly you ought to omit the words "by Hart and his men."

The Court: Mr. Dudley, this discussion relates to Plaintiff's Instruction No. 2.

Mr. Mullen: This is on the law, acts of violence against such men or intimidation of such men by any one.

The Court: Do you agree to that amendment, "by anyone"?

Mr. Allen: Where is that, Judge?

The Court: On next to the last line.

Mr. Allen: Yes, "by anyone."

The Court: You are asking for the union name to stay there?

Mr. Mullen: It should not carry any specific designation of parties.

Mr. Robertson: I say we are suing the three Defendants and that we have a right in our instructions to say that we had a right to work there and employ men who were not members of any one of the three Defendants. It is the whole theory of our case that Hart came there and said, "This is UCW, United Mine Workers, District 50 territory, and you have to join up or we are going to throw you out."

Mr. Allen: And he stuck up a UMW sign.

Mr. Robertson: Take those pickets there, the three pickets applied to the three Defendants consecutively.

Mr. Pollard: Your Honor, it seems to me that if it is going to be a statement of the law, it would be pure law just to have it read this way:

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, without threats of violence or acts of violence against such men, or intimidation of such men by anyone to induce such men to join any union."

Mr. Robertson: Your Honor, this submits the whole point of the instructions. Hart came out there and the burden of Hart's song was that, "This is United Construction Workers territory, District 50, United Mine Workers territory. Join up or we will throw you out." They have a right to an instruction to say, "If you don't believe he did anything like that, the plaintiff has no case," but based on our theory of the case, since the whole burden of their song is what I have said, we have a right to say the plaintiff had a right to come

here and employ and work men who were not members of any of those three defendants without threats or intimidation or violence.

The Court: I will leave the three defendants in. In the next to the last line "Hart and his men" is deleted and in lieu thereof "anyone" is inserted.

Mr. Allen: That discussion was with reference to Instruction No. 2 offered by the plaintiff.

Mr. Pollard: Colonel, will you state your exception?

Colonel Harris: I don't know how you word your exceptions.

Mr. Pollard: No particular wording. Just say we except for the following reasons.

page 2049 } Colonel Harris: All right.

Mr. Lowden: Before he states his exceptions, I don't think I understand yet how it reads. How does the last—

The Court: You strike out "Hart and his men" in next to the last line and insert "anyone" in lieu thereof.

Mr. Lowden: "Intimidation of such men by anyone," and is that where it ends?

The Court: " \* \* \* anyone to induce such men to join United Construction Workers."

Colonel Harris: In No. 2 we except to Your Honor's ruling for the reason that the instruction is confusing; second, for the reason that the instruction is not hypothesized on the evidence; third, the instruction as worded implies and assumes that threats of violence or acts of violence or intimidation were made; fourth, that the United Mine Workers should not be included in that under the undisputed evidence in the case; and fifth, that the United Mine Workers are put in for purposes of prejudice.

Is there any additional ground that you all want to put in?

And on the additional ground that there is no question in this case whatsoever as to the right of the plaintiff to employ anybody, and that it is not a question of the violation of the rights of the men. That is all.

page 2050 } (Plaintiff's Instruction No. 1 follows:)

"The Court instructs the jury it is unlawful to coerce, threaten or intimidate employees and thereby interrupt or destroy an employer's business. The law affords no protection for 'striking' or 'picketing' carried on by means of coercion, threats or intimidation."

Mr. Allen: What did you decide about No. 1, Your Honor?

The Court: You are going to rewrite No. 1 and quote the statute.

Mr. Allen: That is right.

Mr. Pollard: That statute is Section 336.130, Kentucky Revised Statutes 1948.

Mr. Allen: I have that.

Mr. Pollard: I just did that to put it in the record, Mr. Allen.

(Plaintiff's requested Instruction No. 3 follows:)

"The Court instructs the jury that United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America."

The Court: We will take up Plaintiff's Instruction No. 3. Is there any objection to that instruction?

Colonel Harris: That isn't a true and complete statement of the situation. In their Notice of Motion for page 2051 } Judgment they put it "United Construction Workers affiliated with," and United Construction Workers the way they have it there, all that element of the case is left out. Also on the additional ground that any question of the constitution of the union is omitted there.

Mr. Mullen: And they are separate organizations operating under separate rules.

Colonel Harris: And separate charters.

Mr. Robertson: If Your Honor please, we are not bound by any particular form of words so far as we state in the direct proposition. They have admitted time and time again in different words these facts. They have admitted it once in their grounds of defense. They have admitted it I think in their answer to interrogatories. They have admitted it in these pre-trial conferences. They have admitted in substance and in fact just what I have said there. They have said that United Construction Workers is a division or United Construction Workers is a Division of District 50; and District 50 they have used both ways—they have said it is a constitutional district under Section 20 of the Constitution of the International Union, and they have said it is a provisional district. The case is just shot through with it from beginning to end, and that is a correct statement.

Mr. Allen: If Your Honor please, they have given us the correct terminology in their answer to Question page 2052 } No. 1 of Interrogatories (2) addressed to the United Construction Workers. They say here:

"United Construction affiliated with the United Mine Work-

ers of America (properly stated United Construction Workers Division of District 50, United Mine Workers of America)." They say that is the way to state it. Properly stated, it is United Construction Workers Division of District 50, United Mine Workers of America.

Mr. Mullen: Affiliated with.

Mr. Allen: You refer to affiliated and then you come down and say the proper way to state it.

Colonel Harris: We object to any consideration of the interrogatories. We object on the additional ground that they are basing their charge on our answer to the interrogatory, when the answers to the interrogatories were not properly introduced in evidence and are not properly before the Court to be considered by the Court in framing any instruction to the jury. And all the grounds that we stated in the argument to Your Honor about the proper method of introducing interrogatories as made by Mr. Mullen, as I recall, and that the statutes of Virginia and the customary procedure and decisions of Virginia are such that when you introduce interrogatories you must introduce all of them, introduce them as a whole, and the plaintiff has not done it in this case.

Mr. Allen: I take it, Your Honor, that Defendant's Exhibit 65 would certainly settle the question, which is the Charter granted by the United Mine Workers of America to the United Construction Workers, which reads: "To constitute a local union to be known as UCWD, District 50." And the charter is headed "United Construction Workers Division shall constitute a local union to be known as UCWD, District No. 50, for the purpose of effecting thorough organization of the workers in this industry."

Mr. Robertson: Let me follow that up with this: If Your Honor please, in the grounds of defense of all the defendants signed by them jointly and severally, paragraph 12 reads this way:

"With respect to the unnumbered paragraph beginning on page 14 the defendants admit that William O. Hart, David Hunter, and Thomas Ranev were agents of United Construction Workers and of District 50."

They call them that themselves in their own grounds of defense. What I have stated here is the fact, only I have stated it more accurately than they stated it in there because they have referred to it, for instance, "were the agents of United Construction Workers and of District 50," and nothing more to it at all. But when they have come along in their

interrogatories in places they have said that the United Construction Workers is a division of District 50, and therefore to make it more accurate we said: "The Court page 2054 } instructs the jury that the United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America."

I say it is correct as submitted and conforms to what they themselves have said in their own grounds of defense.

Colonel Harris: In reply to that, that stated that men were agents of two separate organizations. It didn't state the fact that they being agents for both of them made the both one. As I understood him to read it, it is a question of agency that he read.

Mr. Robertson: If Your Honor please, I don't see how these gentlemen here at this eleventh hour of this trial can now come in here and deny that United Construction Workers is a division of District 50 and that District 50 is a district of the United Mine Workers. The whole record is shot through with it. You take these pre-trial conferences and it appears scores of times.

Mr. Mullen: I think you have missed the entire point that I made.

Mr. Robertson: I didn't hear your point.

Mr. Mullen: My point was that this was not comprehensive, that it should also show that they were operating under the separate rules of each organization and under charters granted to each, District 50 and United Construction Workers.

page 2055 } Mr. Robertson: I don't agree with that at all. I say this is a fact based on their admissions both in their grounds of defense and in their answers to interrogatories, and which they have stated over and over and over again in these trial conferences, and I am entitled to it as it is put forward there because it is a fact, a fact of record in this case.

Mr. Pollard: Your Honor, may I make a correction in what Mr. Robertson read to you from our grounds of defense. He read that we admitted that Thomas Raney was an agent, and paragraph 12 of our first defense correctly reads "With respect to the unnumbered paragraph beginning on page 14 Defendants admit that William O. Hart, David Hunter, and Thomas Davis were agents of United Construction Workers of District 50," and Thomas Raney—

Mr. Robertson: I am not talking about Thomas Raney or David Hunter.

The Court: I think you did say Thomas Raney.

Mr. Robertson: I read it wrong, then. I am not talking about those two men. I am talking about the fact that they said there that United Construction Workers is part of District 50 and that District 50 is a part of the United Mine Workers.

Mr. Mullen: An isolated statement of fact taken out of its context is not the proper instruction.

Mr. Robertson: Mr. Mullen, I don't believe page 2056 } for one minute you will deny—and if you do, if you will take the time I can refresh your memory—that you have admitted here countless times that United Construction Workers is a division of District 50 and that District 50 is a district of the United Mine Workers.

Mr. Mullen: I have said that repeatedly, Mr. Robertson.

Mr. Robertson: Then I am entitled to this instruction.

Mr. Mullen: I also cited the charter under which autonomy was given to District 50 and that they are operating under separate rules and each with its own responsible organization.

Mr. Robertson: Of course you have injected something new there. We claim it doesn't have autonomy because we have shown by the uncontradicted evidence here that John L. Lewis has the right to call the top officers of District 50, and that denies autonomy. This doesn't go into autonomy.

Mr. Mullen: He hasn't done that. That is absolutely contradicted.

Colonel Harris: Even if he has the right to appoint officers, that doesn't deprive them of the constitution and the method of conducting districts in all other particulars, page 2057 } if the Court pleases.

Mr. Allen: We had a big argument on that. That is not involved in this.

Mr. Pollard: The situation here is this, Your Honor: This instruction is a statement which tends to show agency as given, but there are many other factors which come into the question of agency, and this statement by itself would mislead the jury.

Mr. Robertson: There is nothing in there about agency, Your Honor. It states a fact which they have admitted of record and which we are entitled to set forth to the jury. I am going to read that to the jury, and our argument is going to be, as we have an instruction here later on, that they admit that Hart was the agency of United Construction Workers and they admit that Hart was the agent of District 50. Therefore, if he did the unlawful acts within the scope of his agency, they are hooked and the only question left is whether or not the United Mine Workers is hooked. But we can't put it all out in one instruction.

The Court: The Court will grant Instruction No. 3 as offered.

Colonel Harris: The Defendants reserve an exception to the ruling of the Court, and the grounds of the exception say, first, that the instruction is not full enough; second, that the instruction does not hypothesize the necessary  
page 2058 } facts already in evidence; third, that the instruction would mislead the jury on the question of agency and leaves out various and sundry factors which enter into and must be considered in determining the question of agency.

Is there anything you want to add?

Mr. Pollard: No.

The Court: We will recess for the next few minutes.

(Brief recess.)

Colonel Harris: If the Court please, I would like to add as an additional ground of our exception to Instruction No. 3 that it does not sufficiently take into account the fact that the United Mine Workers of America has a separate constitution which is its organic law and that District 50 and the United Construction Workers have their own separate charters, rules, and regulations.

The Court: Now, gentlemen, we may proceed to Plaintiff's Instruction No. 4.

(Plaintiff's requested Instruction No. 4 follows:)

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with  
third persons.

page 2059 } "It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were then also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them.

"A person acts within the scope of his agency when he is engaged in doing for his principal either the acts consciously and specifically directed, or any other act which is fairly and reasonably regarded as incidental to the work specifically directed, or which is usually done in connection with such work. If in doing such an act the agent acts wrongfully, the wrongful act is nevertheless within the scope of his agency.

"The scope of the agency is to be determined not only by what the principal actually knew of the acts of his agent within his agency, but also by what, in the exercise of ordinary care and prudence, the principal should have known the agent was doing."

The Court: Do you gentlemen have objections to Instruction No. 4?

page 2060 } Mr. Pollard: Yes, sir. Judge, I guess the only way to do this is to take it up sentence by sentence.

Our objection to the first sentence is to "and it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

We think that a union should only be responsible for the acts of its agents which it has authorized, instructed or ratified.

Colonel Harris: Let's look at our instruction, Fred, which covers it more accurately than that, I think.

Mr. Pollard: It is No. 7.

Colonel Harris: No. 7 is our conception of the law.

Mr. Robertson: Are you going ahead on your discussion of the whole instruction?

Mr. Pollard: Yes. Colonel, will you pick it up while I look at something here.

Colonel Harris: The point that Mr. Pollard made is that it is not the full and correct statement of the law as we conceive it to be. It is undisputed in this case that they began to ship coal outside of Virginia before the acts complained of, and we submit that the Norris-LaGuardia Act is a part of the law of Kentucky, and that under the language of that, "None of the defendants can be held responsible or liable for any unlawful acts of individual officers, members, or  
page 2061 } acts, except on clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof."

We think that is a more accurate statement than the first and second sentence of the first paragraph of No. 4.

He says it is admitted that William O. Hart and David

Hunter were agents of United Construction Workers and of District 50, and I was under the impression—I may be entirely wrong—that they were agents of the United Construction Workers and any evidence of agency for both is evidence that is in the case from the use of the answers to their interrogatories, which answers have not been made a part of the evidence of the case in accordance with our contention as to what the law of Virginia requires.

The next sentence says it is for the jury to say whether they were also agents for United Mine Workers of America. The undisputed testimony of Mr. Tom Raney is that he had no authority to give any orders to anybody connected with the United Construction Workers.

Then the last clause of that paragraph is subject to the same objection as to scope of their authority or scope of their agency, which is a new way of expressing it. The decisions that I have run across always say “within the scope of their authority,” and he has modified it and changed page 2062 } it to “scope of their agency.”

Then the last paragraph on that page is subject to the same criticism, that it does not follow the principles enunciated in the Norris-LaGuardia Act and is not a correct statement of the liability of the defendant associations in this case.

The last paragraph adds a novel matter on questions of agency, the very last clause, “but also by what, in the exercise of ordinary care and prudence, the principal should have known the agent was doing.”

As applied to a principal and agent, that seems to me to be an enlargement of the law and particularly an enlargement of the law as stated in the Norris-LaGuardia Act. That paragraph is also subject to the criticism that it uses the phrase “within his agency,” which does not have a recognized and commonly accepted meaning within the law.

page 2065 }

Mr. Robertson: If Your Honor please, coming to the first point about trying to bring in the LaGuardia Act and the National Labor Relations Act and those things at this stage of this trial, you remember that those last defenses were interposed here apparently as an after-thought and filed on Janu-

ary 12. At that time the Court deferred its ruling as to whether or not it would permit them to be interposed as defenses. The Court has not yet ruled on that.

Mr. Mullen: I beg your pardon. The Court has an order allowing us to do it.

Mr. Robertson: But not saying whether you could rely on them.

Mr. Pollard: Excuse me for interrupting you, Mr. Robertson, but the Court said that they are in the same class as all the other defenses we have filed.

The Court: I haven't passed on whether you can rely on any of your defenses.

Mr. Robertson: The Court knows what he has page 2066 } ruled on. I say my recollection is that the Court has not ruled whether or not it will permit you to rely on those defenses. If I am wrong, the Court knows it. I think I am right in that particular.

If Your Honor please, take the opening sentence of this instruction:

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

Before I get to that, however, it has been admitted here countless, numberless times, and they have said it in one of their instructions, that this case is governed by the substantive law of Kentucky and the procedural law of Virginia. I am coming back in a few moments to the LaGuardia Act and the other federal statutes. The LaGuardia Act is not a part of the substantive law of Kentucky, and the Taft-Hartly Act and the Wagner Act and the Mann Act are not a part of the substantive law of Kentucky. It has been held in countless union cases and cases of unincorporated associations that they act just as a corporation does, only through their officers and agents. We have a Kentucky case here that says that unincorporated associations can act only through its officers and agents. I speak subject to correction, but I think that is said in the case where the United Mine Workers and page 2067 } John L. Lewis were fined. There was a long discussion of it in there, as I remember it.

"And it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

That is exactly the law. It is the law of Kentucky. While

we are on that phase of it, Your Honor, which is covered in our trial brief, and Mr. Moore is prepared to discuss it, under the law of Kentucky if a principal knows of the acts of his agent and acquiesces in the actions of his agent and fails to repudiate the acts of his agent and accepts the benefits of the agents' acts, then he is liable for the acts of his agents.

There is no use going into the whole thing. I am not trying to cover the entire field here, but I was perfectly amazed at the testimony of Tom Raney, who was put on by them as their witness, who testified that he is a member of the International Executive Board, appointed by John L. Lewis, who can be fired if John L. Lewis chooses to fire him, responsible to John L. Lewis, taking his orders from John L. Lewis. We have here abundant testimony of this pattern of behaviour throughout Eastern Kentucky over a long period of time. We have Tom Raney and David Hunter in this little dinky town up in Kentucky with a three-story little half-rate office building, and their offices are side by side. We have the pattern of behaviour out there which is bound to have come to the knowledge of Tom Raney as a member of the International Executive Board and as accountable to John L. Lewis. That is a matter of circumstantial evidence, the very existence of those facts.

Then what amazed me was when Raney got on the stand and said, "Yes, I help Hunter whenever he asked me to help him to organize the unorganized. I helped him whenever he asked me to, and on at least one occasion I told him to do something."

Mr. Mullen: He never said that.

Mr. Robertson: I hadn't finished, please. I speak subject to correction as long as I am not reading the page. My recollection is, and I know I am right on this, that he talked about those times he went to Frankfort, Kentucky, Lexington, Kentucky, Hazard, Kentucky, and I think there were one or two other places in Kentucky, to give them a push here and a pull there, and I think I am correct when I make the statement that he said at one time he asked Hunter to do something for him or with him, and I made the analogy there that "If John L. Lewis asked you to do something, wouldn't you regard it as a nice way of expressing an order? Then I think it will recall back to Your Honor's memory when I said, "All right, who had the more important position, you or David Hunter?" and he said "I did."

page 2069 } Then, "If you asked David Hunter to do something, wouldn't that be in effect a courteous way of giving David Hunter an order?"

Now you come down to the Coronado case. We are prepared to discuss this in more detail hereafter. The Coronado case has nothing whatsoever to do with this case. The Coronado case has nothing to do with the substantive law of Kentucky. The Coronado case was construing a federal statute. The issues were entirely different. It was under federal law, where there is no federal common law. It was 25 or 30 years ago, and every one in this room knows that the law of labor disturbances and the tort law of every state in this Union today in cases of this kind is different from what it was 25 years ago. So we have no difficulty at all on the Coronado case. We say that opening sentence is exactly correct.

Now we come to the next sentence: "An agent is one who by the authority"—

The Court: Before you go to the next sentence, Mr. Robertson, you said you had a Kentucky case backing up the statement in the first sentence of this instruction?

Mr. Robertson: I think you have that there, haven't you, Mr. Moore?

Mr. Moore: It is speaking of corporations. It concerns a Kentucky law showing not only is the principal  
page 2070 } liable for compensatory damages but also punitive damages whether or not he ratifies the act of the agent.

Colonel Harris: What case are you talking about, please, sir?

Mr. Moore: It is on page 21 of our trial brief.

Colonel Harris: I haven't got a copy of that trial brief.

Mr. Mullen: Here it is.

Mr. Moore: On page 21 this case of *Smith's Admix v. Middleton*, 112 Ky. 588, 66 S. W. 388, contains the general reasoning of the Kentucky Court on this question of authorization and if it is all right with Your Honor I would like to read and quote the pertinent part where it is stated in that case.

The Court: Where are you reading now, Mr. Moore?

Mr. Moore: Right here at the bottom. Part of it may be unnecessary but we will quickly get into the part that is.

"It is argued that punitive damages are awarded, in one sentence, as a punishment of the wrongdoer for his negligence, only the one actually guilty should be so punished. It is admitted that a contrary rule exists in this state where the master is a corporation. It is said that in such a case the master can act only by its servants; that from the  
page 2071 } necessity of the case the servant, when acting for his employer in the discharge of his duty, is the

master, so far as the act in question is concerned. We are asked to differentiate the liabilities of these two different classes of employers. Why a different rule of liability should be applied to one who is compelled to operate his business by servants, to that apply to one who elects to do so, is not shown, nor are we able to perceive. There seems to have been at one time much contrariety of opinion among the courts on this point, which has later become less marked. In this state we never recognized the distinction now sought to be drawn. The doctrine to us would seem to be unsound, if not pernicious. It would imply that, with respect to all the grossly neglectful acts or intentional acts of the servant in the proposed furtherance of the master's business the law clothed the master with immunity, if the act was right, because it was right, and, if it was wrong, it clothed him with a like immunity because it was wrong. He would thus get the benefit of all his servants' acts done for him, whether right or wrong, and escape the burden of all intentional or grossly neglectful acts done for him which were wrong. Under the operation of such a rule, it would always be safer for the master to conduct his business vicariously than in his own person. The public are invited to deal with the servant concerning his master's business. Through him only can the business be transacted, if the page 2072 } master so wills. Then for his intentional or grossly neglectful act done within the scope of his employment the one dealing with him would be left without a remedy. This would be an inducement to one engaged in a specifically hazardous business conducted by means of financially irresponsible agents, because if they should succeed in the business the master would get all the profits, while, by their gross negligence or willful act injury resulted to another, the master and his business would not be hurt, so far as direct punishment was involved."

I think that is adequate for the point Mr. Robertson is making.

Mr. Pollard: What type of tort was involved in that case, Mr. Moore?

Mr. Moore: The decedent was killed by an error of defendant's drug clerk in selling morphine for calomel and placing it in a box labeled "calomel 1/4 grain."

Mr. Pollard: That was not a willful tort.

Mr. Moore: In Kentucky gross negligence is the same as a willful tort, and it makes the principal liable for punitive damages. That was such gross negligence that punitive damages were allowed.

Mr. Allen: Did you read from *Memphis and C. Packet Co. v. Nagel*, 97 Ky. 29 Southwestern?

Mr. Moore: Go ahead and read it if you have page 2073 } it there.

Mr. Allen: *Memphis and C. Packet Co. v. Nagel*, 97 Ky. 29 S. W. 743. The court there said:

"Appellant contends, further, that exemplary damages should not be awarded against a corporation for the acts of its servants unless it expressly authorized the act as it was performed or afterwards ratified it, or was negligent in employing its servant or retaining him in its employ; and for this he quotes Mr. Sedgwick on Damages (volume 1, Section 380.) True, the learned author says such a rule obtains in many jurisdictions. Fortunately, it has never obtained in Kentucky and we are not now so impressed with its soundness or authority as to undertake to ingraft it on our jurisprudence. Of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated. The later and better rule seems to be that corporations are liable for the acts of their servants committed within the scope of their employment, as by the master of a steamboat or the conductor of a railway with reference to their passengers. This rule has often been applied in Kentucky."

Then referring to another Kentucky case, *Grant* against *Taylor*, 4 S. E. (2d) 741, 1938, the Court said:

"And a corporation, as well as a natural person, may be held liable in punitive damages for injuries in-  
page 2074 } flicted by the tortious acts of employees com-  
mitted within the scope of their authority."

Then there are Kentucky cases exactly to the same effect.

Then follows the Middleton case that Mr. Moore read from.

I have read all of these Kentucky cases myself personally and have analyzed them and I have copied some of the instructions from those cases that were given and have them appended hereto. If I can read and understand the English language, the Kentucky law is if a corporation or labor union or a private person acts as agent and that agent doesn't act within the scope of his employment, it doesn't make any difference about what sort of manner he uses or how far he steps aside or how violent he gets or anything of the kind, if the agent personally would be liable, then his principal is liable. That is the law of Kentucky as I understand it, and it is the law of a great many states. I was surprised to find

it so, not only as to statutory damages, but punitive as well.

Mention has been made here, if Your Honor please, of the Norris-LaGuardia Act and the constitution of the United States and what-not. Before I embark upon a discussion of the Constitution which we expect to make that none of those

federal laws have anything to do with this case, page 2075 } that none of them can be pleaded here as a de-

fense in any way, shape or form, I do want to refer to the fact that the clause cited from the Norris-LaGuardia Act that labor unions are not responsible unless the acts were specifically authorized or expressly ratified, has been amended by the Labor Relations Act of 1947, which is commonly known as the Taft-Hartley Act, and that provides—

Mr. Moore: In Section 2.

Mr. Allen: —provides, “in determining whether any person is acting as an agent of another person as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

I cite that just to show that the law cited by my friend over there wasn't brought down to date. But our contention is that none of those acts have anything to do with this case.

The Notice of Motion doesn't refer to any of those acts in any way, shape or form. The Notice of Motion simply sets forth, as my friend, Mr. Robertson, would express it, the ordinary garden variety of simple torts, except in respect to the aggravated nature of the tort. The only case that I have been able to find where the notice of motion contained the allegation that this notice of motion contained and the De-

fendants tried to bring the case under the federal law is a case decided by the United States

District Court in Massachusetts, *H. N. Thayer Co. v. Binnall, et al.*, 82 Fed. Supp. 566. I will read you the facts in that case. I have my memorandum from it, and I have the book itself here if anybody wants to see it.

“The bills of complaint allege, in substance, that the plaintiffs have entered into collective bargaining contracts with the Thayer's Workers' Council and the H. N. Thayer's Workers' Council, as the collective bargaining representatives of the employees of the respective companies.”

The facts show that in this case contracts were entered into very similar to the types of contracts which were entered into here by Mr. Bryan and the American Federation of Labor and the Richmond City Trades Council.

"\* \* \* that these contracts are still in force and that the companies have no contracts with the aforesaid local union 154 \* \* \*"

We will say that is that local union over there of United Construction Workers, 788-A, I believe it was, wasn't it?

"\* \* \* it is alleged that local union 154 has injured the plaintiffs by calling a strike at their respective plants, by inducing employees of the plaintiffs to violate the existing contracts by engaging in the strike, and that this was done for the purpose of compelling plaintiffs to violate their contracts with the respective workers' councils \* \* \*"

The Richmond City Trades Council here.

"\* \* \* and to enter into contractual relations with local 154 \* \* \*"

Which is 778-A out there.

"\* \* \* which has not been certified by the National Labor Relations Board as bargaining representative of plaintiffs' employees."

This 778-A had not been certified as a bargaining agent for the United Construction Workers.

"It is further alleged that defendants, many of whom are not employees of plaintiffs, have engaged in large numbers in picketing, obstructing entrances to plaintiffs' plants, intimidating employees and others who wish to enter the plants, and have prevented trucks of public carriers from entering plaintiffs' premises."

Mind you, a lot of these people who were engaged in this picketing were not employees of the plaintiff or employees of the men at the plant, but were employees of someone else.

Let's see what the similarities are between the two cases. In the Laburnum case Mr. Bryan had a contract with the A. F. of L. to furnish A. F. of L. labor on all of his jobs. His contract was made with the local trades union here, affiliated with the A. F. of L. Mr. Bryan, so far as the evidence shows here, had not applied to the Labor Relations Board for certification of the bar-

gaining agent for his employees, and that was the same situation in this case.

In this case, representatives of the United Construction Workers came to the place where Laburnum Construction company had their job site in Breathitt County and tried to get the Laburnum workers to join the United Construction Workers with a view to forcing Mr. Bryan to bargain with representatives of the United Construction Workers. In the Thayer case No. 154 and their representatives appeared on the job and tried to organize plaintiff's employees with a view to eventually forcing the Thayer company to recognize them as the bargaining representative of their employees on the job. In both cases the outside unions were trying to make the plaintiffs' employees break their contracts with the plaintiff. In Mr. Bryan's case he had a contract to employ A. F. of L. labor. On this particular job I believe he had permission also to employ others who were not members of any union if he couldn't get A. F. of L. men there.

It is significant that in neither case had the plaintiffs' employees been certified as bargaining units by the National Labor Relations Board. In both cases the outside union representative employed violence, threatened and intimidated the plaintiffs' employees.

The judge comes on and gives the law and he page 2079 } refers to the National Labor Relations Act and any other labor law that is claimed to be applicable. Quoting now from the opinion: "Section 303(b) gives this court," that is the federal courts "jurisdiction over suits for damage to business or property resulting from violation of the secondary boycott \* \* \*"

A secondary boycott as described in that act means, a case like this, for instance: Take a grocery store that sells a lot of meat and they are having trouble there, and then they go to the manufacturer or the wholesaler who sells to that local man and tell him that "We are on strike down there, and if you don't stop selling to that man we are going to boycott your stuff." That is what they are talking about as a secondary boycott.

"\* \* \* and jurisdictional strike provisions of 303(a)—"

That simply means a question of two local unions fighting over which has jurisdiction of the particular plant, two local unions in the same big union.

"\* \* \* But the conduct of the defendants set forth in complaints here does not involve a secondary boycott or a juris-

ditional strike," and it does not here, "and is not such as to constitute a violation of section 303(a). It is true that it is alleged that local 154 and its members, the defendants, have engaged in a strike against the plaintiff-  
 page 2080 } employers here, and have encouraged others to do so, but this falls within the prohibition of the Act only when done for one of the objects enumerated in this section. There is nothing to indicate such a purpose here. Nothing appears to indicate any activity here for the objects listed in Section 303(a), and (3) and (4)."

Mr. Lowden, if you have the section there, you can read 303(a) (3) and (4) so we will see that none of the objects there are involved here in our case; if you haven't, I have it here.

Mr. Lowden: 303?

Mr. Allen: 303(a).

Mr. Lowden: It shall be unlawful for the purposes of this section only industrial activity affecting commerce for any labor organization to engage in or to induce or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process—"

Mr. Allen: Note that, to use, manufacture.

Mr. Lowden: "—transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is (1) forcing or requiring any employer or other self-employed person to join—"

Mr. Allen: Note, employer or self-employed person.

Mr. Lowden: "—to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employ unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) \* \* \*"

The rest of that is not applicable but we might as well finish it.

"—if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act."

Mr. Allen: The Court here says:

"There is nothing to indicate such a purpose. Nothing appears to indicate any activity here for the objects listed in Section 303(a) (3) and (4), but defendants contend that the complaints alleged unlawful activity for the objects named in 303(a), (1) and (2). But there is no allegation here of any attempt to require any employer or self-employed person to join any organization. And in so far as the activities of defendants have been directed toward the plaintiff-companies themselves, there is no indication of any purpose to require these companies to cease in any way from doing business with other persons \* \* \* The object of the strike is alleged to be to require bargaining with a labor organization not certified under the Act as the bargaining representative of the employees. But it is the plaintiff-companies themselves and not any other employer who would be forced to bargain with the uncertified union."

Continuing: "The defendants would violate the Act if they induced or encouraged employees of any employer other than the plaintiffs 'to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services' with the object of forcing such other employer to cease to do business with the plaintiffs or with the object

of forcing the plaintiffs' employers other than the employer of the employees thus induced to act to bargain with the uncertified union. But the complaint makes no allegation of an inducement or encouragement of a strike or of any concerted action by employees of any one except the plaintiffs. Defendants contend such an allegation can be found in the statement of the complaint of the defendants and their associates who are on the picket lines have refused to permit public carrier trucks that normally transport goods to and from the plants of these plaintiffs to enter upon the plaintiff's premises. This is too vague a statement to be construed as an allegation of encouragement or inducement to action by the employees of such carriers, much less as an effort to encourage concerted action on their part. In the light of its context, the statement amounts to no more than a specific allegation

page 2084 } of the general charge that the pickets have unlawfully interfered with free access to the plants.

"Plaintiffs in their complaints have nowhere expressly laid claim to any right or remedy given them by any federal law. They contend that their complaints are based solely on alleged unlawful interference with their contractual rates and the right to do business as given to them by the common law of Massachusetts, and that they ask only the remedy of injunction traditionally available to them under the equity courts of the courts of that state. A fair interpretation of their bills of complaint shows that that is the only cause of action which they purport to set forth. To construe these bills as stating a cause of action which plaintiffs may have under federal law, but which they have elected not to pursue, would be a tortured interpretation of them which I cannot adopt.

"Therefore, I conclude that the complaints do not state any cause of action based on the constitution or laws of the United States and, in particular, on the Labor-Management Relations Act of 1947. Diversity of citizenship being lacking, the case is not one over which this court has jurisdiction, and the cases are remanded to the court from which they were removed."

That case involved an injunction, and if that court could have found any authority whatsoever in the federal law upon the statement of facts and the facts as they appeared in the case, it would have had jurisdiction, but the federal court says under the complaint that all these people contend here is there that you, by unlawful picketing, by unlawful interference through picketing and violence and intimidation and that sort of thing, did these

page 2085 }

people a wrong. That is all I see in the case. "There is no federal law involved in it, and you go back to the state court and litigate that out."

That is exactly the situation that I see we have here. The federal law has nothing to do with this thing in any way, shape or form, and any rights which they may claim under it should not be permitted.

Your Honor, will I am sure, remember that when they filed their defenses we preserved our exception, preserved our objection. I remember stating then myself distinctly—I was sitting where Mr. Robertson is now—the objection and exception, and I think we all joined in it.

In addition to all of that, Your Honor, when they were called upon to state their grounds of defense, they stated them—

The Court: We will adjourn until 2:15. It is now after one o'clock.

(Whereupon, at 1:05 o'clock a. m. the conference was adjourned until 2:15 o'clock p. m. the same day.)

page 2086 } AFTERNOON SESSION.

2:15 p. m.

Mr. Allen: Your Honor, I had just about concluded what I had to say on that phase of the case. Of course, it was apparent that the discussion of the questions involved in the case that I read from came up upon a motion to remand the case from the federal court to the state court. The case was originally brought in a state court. Of course as every lawyer knows, when a case is removed from a state court to a federal court, and a motion is made to remand it, the federal court has to go by the cause of action as it is stated in the complaint. No federal questions that may be raised by answers or defenses would come up.

The point I was making was that in that case the judge dealt with all the offenses that could come up under the federal law in an act of this kind. The case on its facts was exactly like ours, and in dealing with the case from a factual standpoint the court decided that no federal question was involved.

The Sherman Act and the Norris-LaGuardia Act, too, I believe, had that provision about authorizing and ratifying the acts of an agent. I know the Norris-LaGuardia Act had it. The cases construing the Norris-LaGuardia Act hold that that

applies only in a federal court, and the Norris-LaGuardia Act expressly says so.

page 2087 } Now we come on to the amendment to the Labor Relations Act of 1947, referred to as the Taft-Hartley Act. It is provided there that agency shall be determined not alone by whether the act was authorized or ratified, and that applies to cases in both federal and state courts. However, our contention is first, last, and all the time that we have nothing but the simple ordinary state question here involved.

Now I turn to the discussion on that phase of the case over to Mr. Lowden.

Mr. Lowden: If Your Honor please, the question under discussion, as I understand it, is their responsibility for acts of their agents, and we are contending, and I think rightfully, that their responsibility is just the same as it is for a corporation, and that they are responsible for the acts of their agents done within the scope of their authority or employment.

If you reflect upon it for a moment, it is apparent that that is bound to be the rule. This defendant, United Mine Workers of America, has 440,000 members; it owns office buildings in Washington; it is a tremendous organization. Right on the face of it, it seems to me apparent that they are responsible just the same as anybody else. In Kentucky you will find the Kentucky court of appeals expresses that idea. I am not talking about agency, but in *Chapman v. Commonwealth*, 294 Kentucky, 631, 172 S. W. (2d) 228 (1934), page 2088 } the Court, after having finished its opinion, takes time out to lay down the law that labor unions in Kentucky are going to be treated just like everybody else and have no special privileges.

I am not going to go back and cover it again, but there was read this morning a part of the memorandum of authorities in the trial brief given on page 18 and the following pages with respect to the liability of corporations for acts of their agents. We submit that that liability is the same in Kentucky for unincorporated associations.

In 4 American Jurisprudence, page 483, the following general statement of the law is made:

"An association is liable for a tort committed by its servants or agents in the course of their service. Organizations called into being by the voluntary action of individuals forming them for their own advantage, convenience, or pleasure, being but aggregations of natural persons associated together by their free consent for the better accomplishment of their purposes are bound to the same care in the use of their prop-

erty and the conduct of their affairs to avoid injury to others as are natural persons, and a disregard or neglect of that duty involves a like liability."

In a recent Kentucky case, *Jackson v. International Union of Operating Engineers*, 211 S. W. (2d) 138 (1948), the court points out, in a case which involved the right to sue an unincorporated association in its own name, that Section 208 of the Kentucky constitution provides that "The word corporation as used in this constitution shall embrace joint-stock companies and associations."

They pointed out that Section 446.010 of Kentucky Revised Statutes provides:

"'Corporation' may be applied to any corporation, company, partnership, joint stock company or association."

Then they go on to say:

"We have just shown by reference to the Kentucky constitution and statute that there is authority to sue such concern as it is treated as a corporation."

This morning reference was made to the case of *Blandford v. Press Publishing Company*, 286 Kentucky 657, 151 S. W. (2d) 440. If I understood the statement correctly, the representation was made to the Court that that case holds, dealing with labor matters, that Kentucky applies the federal law. I say the case holds no such thing as that at all. The case does hold—and it is obviously correct—that the constitutional guarantee of free speech in the federal Constitution overrides any law of Kentucky. Nobody here denies that. They say that if the Supreme Court of the United States states that a certain act is an exercise of freedom of speech, their court would be bound by that, and I think everybody agrees to that. But there isn't a single word here that I see in the case that says anything about applying the federal law of agency in Kentucky just because someone is an unincorporated association.

They say that the Norris-LaGuardia Act's definition of agency should be applied, and I think that we ought to read to the Court what that statute really says. It is Section 6, which says:

"No officer or member of any association or organization,

and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in or actual authorization of such acts or ratification of such acts of actual knowledge thereof."

So, this statute is talking about what will happen in courts of the United States and has nothing whatever to do with the courts of Kentucky or the courts of Virginia or the courts of any other state, because "courts of the United States" in this statute refers to federal courts and the title of the act is "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes."

I think it is fundamental that the Congress of the United States hasn't got anything whatsoever to do  
page 2091 } with the jurisdiction of this court, which is fixed by the Constitution of Virginia and our Assembly, and they have no power to affect the jurisdiction of a state court.

So it is apparent right from the words of the statute and the decisions of the court that the Norris-LaGuardia Act has nothing whatsoever to do with the substantive law of Kentucky.

Even assuming that Kentucky should apply the federal rules of agency, I submit to you that the federal rules of agency at the present time are exactly what we are contending for, and I think you will find the most recent expression of that view is found in the Sunset Lines and Twine case recently decided by the National Labor Relations Board, which Mr. Moore will read.

Mr. Moore: The full name of this case is International Longshoremen's and Warehousemen's Union, CIO and Local 6 International Longshoremen's and Warehousemen's Union, Sonoma County Division and Sunset Lines Twine Company, 79 NLRB, Case No. 207, and was decided in 1948. In this case it was urged that the respondent unions by their officers and agents restrained and coerced employees of the company by intimidation of bodily harm and mass picketing. The union had struck because it alleged the company refused to bargain. The intimidation was against the employees who remained on the job. In holding the International Union responsible for the acts of the local agents the  
page 2092 } Board stated the following at page 1507:

"Therefore, the only question before us is whether or not

the conduct of these individuals (local agents) can properly be imputed to one or both of the respondent unions, for, unless the record justifies that imputation, there was no violation of the act in this case. In determining whether or not the evidence does afford a basis for holding the unions responsible for the episodes in question, the Board has clear statutory mandate to apply the 'ordinary law of agency.' For this purpose we are to treat labor organizations as legal entities, like corporations, which act and can only act, through their duly appointed agents, as distinguished from their individual members."

The Court: Are there any further observations, gentlemen?

Mr. Pollard: Yes, I would like to make some, Judge, if I may.

The Court: All right, sir.

Mr. Pollard: First, in the case cited by Mr. Allen, the Labor Relations Act in the section he cited, which I think was 301—was it, Mr. Allen?

Mr. Allen: 303.

Mr. Pollard: 303. —specifically sets up certain situations in which an employer may sue a union for damage page 2093 } ages. They have to fit those cases. I think there are four different situations. All the court did in that case was to say that the facts of this case were not one of the four cases in which the National Labor Relations Act permits an employer to sue a union. So that case has no bearing here.

Secondly, we are dealing here with an alleged willful tort. The Plaintiff has cited no case in Kentucky which lays down the rules of liability for acts of agents with respect to unions. They have cited no cases that deal with intentional torts in Kentucky. We have cited a case that deals with an intentional tort, the Newberry Case, a case of libel and slander, where ratification, authorization or participation was required in that type of tort.

Thirdly, in the notice of motion for judgment, on page 14 thereof, beginning 12 lines from the bottom, the plaintiff alleges as follows:

"The said United Mine Workers of America, said District 50, and said United Construction Workers, each jointly and severally ratified, approved, and confirmed and authorized the said acts of William O. Hart and his mob against the plaintiff in Breathitt County, Kentucky, for the purpose of willfully, maliciously and unlawfully attempting to destroy

plaintiff's business and to prevent plaintiff from further continuing lawfully to work within the State of Kentucky unless and until the plaintiff submitted to their demands to permit United Construction Workers to become the bargaining agent for plaintiff's employees."

That is an allegation that they have made in their Notice of Motion, and we submit that they are bound by it and have to prove it, and that that is what the instruction should be to the jury.

\* \* \* \* \*

page 2099 } Just to reiterate the four things that I mentioned, sir, they allege ratification, authorization, and participation in the Notice of Motion; they have cited no Kentucky cases dealing with the question of agency with respect to labor unions; they have cited no Kentucky cases dealing with an intentional tort, whereas the case we cite says that in the case of intentional tort, ratification, participation, and authorization is necessary. We rely on the Coronado case, which I have just read, which is certainly still the federal law and, we think, the law of Kentucky in the absence of any other showing.

Colonel Harris:

\* \* \* \* \*

page 2102 }

\* \* \* \* \*

The jurisdiction of the National Labor Relations Board doesn't enter into this case at all.

\* \* \* \* \*

Mr. Pollard: Your Honor, may I add just one thing. The rules of the Construction Workers, the rules of District 50, and the Constitution of the International Union all prohibit the calling of a strike until it has been approved by the respective unions. So the Supreme governing law of each union requires ratification. If the governing law of each union requires ratification, I don't see how we can enforce any other rule against them.

The Court: Does Colonel Harris have something else to

say? You were conferring and I didn't know whether you had something else to say or not, Colonel.

Colonel Harris: That was a part of the decision that I did not read, the Blandford case, in which this was said:

"However, on February 3, 1941, the Supreme Court of the United States in the case of the *United States v. Hultcheson*, held that the Norris-LaGuardia Act—"

Mr. Allen: What are you reading from?

Colonel Harris: I am reading from the Blandford case, the law of Kentucky.

"—held that the Norris-LaGuardia Act, 29 U. S. C. A. had 'removed the fetters upon trade union activities', a result allegedly sought to be accomplished by the Clayton Act and 'explicitly formulated the public policy of the United States in regard to the industrial conflict and by its light page 2106 } established that the allowable area of union activity was not to be restricted as it had been in the Duplex case, to an immediate employer-employee relationship.'"

They started off their case and said they were going to show a pattern. They haven't shown a pattern, and now they want this court to change the law of agency.

Mr. Robertson: If Your Honor please, I don't know how long you want to continue this. I don't think this last observation merits consideration. It is such a misstatement of facts that I won't dignify it by a reply to it.

We start out here with the *reiteration* time and again that the substantive law of Kentucky applies to this case, not the Norris-LaGuardia Act, not the Taft-Hartley Act, not the Clayton Act, not the Sherman Act, not anything but the garden variety law of Kentucky.

We have in our trial brief here—and Mr. Moore is prepared to answer it again, or if the court wants to take it home with him, he can read it again—that in Kentucky you do not have to have prior authorization, you do not have to have subsequent ratification. If you acquiesce in what is done and do not repudiate it and accept the benefits of it, you are bound by it as the act of agency. That has been repeatedly said. It is in the brief and I won't say anything more about it now.

The Coronado case is a federal case for a page 2107 } federal statute and construed by a federal court, and it has nothing to do with the garden variety

law of torts in Kentucky. The Coronado case does not apply in this case for those reasons. Both Mr. Allen and Mr. Lowden have read that case since I have, and they are prepared to argue that just as long as the court wants to hear them. I could argue it too, but I won't say anything more about that.

About a pattern, about no acts of violence, I won't dignify that. I assume that the Court remembers the testimony in this case and that when such unwarranted statements are made as have been made here that the Court was challenging them in his own mind.

It has been agreed that substantive law of Kentucky applies. It has been shown here that the Coronado case was construing a federal statute which says that it shall apply only in federal courts. We have shown a pattern here throughout Eastern Kentucky, and we have shown more than that by circumstantial evidence, and it is just an affront to your intelligence to say it has no weight. All three of these defendant unions are bound to have known what Hart and David Hunter and Tom Raney were doing. They acquiesced in it, and to this moment they have not repudiated it and to this moment take the benefits of the thing by having demonstrated their power in running us out of Kentucky.

I am going to ask that either Mr. Allen or Mr. Lowden speak, if the Court wants to hear any more. I don't know how much longer the Court wants to go.

The Court: Let's bring it to a close, although I want you to have a full opportunity to discuss the question.

Mr. Allen: If Your Honor please, the question of agency and the question of prior authorization and subsequent ratification are coming up at nearly every instruction that is going to be offered from now on by us and by them. It runs through them all. I think we might as well meet this question squarely and let everybody say everything that is to be said on it, and hereafter when the instructions come up, maybe we can just let Your Honor pass on them from the arguments you have heard. There isn't any use in repeating this argument on every instruction that involves the question of agency. We are now getting to ours. Every one of them involves that question.

I would like to give my respects to the Coronado case. I have studied the case carefully. I am going to confine myself in explaining the case largely to what the appeal itself says.

The opinion was rendered by Chief Justice Taft. I am reading from the facts now as he states them.

"The defendants in the Court below were the United Mine Workers of America and its officers, District 21 of the United Mine Workers of America, and its officers, 27 page 2109 } local unions in District No. 21 and their officers, and 65 individuals, most of them members of one union or another, but including some persons not members. All of them were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce in violation of the first and second sections of the Antitrust Act, and with having in the course of that conspiracy and for the purpose of consummating it, destroyed the plaintiff's property. Treble damages for this and attorneys' fees were asked under the 7th section of the Act. The trial resulted in a verdict of \$200,000 for plaintiffs, which was trebled by the court, and to which was added a counsel's fee of \$25,000 and interest in the amount of \$120,600 from July 17, 1914, to the date of destruction of the property, November 22, 1917, the date upon which the judgment was rendered. The verdict did not separate the damages," and so forth.

This was reversed as to interest but in other respects the judgment was affirmed by the United States Court of appeals.

So mind you now, the cause of action there was a conspiracy entered into by all of these parties to monopolize and restrain interstate commerce, and in the course of carrying out that conspiracy, destroyed the plaintiff's property.

"Of the nine companies of which the plaintiff was receiver and for which he was bringing the suit, five were page 2110 } operating companies engaged in mining coal and shipping it in interstate commerce. The defendant, the United Mine Workers of America, is alleged to be an unincorporated association of mine workers governed by a constitution, with a membership exceeding 400,000, subdivided into 30 districts and numerous local unions."

Right here let me remind you that it is divided into 31 districts now, but long after this suit, back in 1936 this district 50 was created, which we shall presently show is entirely different from other districts and actually all through, ever since its organization, has been acting as agent of the United Mine Workers in organizing these industries outside of the coal mines. We will pass that for the present.

"These subordinate districts and unions are subject to the constitution and by-laws not only of the International Union but also have constitutions of their own."

We are going to show you that their constitutions have been changed since that.

"The object of the conspiracy of the United Mine Workers and the union operators acting with them is the protection of the union-mined coal by the prevention and restraint of all interstate trade and competition in products of non-union mines. The complaint enumerates states in which coal mining is conducted and alleges that the coal mined in page 2111 } each comes into competition in interstate commerce directly or indirectly with that mined in Illinois, Kentucky, Alabama, New Mexico, Colorado, Kansas," and a number of other states there.

"But for the Defendants' unlawful interference, Plaintiffs would have engaged in the trade in 1914 in all those states.

"The plaintiff said that in April, 1914, the defendants and those acting in conjunction with them in furtherance of the general conspiracy already described to drive non-union coal out of interstate commerce and thus to protect union operators from non-union competition, drove and frightened away the plaintiff's employees, including those directly engaged in shipping coal to other states, prevented the plaintiff from employing other men, destroyed the structures and facilities of the mine, loading and shipping coal, and the cars of interstate carriers waiting to be loaded as well as those already loaded with coal in and for interstate shipment, and prevented plaintiffs from engaging in or continuing to engage in interstate commerce. The complaint alleges that the destruction to the property and business amounted to the sum of \$740,000, and asked judgment for three times that amount or \$2,220,000."

Your Honor knows that under the Antitrust Acts you treble the damages and also add attorneys' fees on top of that.

page 2112 } "Certain of the funds of the United Mine Workers in Arkansas were attached. The defendants, the United Mine Workers of America, District No. 21, and each local union and each individual defendant filed a separate answer. The answers deny all the averments of the complaint."

Coming on down to the questions, he said:

"The third is that there is no evidence to show any agency by the United Mine Workers of America in the conspiracy charge or in the actual destruction of the property, and no liability therefor.

"The fourth is that there is no evidence to show that the conspiracy alleged against District No. 21 and the other defendants was a conspiracy to restrain or monopolize interstate commerce."

Then they discuss those questions at some length.

"The next question is whether the International Union was shown by any substantial evidence to have initiated, participated, or ratified"—note the word "initiated"—"participated in, or ratified interference with Plaintiffs' business which began April 6, 1914, and continued at intervals until July 17 when the matter culminated in a battle and the destruction of the Bache-Denman properties. The strike was a local strike, declared by the president and officers of the district organization No. 21, embracing Arkansas, Oklahoma, and Texas. By Section 16 of the International Constitution, as we have seen, it could not thus engage in a strike if it involved all or a major part of its district members, without sanction of the International Board. There is nothing to show that the International Board ever authorized it, took any part in the preparation for it or in its maintenance. Nor did they or their organization ratify it by paying any of the expenses. It came exactly within the definition of a local strike in the constitutions of both the International and the district organizations. The district made the preparations and paid the bills. It does appear that the president of the National Body was in Kansas City and heard of the trouble which had taken place on April 6 at Prairie Creek, and that, at the meeting of the International Board, he reported something he had learned—"

Now he goes on dealing with a number of things that they heard about it. The question in my mind is whether that would be ratification under the Kentucky law, but I pass over that. Coming to the question directly in point:

"A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against a unincorporated organization like this . . . ."

"But it is said that the district was doing the work of the International in carrying out its policies, and this circumstance makes the former

agent. We can not agree to this in the face of the specific stipulation between them that in such a case unless the International expressly assumes responsibility, the district must meet it alone."

Now they are talking about the strike that was called and wasn't sanctioned. Up there they were talking about the business of the union that was being carried on. If the agent or the local union or whatever it was, was carrying on the business of the International Union, they would be liable on that theory.

"We conclude that the motion of the International Union, the United Mine Workers of America, and of its president and its other officers that the jury be directed to return a verdict for them should have been granted."

"The next question is two-fold: Whether District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their property, and whether they did these things in pursuance of a conspiracy to restrain and monopolize commerce."

They discussed interstate commerce at length, whether coal mining was interstate commerce and all that sort of thing.

page 2115 } "The evidence leaves no doubt that during the month of June there was a plan and a movement among the union miners to make an attack upon Prairie Creek Mine No. 4. On the date of the 16th the union miners' families who lived in Prairie Creek were warned by friends to leave that vicinity in order to avoid danger, and at four o'clock the next morning the attack was begun by the volley of many shots fired in the premises, and a large force with guns attacked the mining premises from all sides later on in the day. The overwhelming weight of the evidence establishes that this was purely a union attack under the guidance of District officers. It is a doubtful question whether this responsibility was not so clearly established that had that been the only element needed to justify a verdict, the court might properly have directed it. It is contended on behalf of District No. 21 and the local union that only local members of these bodies whom the evidence shows to have participated in the talks can be held similarly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and in view of our findings that District No. 21 and the unions

are suable we can not yield to the argument that it would be necessary to show the guilt of every member of District 21 and of each union in order to hold the union and the strike fund to answer. District No. 21 and the local unions were engaged in a work in which the strike was one of the chief instrumentalities for accomplishing the purpose for which their unions were organized. Thus the authority is put by all the members of the union, District No. 21, in their officers to order a strike, and if in the conduct of their strike unlawful injuries are afflicted the district organization is responsible, and the fund accumulated for strike purposes may be subjected to the payment of any judgment which is recoverable. It is necessary, however, in order to hold District No. 21 liable in this suit under the antitrust act to establish that this conspiracy to attack the Bache-Denman mines and to stop non-union employment there was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union."

He went on that interstate commerce was involved.

"The plaintiffs charge there is and has been a continuing operating conspiracy between the unions and the coal operators and the International Union to restrain interstate commerce in coal and to monopolize it and that the work of District No. 21 at Prairie Creek was a step in that conspiracy which it can be held liable under the antitrust act. Coal mining is not interstate, and the power of Congress does not extend to its regulation as such. Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it of course may affect it by reducing the amount of coal to be carried in that commerce. It is clear from these cases that if Congress deems certain recurring practices, though not really a part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan to restrain or monopolize interstate commerce. But in the latter case the intent to injure, obstruct, or restrain from interstate commerce must appear as an obvious consequence of what is to be done or to be shown by direct evidence or other circumstances.

"If unlawful means had been used by the national body to unionize mines whose product was important actually or potentially in affecting prices in interstate commerce, the evi-

dence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the anti-trust act. This principle is involved," and so forth. They go on off and cite other cases. Then, to wind up:

"And so in the case at bar, coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material, and substantial effect to restrain commerce in it that the intent reasonably must be inferred. page 2118 }

In the case at bar there is nothing in the circumstances of the declarations of the parties to indicate that Stewart, the President of District No. 21, or the secretary-treasurer or any of their accomplices had in mind interferences with interstate commerce or competition when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with non-union men \* \* \*.

"Stewart said, 'We are not going to let them dig coal, the scabs.' His intention and that of his men was fastened upon the present non-union men in the mines in that local community. The circumstance that a car loaded with coal and hilled to a town in Louisiana was burned by the conspirators has no significance upon this case. The car had been used in the battle by some of Bache's men for defence. It offered protection, and its burning was only a part of the general destruction.

"Nothing of this is recited to justify the slightest lawlessness or outrages committed, but only to point out that as it was a local strike within the meaning of the international and district constitutions, so it was in fact a local strike in its origin and motive, local in its waging and local in its *felious* and murderous ending. District No. 21 in Arkansas, Oklahoma, and Texas would become non-union," and so forth.

"The result of our consideration of the entire page 2119 } record is that there was no evidence submitted to the jury upon which they properly could find the outrages, felonies and murders of District 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The case has been prepared by counsel for the plaintiffs with rare assiduity and ability. The circumstances have been such as to cause regret that in our view of the federal jurisdiction we can not affirm the decision, but it is of far higher importance that we should preserve inviolate the fundamental limitations with respect to the federal jurisdiction."

So the case went off on a question of federal jurisdiction. It was decided on a question of federal jurisdiction, and the lack of federal jurisdiction was inherent in the charge that certain miners, certain labor unions, including the international union, joined in a conspiracy to obstruct and affect the interstate commerce. The case has nothing in the world to do with what we have here. It does apparently place labor unions on the basis of corporations and it does intimate clearly that it has been shown in that case that if District 21 was operating and carrying on the business or doing the business of the United Mine Workers, then there would be agency and there would be liability.

We contend that in this case there is ample page 2120 { evidence to show—and we are asking for an instruction on that theory, and that is why I am discussing it now—that this District 50 was an agency, was an arm, was an instrumentality of the international union in carrying on its business of organizing the unorganized outside of the mines. You start with Section 20 of the Constitution. Section of the Constitution of the United Mine Workers of America, which is in evidence here as—

The Court: Don't you think we had better discuss that when we get to that instruction? I am afraid we will go too far afield while we are discussing this instruction.

Mr. Allen: Just as Your Honor suggests.

The Court: Let's defer argument with reference to the constitutional matter until we get to the appropriate instruction.

Mr. Allen: All right. We are talking about the question of previous organization and ratification and agency, aside from what these written documents have to say on the question of agency. So I will leave that out of it.

There isn't any question about the fact that the Kentucky law is clearly laid down in the cases cited in the memorandum for trial filed by Mr. Moore, and I have an additional memorandum also. They lay down the doctrine clearly that if the acts were done within the scope of the employment or in the business of the company, and so forth, no express page 2121 { previous authorization is necessary and no ratification is necessary.

The Court: What about if it was a willful tort?

Mr. Allen: It doesn't make any difference if it is a willful tort. That is all illustrated by some half dozen cases that were brought against the Louisville & Nashville Railroad Company, in which the railroad company was sued for acts of the conductor of the railroad who committed a tort against a pas-

senger. If that tort was committed while he was on duty, so to speak, tending to duties assigned him, then the railroad company was liable not only for compensatory but for punitive damages. That theory, if Your Honor please, is not unusual. For instance, there was a recent case decided by the United States Court of Appeals where a taxi driver got into a fight with a man over the fare and beat him up, and they sued the taxi company and held the taxi company liable for beating just the very stuffing out of that man.

Mr. Robertson: They do it in bus cases all the time.

Mr. Allen: They do it in bus cases. Mr. Robertson knows that.

Mr. Robertson: His Honor knows it, too.

Mr. Allen: I do want to answer Mr. Pollard on one thing that he mentioned. Mr. Pollard referred to the page 2122  $\frac{1}{2}$  allegation in the complaint, that we went further than necessary to allege that there was ratification by these defendants, by the International Union. Mr. Moore has a memorandum on that, but the latest case on that subject is in 189 Virginia at page 200. It went up from Judge Lamb's court. In that case the plaintiff alleged in his notice of motion more than he was required to allege, and Judge Lamb held him to it. The Court of Appeals said, "No, if the attorney who drew the complaint alleged more than he was required to allege, all he is required to do is to prove what makes out a case."

Mr. Robertson: And I claim it is ratified under the law of Kentucky as set out in the trial brief.

Mr. Moore: That is on page 27 of our trial brief.

The Court: I don't think you need to discuss that.

Mr. Allen: All right, sir. I am done.

The Court: Let's go on to the next point in this instruction.

Mr. Robertson: All right, Your Honor. The next sentence: "An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons."

There certainly can't be any question about page 2123  $\frac{1}{2}$  that. It is admitted that William O. Hart and

David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case—"

I talked about that this morning and won't repeat it.

Mr. Pollard: Excuse me, Mr. Robertson. The way we were handling these instructions before the argument started on this question was that we were making our objections.

The Court: I believe you are right, Mr. Pollard.

Mr. Robertson: I said, go ahead. I quit. Mr. Allen has almost talked me into collapse, but I quit.

Mr. Pollard: George, read us another case, will you!

The Court: Go ahead, Mr. Pollard.

Mr. Pollard: Judge, in the second paragraph I think it would confuse the jury if we spelled out the full name each time, and if we limit it in each case where you want to mention one of the unions to say "United Construction Workers," "District 50," or "United Mine Workers," and keep it to those designations for the three unions.

The Court: Is there any objection to that?

Mr. Robertson: Yes, sir. We put it that way because that is the way they have insisted upon it heretofore, and that is the way it is.

Mr. Allen: They say that is the proper and page 2124 } correct designation.

Mr. Robertson: They have held us to account on that in their answers to interrogatories.

Mr. Pollard: We feel that the object of the plaintiff in wording the instruction that way is to give it an opportunity to repeat the words "United Mine Workers of America" in connection with each defendant in an effort to create prejudice and confuse the jury and to think there is more connection than they should think.

Mr. Lowden: That is the name of them, isn't it?

The Court: Let us let Mr. Pollard finish now.

Mr. Pollard: With respect to that one point that is all I have to say on it, sir.

The Court: Let's take the paragraph, if you don't mind, Mr. Pollard, or would you rather dispose of that point first?

Mr. Pollard: If we could dispose of that point that would free my thinking for the rest of the paragraph.

Mr. Robertson: If Your Honor please, we say that they have told us and we stand corrected, that they told us that that was the right way to do it. They have put it that way when they want to get the benefits of it, and we put it that way in the hope that they will get the burden of it, and we have a right to do it. They sing high and sing page 2125 } low, and they have to sing the same way both times.

The Court: I am of the opinion that this is the correct way to state it. Let us go to the next point.

Mr. Pollard: We except to that ruling.

The Court: What is your next point. Mr. Pollard?

Mr. Pollard: Then to take up the next of it, we need a ruling from Your Honor as to whether the statement there

is proper where it says "within the scope of their authority."

The Court: The Court rules that that statement is proper.

Colonel Harris: That is the first paragraph?

The Court: The first paragraph, yes.

Mr. Mullen: We note an exception.

Mr. Pollard: I wonder, to save time, since the reporter is taking everything down, could we make our exception merely by saying we except to your Honor's ruling for the reasons heretofore stated?

The Court: That is satisfactory to the Court.

Mr. Allen: Yes, I think that is proper.

Mr. Pollard: Then we except to Your Honor's ruling for the reasons heretofore stated.

To get back to the first paragraph, we want to make a further exception, and that is, Your Honor having ruled that the rule of *respondere superior* applies rather than the rule of authorization, participation, and ratification, page 2126 } we now think that the rule of *respondere superior* is incorrectly stated in the first paragraph and that the rule properly stated is as follows:

"*John v. Lococo*, 76 S. W. (2d) 897 (1934).

"If the assault of a servant of a third person is done in the execution of the authority given him by the master and for the purpose of performing what he was directed to do, the master is responsible whether the wrong done was occasioned by a wanton, willful purpose, or to accomplish his business in an unlawful manner, but, if the servant commits a wrongful act without authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor. \* \* \*"

Mr. Robertson: Are you going back to the first paragraph?

The Court: Yes, in view of the Court's ruling.

Mr. Pollard: That is the ruling laid down in Kentucky in the case of *John v. Lococo*, in 76 S. W. (2d) 897, and that is the way that rule is correctly stated. We think it is now erroneously stated as long as the Court has ruled that it is going to follow that doctrine of agency.

Mr. Robertson: That is just an additional ground of objection to the ruling of the Court that you are making now.

The Court: What have you gentlemen got to page 2127 } say about the objection?

Mr. Robertson: I don't think we have to say anything on it because the Court has already ruled.

The Court: Do you have anything to say on that point, Mr. Allen?

Mr. Allen: I don't think that Mr. Pollard is correct about that, Your Honor. I think you will find the correct rules stated in a little more detail on page 3 of our Instruction No. 10:

"It is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing the acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

That is the exact language of one of the Kentucky cases.

Mr. Robertson: It all comes back to what we have in the trial brief.

page 2128 } Mr. Pollard: I have nothing further to say on that.

The Court: The Court will tentatively overrule your objection.

Mr. Pollard: And we except for the reasons stated.

Mr. Mullen: Is there anything you have to say on the last part of that?

Colonel Harris: I was just checking up with the reporter. You all will recall that I started at the beginning of this instruction and went all the way to the end stating my objections earlier in the day.

The Court: I think you did.

Mr. Pollard: In the third paragraph, Your Honor, attempts to define when a person acts within the scope of his agency. As I understand, the master is liable in Kentucky under the *respondent superior* doctrine when he acts within the scope of his authority, and the master is also liable when he acts outside of the scope of his authority provided the act was motivated by a desire to serve the master and was in fact acting in the master's interest. I don't think that this third paragraph expresses those thoughts.

Mr. Robertson: I think the paragraph is correct as written. It is taken out of a case decided in Alaska last summer.

The Court: Decided where?

Mr. Robertson: In the Federal Court in Alaska.

The Court: We are in Kentucky now.  
page 2129 } Mr. Robertson: I stand corrected. I say that  
                  } accords with the Kentucky law.

Mr. Pollard: May I have the case, Mr. Robertson, on which you are relying for this statement?

Mr. Robertson: You know it.

Mr. Pollard: The Kentucky case on which you are relying for this statement.

Mr. Robertson: It is in the original brief. You asked me a question; let me answer you. If the agent acts within the scope of his authority and the principal acquiesces in it and knows about it afterwards and accepts the benefit of it and does not repudiate it, he is hooked. That is covered in the trial brief.

Mr. Pollard: I asked for the citations.

Mr. Robertson: I refer to the trial brief. That is all I have at the moment. I don't carry them like that, Mr. Pollard.

Mr. Lowden: Page 18 *et seq.* You've got it.

Mr. Robertson: Mr. Allen suggested this. We will eliminate the last two paragraphs of that particular instruction.

The Court: All right.

page 2129-A } (Plaintiff's requested Instruction No. 5 follows:)

"The Court instructs the jury if you believe from the evidence that, during the period in which the acts complained of were committed, United Mine Workers of America, was using District 50, United Mine Workers of America, and United Construction Workers, a division of District 50, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America, is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while carrying out the purposes of the agency."

Mr. Robertson: There is one slight correction that ought to be made in No. 5 before it is discussed.

page 2130 } "The Court instructs the jury if you believe  
                  } from the evidence that"—you see the way it is  
                  } written now—"during the period in which the acts com-  
                  } plained of were committed \* \* \*". That assumes they were  
                  } committed when that is in controversy. So we ought to strike  
                  } out the words "during the period in which." It should read  
                  } this way: "The Court instructs the jury if you believe from

the evidence that the acts complained of were committed," then insert "and that during the period in which they were committed." Then the rest of it remains as written.

Mr. Allen: Comma after United Mine Workers of America?

Mr. Pollard: Excuse me, Your Honor. Mr. Robertson jumped over to No. 5 before I was quite finished with my objections to No. 4.

The Court: All right.

Mr. Pollard: That is with respect to the last four lines of the second paragraph. It would seem to make a fairer statement if that clause were rearranged to read as follows: "Whether during that period of time they, within the scope of their agency for United Construction Workers or District 50 or the United Mine Workers or all of them, committed the acts charged against them."

Mr. Robertson: I think it is correctly written, and I submit that we have the right to have our language page 2131 } as submitted.

The Court: Do you gentlemen oppose that change?

Mr. Robertson: Yes, sir.

Mr. Allen: I didn't quite catch the change you are suggesting, Mr. Pollard.

Mr. Pollard: After the word "they", "whether during that period of time they," then put in the clause, "within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them, committed the acts charged against them." It gives it a different meaning, Mr. Robertson.

Mr. Robertson: I don't think it does.

Mr. Pollard: The way it is now stated it presents to the jury an assumption that the acts were committed.

Mr. Robertson: It doesn't at all.

Mr. Pollard: Your Honor, the way it is now written there is an assumption that if acts were committed, they were committed within the scope of their agency.

Mr. Robertson: Not at all.

The Court: It says "whether during that period." I think that is all right as written.

Mr. Pollard: We except.

The Court: Did you get your exception in?

Mr. Pollard: Yes, sir.

Colonel Harris: I have something I want to page 2132 } say about No. 5, if the Court please.

Mr. Robertson: Let me get the wording in that I am offering.

"The Court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50—"

Mr. Mullen: We have always spoken of it as a Division of District 50.

Mr. Robertson: You have spoken of it as a division. We had all that out before lunch, Mr. Mullen.

Mr. Pollard: On the last instruction we went into the question of the responsibility of a principal for the acts of its agent, and I assume that question was whether the United Construction Workers were liable for the acts of Hart. This instruction goes into the question of the liability of one union for the acts of another union. We say that the doctrine of *respondet superior* could not possibly apply there. You never have the doctrine of *respondet superior* applying as between two corporations, and they have made out that the union organization, the defendants, are like corporations. With respect to the responsibility of one union as to another union, then of course there must be either authorization or participation or ratification, and that is what this instruction goes into.

The Court: Let me read this.

Mr. Robertson: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of the District 50 and United Construction Workers while carrying out the purposes of the agency."

Colonel Harris: Judge, the thing I think you ought to be considering, too, is those last eight words "while carrying out the purposes of the agency." To me that is a new way of charging *respondet superior*. I have always heard when they act in the line and scope of their employment and in the course of their principal business. Anybody could be carrying out the purposes of agency without sticking within the line and scope of his employment. We are jumping—

Mr. Robertson: Do you want that changed?

Colonel Harris: I say the way you have got it page 2134 } I don't want this charge as written given because it is a new test.

Mr. Robertson: What do you say about the last few words of it?

Mr. Harris: I say the words I have heard are "in the line and scope of their employment and within the course of their principal's business."

Mr. Robertson: How do you suggest that we word it there?

Colonel Harris: I just dictated it to him; "in the line and scope of their employment."

Mr. Robertson: "is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while—" What?

Colonel Harris: "—while acting in the line and scope of their employment and within the course of the business of United Mine Workers of America."

Mr. Pollard: I am afraid—

Colonel Harris: You don't want that? I withdraw as draftsman, if the Court please, but as a critic—

Mr. Robertson: We accept that amendment.

The Court: I didn't get it.

Colonel Harris: My associates don't approve, and I didn't want to commit them to something they don't approve of.

The Court: "While acting in the line and scope of their employment," and what else? page 2135 }

Mr. Pollard: I don't see why you couldn't just put a period after United Construction Workers.

Mr. Robertson: Let's finish getting the suggestion of Colonel Harris.

The Court: You are not bound by this suggestion, Colonel, but I want to get this down for the purpose of argument. "Acting in the line and scope of their employment"? What follows that?

Colonel Harris: "and in the course of their principal's business."

Mr. Robertson: I accept that.

The Court: You are offering it that way?

Mr. Robertson: Yes, sir; we offer it that way.

Mr. Lowden: He wants to put a period after United Construction Workers. He wants to say, " \* \* \* United Mine Workers is liable for any wrongful act of the agents and employees of District 50 and United Construction Workers," and put a period. If he wants that, I think we ought to agree to that.

Mr. Robertson: I don't see where he means to put the period.

Mr. Allen: That is all right. Let's do that.

The Court: The Court wants to hear some argument on this.  
page 2136 } Mr. Robertson: Either way you want it is all right with us.

Colonel Harris: If the Court pleases, we also object on the additional ground that the defendants are not properly and correctly named and that even now the doctrine of agency is not fully and completely stated as applicable to the facts of this case.

Mr. Robertson: Before we get to that we are entitled to know whether they want it the way Colonel Harris suggested or the way that Mr. Pollard had it, because we want to know whether you do invite it that way or whether you don't.

Colonel Harris: No, I don't invite it either way.

Mr. Robertson: Then I am going to offer it this way. I am going to offer it, then, the way Colonel Harris suggested at first. We offer it that way.

The Court: It is understood, of course, Colonel Harris is not bound by this instruction. He is objecting to the instruction.

Colonel Harris: That is right.

Mr. Robertson: But we offer it in the manner he suggested.

Mr. Pollard: I think before we go any further, Your Honor, there is no sense in working on this instruction unless we first get a ruling from you as to whether you  
page 2137 } are going to apply the doctrine of *respondet superior* for acts within the unions, which would make one union liable for the acts of another.

The Court: The Court wants to hear some argument.

Mr. Robertson: Everybody seems to be learning some law here today. I don't know what they mean by trying to make a difference between *respondet superior* and the law of principal and agent. It seems to me it is one and the same thing.

Mr. Allen: No difference.

Mr. Robertson: What you do through somebody else you do for yourself, and you are saying *respondet superior* as if unveiling some other mystery. I understand it is all the same thing.

Mr. Pollard: Your Honor, if Mr. Robertson takes that position, if he will take our instruction on the first page, we will have no further argument.

Mr. Robertson: I am not taking anything. We will meet each one as we come to it. As I say, I don't know what you mean by trying to make a distinction between *respondet superior* and agency.

Mr. Pollard: Your Honor, may I answer Mr. Robertson?

So he will know what I am talking about in the future even if I am wrong.

The Court: Yes.  
 page 2138 } Mr. Pollard: When I said *respondent superior* I mean the doctrine which says that a principal is liable for the acts of his agent when the agent is acting within the scope of his authority, or even though he is acting outside the scope of his authority if he is activated by a desire to serve his principal and is in fact acting in the principal's interest. I consider that one doctrine. The other doctrine is that in order for a principal to be liable for the acts of his agent, the acts must be authorized, participated in or ratified. I say that the latter doctrine must apply to make one union liable for the acts of another union because that would certainly apply in the situation of corporations which you all have said applies to unions.

Mr. Robertson: I have no further comment on that, Your Honor.

The Court: I would like to hear you all answer Mr. Pollard.

Mr. Lowden: On what point?

The Court: Whether or not there is any difference between the two.

Mr. Robertson: Your Honor, I will answer it. I will say there is none. I will say they are three parts of one whole. You have the United Construction Workers Division of District 50. You have District 50 which is admittedly a district of United Mine Workers. You have already  
 page 2139 } ruled here that the United Mine Workers can act only through its officers and agents. It can make one of its districts agent, it can make one of its divisions of that district its agent. We say that we have evidence here that submits that whole thing to the jury.

Mr. Allen: Now, Mr. Pollard, let's see if I understand you correctly. It is your contention that the ordinary doctrine of *respondent superior* does not apply as between unions, but when you come to the question of whether one union is the agent for another, you have to prove previous express authority or subsequent ratification. Is that your contention?

Mr. Pollard: That is my contention, sir. I base that on the constitution of the United Mine Workers of America, the rules of District 50, and the rules of United Construction Workers.

Mr. Allen: Now let me answer him.

Mr. Lowden: Our theory of it can be very simply illustrated, I think, by the fact that the United Mine Workers of America employed the firm of Williams, Mullen & Hazelgrove,

which is an unincorporated association, called a partnership, but is composed of members, and there you had one association employing another, and the association in Richmond sent an agent up to this court who is not a member of that association but was merely an agent. The United Mine Workers, however, was bound by what he did up here, just as page 2140 } easy as that.

Mr. Pollard: Provided it was authorized.

The Court: He had express authority to appear here.

Mr. Pollard: That is correct.

Mr. Lowden: But the fact that he did not have express authority still would have bound him if he appeared.

Mr. Robertson: I think you have that in Kentucky where you took me a few moments ago, Your Honor. Under the law of Kentucky you do not have to have prior authorization or express ratification. If the United Mine Workers had knowledge of it, and acquiesced in it and accepted the benefits of it and failed to repudiate it, they are bound by it.

Mr. Lowden: You don't need any express authorization, Judge, if a man calls me up and says "I want you to represent me in a case," and I go to court on it, he may not even know I am going, but whatever I do over there binds him. He may have a cause of action against me, but he is still bound just the same.

Mr. Pollard: Judge, no corporation can act for any other corporation and be bound except where the agent is authorized, participated in or ratified. They say the law of corporations applies to unincorporated associations.

Mr. Lowden: We are going to show, and the page 2141 } evidence does show, and the magazine of the United Mine Workers shows clearly what District 50 and United Construction Workers were authorized to do on behalf of the United Mine Workers of America.

Mr. Pollard: If you can convince the jury that the evidence shows authorization, all right.

Mr. Lowden: That is all this instruction asks for.

Mr. Robertson: It is a question of fact to the jury.

Mr. Allen: Let me say a word here before we conclude this. Cases were cited here this morning and the Kentucky statutes were cited to show that in Kentucky labor unions are dealt with just exactly like the corporations are dealt with. Everywhere, so far as I know, one corporation can act as agent for another without any express authorization, and it does it by simply having that corporation act as an instrumentality of the other corporation. I cited a case here the other day which was recently decided over in the federal court, the name of which I cannot recall right now, but I know

that very question came up and the court held that the Virginia corporation was used by the foreign corporation as an instrumentality of agency to carry on its business in Virginia, and no express authorization or subsequent ratification was involved in the case. If you pick up the Va. Digest I dare say you can find any number of cases holding page 2142 } that one corporation may act as agent for another corporation. You just simply use that corporation to tend to your business. You don't have to have any resolution.

Mr. Robertson: I think we met the point when we said we submitted it as an issue of fact to the jury.

Mr. Allen: Wait a minute. I am coming to exactly what their constitution provides. In Section 20 of the constitution of the United Mine Workers, Article 20, Section 1:

"District 50 United Mine Workers of America, subject to the jurisdiction and regulation of the International Executive Board, is hereby created and set up under authority of the International Union and may adopt by-laws and rules not inconsistent with this constitution."

The rules of District 50 in evidence show:

"This organization shall be known as District 50, United Mine Workers of America, and shall work under and subject to the constitution of the International Union as provided in Article 20," which I have just read.

Then Article 3 of the rules of District 50, section 1, provides:

"The administrative officer, operating under the authority of Article 20 of the constitution of the International Union, shall have general and complete supervision over and administration of the affairs of District 50."

The evidence shows that that administrative page 2143 } officer is A. D. Lewis. The evidence shows that he is appointed by John L. Lewis, the president of the United Mine Workers, subject to the approval of the International Executive Board. The evidence further shows that all of the top officers that run District 50 are appointed by John L. Lewis, subject to the International Executive Board.

The authorities all show that it is the power of control that decides the question of agency in a case like this, and the

International Union through Mr. Lewis, with the approval of the International Executive Board, shows that they had the power of control.

Mr. Robertson: It is a question whether he exercised it or not.

Mr. Allen: The evidence shows that they did exercise it.

Mr. Robertson: And that is a jury question.

The Court: Gentlemen, the Court will grant Instruction No. 5.

Mr. Pollard: We except for the reasons stated, and after the recess, Your Honor, we would to take up those last eight words in No. 5. Mr. Robertson, we said that before we could decide on the last eight words we had to have a ruling from the Judge on the question of *respondet superior*.

The Court: Recess, gentlemen, for a few minutes.

page 2144 } (Brief recess.)

The Court: You had a few remarks you wanted to make, Fred. Before you get into that, did you have something you wanted to put in the record?

Mr. Moore: I want to read this into the record to support your contention that a corporation can legally act as an agent, citing 2 American Jurisprudence, page 22, where it is stated under the title "Capacity to Act as Agent."

"It is clear that a person of legal age and of sane mind may act as an agent unless he is laboring under some disqualification from infancy. A corporation may act as agent under the same limitations."

Mr. Pollard: Your Honor, we don't take exception to that. We just say that in order for one union to be liable for another, there must be ratification, participation or authorization.

I would like to clear up one thing. When we say that we take exception for the argument previously stated, we would like to know if it would be satisfactory to have it understood where the same point is raised on another instruction, to avoid going through the complete argument again, we would like to be able to save the point by saying for the argument previously made regardless of which instruction is comes in."

The Court: Is that satisfactory to you gentlemen?

Mr. Robertson: Yes.

page 2145 } Mr. Pollard: With regard to the last eight words, we think that they should be stricken out

and there be substituted in their place the following—

The Court: Which words are you referring to?

Mr. Pollard: The last eight words in the instruction, "while carrying out the purposes of the agency."

Mr. Lowden: It is changed now.

Mr. Robertson: We have adopted Colonel Harris' wording.

Mr. Lowden: "While acting within the line or scope of their employment and during the course of their business with the United Mine Workers of America."

Mr. Pollard: We have now reached an agreement among us and we think that should say: "Provided you shall first have found the acts to be wrongful and District 50 of the United Construction Workers liable for such acts."

Mr. Robertson: You have already ruled on it and we don't think it is necessary to put that in there.

The Court: This is the first I have heard of that. What do you want to add to it?

Mr. Pollard: After United Construction Workers, say "provided you shall have first found the acts to be wrongful and District 50 and United Construction Workers liable therefor."

page 2146 } Mr. Robertson: If Your Honor please, we don't think that is correct for this reason: We put the question right square up to the jury and the Court has ruled on it already. "The court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50 United Mine Workers of America and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business"—If you believe all of that—"then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while acting in the line and scope of their employment and in the course of their principal's business." It is an issue of fact just as much as you can make it.

Mr. Moore: In other words, we say if you find the fact up at the top. There is no reason to put it in again at the bottom as Mr. Pollard suggests.

The Court: They have first to believe that the acts complained of were committed.

Mr. Robertson: That is right.

Mr. Pollard: They have also got to believe, Your Honor,

that District 50 and United Construction Work-  
page 2147 } ers are liable for them.

Mr. Robertson: That is what it says. It puts the whole issue up to the jury.

Mr. Pollard: It doesn't say anything about whether the United Construction Workers and District 50 are liable.

Mr. Robertson: It says it just as plain as the English language can say it.

Mr. Pollard: Whereabouts?

Mr. Robertson: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed," then I change it so it wouldn't assume something that is in issue and inserted "if you believe it was committed and during the period \* \* \*" The "if" goes to the whole thing from beginning to end.

Mr. Pollard: I still don't see where you have said in there that you first have to believe that District 50 and the Construction Workers were liable.

Mr. Robertson: If you believe from the evidence that the acts complained of. You don't have to put it in every time.

Mr. Pollard: I just want it in there once. Mr. Robertson.

Mr. Robertson: It is in there. I don't want to argue any more. I think it is in there.

The Court: Do you have any observations?  
page 2148 } Mr. Allen: I see what you are talking about,

Mr. Pollard. You think the instruction ought to read so as to put liability on the United Construction Workers and on District 50, and then if the jury believes that United Mine Workers were using District 50, the liability would follow. You want all three of them in there.

Mr. Pollard: I do.

Colonel Harris: If I may make an observation, what Mr. Pollard means is this: That you can't hold a principal liable for the acts of an agent unless the agent is also liable, and that is clear and undisputed law. That is what you are trying to bring out there only you enumerated it.

Mr. Robertson: He hasn't worded it so anybody here can understand him except you.

Mr. Allen: This instruction deals only with the liability of the United Mine Workers, Your Honor. We have other instructions dealing with the liability of District 50. Of course it is true that if the situation is such that the agent isn't liable, the principal wouldn't be liable. Everybody knows that.

Mr. Pollard: This instruction doesn't say so.

Mr. Allen: You want to insert the agent—

Mr. Robertson: I don't think it has to be.

The Court: Why don't you get together on page 2149 } this? I think Mr. Allen is stating something that he feels might be helpful to clear this situation up. Finish your statement, Mr. Allen.

Mr. Allen: Your objection goes to the point that the principal can't be held liable unless the agent is liable. Then you want it stated there so there will be a finding against the agent and the principal, too, as I understand it.

Mr. Pollard: No. So the jury can't find against us unless they find all of that.

Mr. Allen: Sure. The jury can't find against you unless they find against the agent also. That is a perfectly clear proposition. If you want that in there, I don't see any objection to putting it in there.

Mr. Mullen: I think it should be done.

The Court: Suppose you rewrite that instruction overnight.

Mr. Mullen: I think it should be in there.

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(Plaintiff's requested Instruction No. 7 follows:)

"The Court instructs the jury that while employees may, free from restraint or coercion by employers of their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, collectively and individually, strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

"If you believe from the evidence that William O. Hart, while acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants, and by intimidation, threats, acts of violence, or coercion, caused

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plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instruction herein on damages."

The Court: All right, gentlemen.

Colonel Harris: May I ask whether that is taken from any case that we failed to find?

Mr. Pollard: Kentucky statute.

Mr. Mullen: The first part of it is taken from the statute.

Colonel Harris: Did you check it with the statute?

Mr. Pollard: It is almost word for word.

Mr. Mullen: It paraphrases the last part of the statute.

Mr. Pollard: It seems to me that their first instruction would now become unnecessary because the first paragraph here states the statute.

The Court: Let's pass over that and take up the next one.

(Discussion off the record.)

Mr. Pollard: Do you insist on your first instruction since this states the statute in the first paragraph?

Mr. Allen: This instruction is an application page 2160 <sup>1</sup>/<sub>2</sub> of the Kentucky statute to the facts in this case which we think we have proven. The only thing that is left out in the first part of the instruction is the part of the statute that prohibits an employer from coercion. We are not concerned with that. We are applying the employee part of the statute to the facts in this case.

Mr. Pollard: I understand that, sir, but your first instruction will be the same as the first paragraph of this.

Mr. Robertson: We are perfectly willing to go back to the first instruction as offered, leave the statute out and put the first one in there as written. We went to the other to try to meet their objection. If they make that objection, we go back and offer that at this time.

Mr. Pollard: We are not making an objection. We just asked if you were willing to—

Mr. Robertson: To do what?

Mr. Pollard: To withdraw your first one.

Mr. Robertson: I am willing to withdraw the first instruction and substitute this one for it.

Mr. Pollard: No.

Mr. Mullen: Substitute the one we are reading now?

The Court: No, the one they originally offered, which they agreed to rewrite and quote the full section.

Mr. Robertson: I believe we will do that. We page 2161 } will come back and offer this one as we offered it and then paraphrase the statute here.

Mr. Pollard: To get to Instruction No. 7, in the last line of the first paragraph we object to the use of the word "violence." There is no allegation of violence in the case and therefore it has no place in the instructions.

Mr. Robertson: You have forgotten that they said they got the laborers by the arm and made them sign. You have forgotten that.

Mr. Pollard: There is no allegation of violence in the notice of motion.

Mr. Robertson: I think there is.

Mr. Allen: I think you are wrong there.

Mr. Mullen: I don't think any witness ever testified to that: You testified to it in your opening argument.

Mr. Lowden: Surely witnesses testified.

Mr. Allen: One witness testified that they got one man between two men, got one man right between them and made him sign an application.

Mr. Lowden: It is in there.

The Court: I recall something along that line.

Mr. Lowden: You would like not to have that in there.

Mr. Mullen: You had it in a deposition which page 2162 } you didn't put in, for one thing.

Mr. Robertson: The Hackworth boys, that you boys needled, testified to that. You said they were lying, but that is what they said.

Colonel Harris: We will prove it by Mr. Bryan's testimony when the time comes.

Mr. Mullen: I don't want to argue the facts of the case now. Let's see what the instruction is.

Mr. Pollard: At the top of the second page—

Colonel Harris: Let's don't go to the second page, Fred.

Mr. Pollard: All right, sir. You take over.

Colonel Harris: The paragraph that begins "if you believe," the way that is worded, "if you believe that William O. Hart acting for United Construction Workers," and so forth, "within the scope of his authority." You see that assumes and implies that he was acting within the scope of his authority.

Mr. Robertson: It doesn't do any such thing. It starts out "if you believe." Judge, that is the way all these begin.

Mr. Mullen: "If you believe from the evidence that William O. Hart." Then you inject this sentence simply saying "while acting for."

Mr. Robertson: See if this relieves it. "If page 2163 } you believe from the evidence that William O. Hart was acting for United Construction Workers."

Mr. Allen: "And while so acting." Put it that way if you want to. If you strike out the comma.

Mr. Robertson: Change the "while" to "was."

The Court: "If you believe \* \* \* that William O. Hart was acting for United Construction Workers Division of District 50 \* \* \* within the scope of his authority, and while so acting went \* \* \*"

Mr. Robertson: "While acting within the scope of his authority."

Colonel Harris: I haven't got how you put it down there on the sixth line.

Mr. Moore: "Within the scope of his authority and while so acting went to plaintiff's job site in Breathitt County."

Mr. Harris: I thought Mr. Robertson added something else ahead of "within the scope of his authority."

The Court: What did you add after that, Mr. Robertson?

Mr. Robertson: "Within the scope of his authority and while so acting went to plaintiff's job." You have already written it there.

The Court: I have "and while so acting went to plaintiff's job site in Breathitt County."

page 2164 } Mr. Mullen: There is a further objection. It has been testified that William O. Hart was acting for United Construction Workers and District 50, but it has been denied throughout that he was acting for United Mine Workers of America.

Mr. Robertson: But we are relying on circumstantial evidence there and direct evidence, too; one, the pattern, two, all in the same office, three, that under the laws of Kentucky they were bound to have known about it, they were bound to have acquiesced in it, they have accepted the benefits of it, and they have never repudiated it.

Mr. Mullen: That is your argument. There were no benefits. When it comes to that matter of pattern, when we reach that, I have something to say on that point.

Mr. Robertson: All right.

Mr. Allen: And we are also relying on the agency of District 50 as shown by the written documents and as shown by Mr. Bryan's own testimony in answer to questions which you asked him. He said that District 50 was agent for the United Mine Workers for the purpose of organizing those engaged in industries outside of the mines, and there was no exception to that and no objection to it.

Mr. Mullen: I am talking about the United Mine Workers now, not District 50.

Mr. Allen: If District 50 was the agent of page 2165 } United Mine Workers and William O. Hart was acting as agent for District 50, it comes completely within the line of being authorized to act for the United Mine Workers.

Mr. Mullen: Which brings it right back to the objection Mr. Pollard stated about one organization being agent for another organization without express authority.

Mr. Robertson: I agree with that. That is what the Judge ruled on, that they could be.

Mr. Pollard: Judge, I am worried about the jury's not realizing they must believe all of this. I think it ought to start off "If you believe all of the following from the evidence," and then go on.

The Court: "If you believe from the evidence that William O. Hart was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50 United Mine Workers of America, and for United Mine Workers of America within the scope of his authority—"

Doesn't that mean that the jury has to believe those facts?

Mr. Pollard: Yes, sir.

The Court: "And while so acting—"

Mr. Pollard: It gets a little dubious down there.

The Court: "—went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a dis- page 2166 } orderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants, and by intimidation, threats, acts of violence, or coercion, caused Plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instruction herein on damages."

Mr. Robertson: I don't object to putting it this way if they want to. I don't think it is necessary: "If you believe from the evidence that William O. Hart was acting for United Construction Workers division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe that while he was so acting he went—"

I don't think it adds anything to it.

Mr. Pollard: I don't think you ought to put it in just two places and not put it in all.

Mr. Robertson: "And if you believe," after "authority"; "and if you believe while he was so acting he went to the plaintiff's job site in Breathitt County, Kentucky on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants," and if you want to you put it in page 2167 } again, "and if you believe—"

Mr. Pollard: Why not put it just before "in furtherance of the business of all three defendants"?

The Court: Right after "employees"?

Mr. Pollard: Yes, right after that "and".

Mr. Robertson: "And if you believe he was then acting—"

Mr. Harris: Did you all leave out "from the evidence" every time? If you are going to put "if he believes" don't you have to hypothesize that on the evidence?

The Court: Yes, "from the evidence," ought to be in there; "if you believe from the evidence."

Mr. Allen: We will have to write that over again.

The Court: "If you believe from the evidence"

Mr. Allen: "That he was acting in furtherance."

The Court: "Of The business of all three defendants and by intimidation, threats," and so forth.

Mr. Pollard: And insert the same thing at that point.

The Court: "And if you believe from the evidence—"  
What goes after that?

Mr. Robertson: "That while he was so acting."

The Court: No, because you have "by intimidation."

Mr. Allen: "If you believe from the evidence that while so acting he by intimidation, threats, acts of violence."

The Court: Is there anything further you page 2168 } want to say?

Mr. Pollard: Yes, sir; at the top of the page, after the word "work" in the middle of the first line I should like to add "and that such acts caused the alleged damages of the plaintiff."

The Court: Wouldn't that naturally follow if they believed that?

Mr. Pollard: No, sir; we are not liable for those acts unless they caused the damage.

Mr. Allen: Where are you suggesting that that go?

Mr. Pollard: After the word "work" at the top of the second page.

Mr. Lowden: But they are going to assess the damages in connection with their instruction on damages.

Mr. Robertson: We can stop right there.

Mr. Pollard: But there is no proximate cause in there.

Colonel Harris: There is another objection that is patent

there. It might cause them to return to work that first day, but if it did not continue on in the other days after the picket sign was put up, then the only thing we would be responsible for would be the damage during that very short interval of time before the picket sign was put up. It not only has to drive them away from the work, but to cause page 2169 } them to stay away.

Mr. Robertson: They can ask for any instruction they want to on this theory of the case. This instruction is based on our theory of the case that they drove us away and kept us away. It is an issue of fact for the jury.

Colonel Harris: That would allow them to recover if, for the sake of argument, we drove them away 20 minutes. That would allow them to recover.

The Court: What would be your objection to adding to the instruction "to refuse to return to work—"

Mr. Allen: Thereafter.

The Court: "—thereafter". How about that?

Mr. Robertson: I don't object to that.

Mr. Pollard: I think they should further find from the evidence, Your Honor, that such acts caused the alleged damage to the plaintiff.

Mr. Allen: The damage instruction deals with that.

Mr. Pollard: No.

Mr. Allen: You can't set out everything in one instruction.

Mr. Pollard: We are not trying to set out everything in one instruction. I just say it has to be the proximate cause of the damage.

Mr. Allen: We don't want to stop at "three defendants,"

Your Honor, if you have that objection.

page 2170 } Mr. Robertson: We have put "If you believe" in there four or five times. We don't care whether we leave it in there about damages or not, either way.

The Court: You have a damage instruction here. Wouldn't that cover it?

Mr. Allen: I would be a little uneasy with an instruction on findings that winds up and doesn't give the jury any idea about how to assess damages unless it does refer to another instruction which gives them such instruction.

The Court: I think that is all right. "And assess damages in accordance with the instruction herein on damages."

Mr. Harris: Instruction herein?

The Court: Yes.

Colonel Harris: There isn't any instruction herein.

The Court: It will be the next instruction.

Colonel Harris: That will be hereafter.

Mr. Allen: It means in the case. Designate it anyway you want to.

The Court: How about "with the instruction on damages"?

Mr. Pollard: "Instructions."

The Court: Do you want to put plural on it?

Mr. Allen: Yes, "instructions on damages."

Mr. Pollard: Your Honor, you have ruled, I take it, that it is not necessary to add in after the word page 2171 { "work" the following, "and if you further believe that such acts caused the alleged damages."

Mr. Robertson: I think I could tell you in two minutes why that is wrong. That turns them out all over the lot, whereas in this other way you say you can't wander around and give damages at large. You have to come back to these other specific instructions.

Mr. Pollard: Yes, but they can't find for the plaintiff unless they believe the damage was caused by the acts.

Mr. Allen: They are told that in the damage instructions.

Mr. Lowden: As a matter of fact, the law of Kentucky is that there may not be any damage proximately caused and they still can recover punitive damages and any such instructions as that would be erroneous.

Mr. Allen: That is right.

The Court: As presently advised I will give the instruction as amended.

Mr. Pollard: We except for the reasons stated in the argument.

Colonel Harris: And for the additional reason that the defendants are not properly named.

Mr. Lowden: Aren't we calling them by their exact name?

Mr. Mullen: You have the correct names in page 2172 { your suit. I think you would be held to the names that you used for them as defendants.

Mr. Allen: If you will just simply agree that we may recover according to our allegations and all, we will be all right. We will shorten the case.

Mr. Mullen: You would have the money in your pocket, wouldn't you?

Mr. Harris: Wouldn't you like for us to be playing bridge and double it for you?

The Court: Instruction No. 8.

Colonel Harris: I would suggest that there has to be some rewriting done. Let's wait and study this No. 8 some more.

The Court: Since they are going to rewrite a couple of

them, it occurs to me that we might study 8 and 9 overnight.

Mr. Allen: And 10.

Mr. Lowden: Why don't you finish that one the same as 7 and then we will have a new subject coming up.

Colonel Harris: I understood the Judge to say when we got started he was going to quit at five o'clock.

The Court: Let me read this instruction first, Colonel.

(Court reading Plaintiff's requested Instruction 8.)

page 2173 } The Court: Let's adjourn until tomorrow morning at nine o'clock.

Mr. Allen: May I make a suggestion for procedure tomorrow which I hope will expedite this matter? I assume that we will take up the balance of our instructions. Let's let all of these gentlemen, Colonel Harris, Mr. Pollard and Mr. Mullen, and Mr. Owens, too, if he wants to, say everything they have to say about the particular instruction we are considering, then let us say what we have got to say and be done and they have a reply.

Mr. Mullen: I think myself that that would get us through quicker. I don't think we ought to be able to talk back and forth.

The Court: I don't think so, either.

Mr. Mullen: I said yesterday we would want to file a motion to strike. I thought I had all the copies here. Bob wrote it up and he is sick. I will bring it up tomorrow morning when I can give you a copy of it and then you can see it.

Mr. Robertson: All right.

(Whereupon, at 5:00 o'clock p. m. the conference was recessed until 9:00 o'clock a. m. the next day.)

\* \* \* \* \*

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\* \* \* \* \*

City Hall, Richmond, Virginia  
Wednesday, February 14, 1951

Met in chambers, pursuant to recess, at 9:45 o'clock a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Walter E. Rogers, Counsel for the Defendants.

Also Present: Willard P. Owens.

page 2175 } PROCEEDINGS.

Mr. Robertson: Your Honor, we have written No. 8.

Mr. Mullen: If Your Honor please, before taking the instructions, we wish to present another matter. We wish to move for a mistrial, Your Honor, because of the publication of this article in the News Leader last night. After our evidence was in and before the jury delivered its verdict, it published an inflammatory article against the United Mine Workers and John L. Lewis. The papers are of Bryan Properties, his company. Bryan Properties I think are mutual stockholders. Did Your Honor read the article?

The Court: No, I haven't seen it (handed to the Court).

Mr. Allen: I wonder if for the benefit of all of us you would mind reading it?

The Court: Very well.

"Enemies" of the Miner?

"John L. Lewis, notifying his miners recently of their \$1.60 per day wage increase, included a blunt notice in his announcement: The 425,000 American members of the UMW have been assessed, by vote of the union's executive board, \$20 each, the sum to be collected in four equal installments this month and next. Mr. Lewis made no secret of what he intends to do with the estimated \$8,500,000 from this assessment:

page 2176 } "Expensive litigation is pending and our enemies evidently contemplate additional litigation. \* \* \* We can only judge what is to come by what we are now encountering, and we can expect these attacks from our enemies in the future. \* \* \* (We are) compelled to build up our financial bulwarks to ward off onslaughts from our adversaries \* \* \*

"What we have been waiting for is some reaction—from any direction—to the language of the Lewis letter. Yet no one has been heard to protest, even mildly, this typically Lewisian thunder about *enemies* and *adversaries*, none of whom is identified in the letter.

"There is something almost ominous in that silence. Have we reached the point at which the labeling of one group of

men, by another, as *enemies* no longer disturbs us? Mr. Lewis' language has the ring of a Politburo voice denouncing the 'enemies of democracy.' Economic factionalism in the past decade has become a cancerous disease spreading insidiously, deeper than many persons are aware. There may come a golden age when we all recognize the simple fact that we are each of us in the same boat and will perish or reach shore safely together. Mr. Lewis speaks for those who not only fail to perceive this, but also insist on rocking the boat at a time when all hands are sorely needed at the oars."

Mr. Mullen: If Your Honor please, people were calling me last night to say, "Have you read that article page 2177 } in the paper and what does it mean?" The lawyers who have spoken to me about it have condemned it as the most outrageous article constituting contempt of the Court. It sets forth also financial affairs of the union which Your Honor has ruled it could not do. It makes charges in the last part you read against Mr. Lewis. While Your Honor told the jury not to read accounts of the case, they will read this without realizing that it came under your prohibition. It is highly prejudicial to the case of the defendants, and we think that our motion for mistrial should be sustained. Mr. Bryan is here if you want to find out any interest he may have by reason of ownership in the New Leader or by reason of sharing in a trust in which the stock has been placed. He and his family—Mr. Tenant Bryan is his first cousin, I believe—own the Bryan Properties in Richmond. This is a serious offense.

Mr. Robertson: Are you through?

Mr. Mullen: I am through.

Mr. Pollard: No. I would like to offer as defendants' exhibit No. 71 the editorial page, Richmond News Leader, Tuesday, February 13, 1951, which includes an editorial entitled "Enemies' of the Miner?" Which also shows at the bottom of the paper that David Tenant Bryan is President and Publisher of the Richmond News Leader.

Mr. Lowden: Do you offer this in evidence?

page 2178 } Mr. Pollard: To be marked as Exhibit No. 71.

Mr. Mullen: We offer it on our motion.

(Article referred to was marked Defendants' Exhibit 71 and received in evidence.)

Mr. Robertson: If Your Honor please, of course there is no merit to the motion. I read the article yesterday after-

noon when I went home. I knew nothing of it until its coming out in the paper, and I assume nobody else on our side did, including Mr. Bryan. I don't think that anybody takes the News Leader so seriously as Mr. Mullen seems to contemplate, but I do want to say this, Your Honor: We have talked about a pattern in eastern Kentucky. I want to talk about a pattern in this type of case. I tried a case very much like this one at Luray two years ago. They ran Judge Ford out of the case. They tried to run Judge Crosby out of the case. They tried to run me out of the case. They tried to get a writ of prohibition against Judge Crosby. They made all sorts of motions for mistrial. They made an attack on my personal honesty, and I had to ask the Court to let me go on the stand and testify to what the facts were. The case was taken to the Supreme Court of Virginia and they tried to take it to the Supreme Court of the United States.

Mr. Pollard: May I interrupt, Mr. Robertson, just a moment. Were any of the defendants in this case connected with the case that you were talking about, the Luray case?

Mr. Robertson: I was.

page 2179 } Mr. Pollard: I said were any of the defendants.

Mr. Robertson: You asked me a question. Let me finish it. Until the sheriff and the clerk of the court lied, and the commonwealth's attorney threatened to sue me, and I asked to go on the stand and be permitted to tell my version of the facts under oath and subject to cross-examination, and was permitted to do so. So I am very vitally interested in both cases.

Mr. Pollard: Your Honor, that wasn't the question I asked.

Mr. Robertson: I am coming to this case, Your Honor.

The Court: Let's come to this case.

Mr. Robertson: Now what have they done here? They came along here some days ago and tried to upset this trial after it had been going several weeks on a motion of a number of typewritten pages that were in the vernacular almost entirely baloney. They came along again and said they had another motion here in which they were going to ask for a mistrial earlier this week, and they apparently forgot it because they didn't even present it at the close of all the testimony in the case, they didn't even present it at the beginning of the arguments on instructions here yesterday—

The Court: What about this particular page 2180 } motion?

Mr. Robertson: I am coming to this one. There is no merit in this one. Here is what makes it self-

evident: If John L. Lewis, who is a national character and who thrives and lives and flourishes on publicity, chooses to sound off for the benefit of the press and then his statements are broadcast throughout this country, if there is any soundness in their motion, John L. Lewis could stop a trial whenever he wanted to by making whatever utterances he chose to make.

Mr. Mullen: Mr. Robertson—

Mr. Robertson: Just a moment, we haven't finished. Some of my colleagues may want to say something.

The Court: You all have everything you want to say, and then I am going to let these gentlemen close, and then I am going to rule.

Mr. Allen: If Your Honor please, of course this was sprung upon us without notice. I read the article last night, but it didn't impress me as being of any great importance and that is the reason I asked Your Honor to read it a moment ago. Being without notice that this motion be made, I can not point specifically to cases which have passed on this question, but Your Honor will remember that the same question came up in bank cases over here in the Federal Court. There was a great long publication in the newspapers much more damaging than that against those men. A motion was page 2181 } made for a mistrial. The district judge overruled the motion and it went up to the circuit court of appeals and they agreed with that also. You remember the same thing happened two or three times up there in the Communist trials in New York. The appellate court ruled on those motions. The sum and substance of all the rulings in cases like this is that in a trial which has attracted public attention like this one has, with national figures involved in the case, it is utterly impossible to keep newspapers from writing editorials and publishing news articles on the subject. If a newspaper contains a news article or writes an editorial which Your Honor thinks is improper, you have the right to issue your rule for contempt, but Your Honor should not penalize us. Not a single attorney knew anything about it, and I conferred with Mr. Bryan and he knew nothing about it.

Furthermore, what is more important in the case, the editorial is in response to a statement that the principal defendant in this case made. I say principal defendant. Mr. Lewis is not personally the defendant in this case, but the union of which he is boss and which he controls is defendant. It is the equivalent of almost a personal suit against Mr. Lewis except that no personal judgment can be rendered against him. He came down here during the progress of the trial. The newspapers published a memorandum of that, published his picture

in the paper. Now he comes and makes this  
 page 2182 } statement about collecting money for litigation,  
                   collecting money for defense purposes, while this  
 case is pending in which his union is involved. He couldn't  
 expect anything but editorials on the subject. The editorial  
 didn't mention this litigation. It didn't mention any specific  
 litigation. It didn't mention Mr. Bryan or the Laburnum  
 Construction Corporation or anybody else. The editorial  
 dealt with the matter as a general news item and as a general  
 policy and was writing on the subject generally.

There is not a scintilla of evidence anywhere, and if they  
 can produce any, then let them produce it, but until it is pro-  
 duced there is no evidence that the editorial was intentional,  
 there is no evidence that the editorial was designed to affect  
 this case, there is no evidence that Mr. Bryan, the plaintiff, or  
 any of the officials of Laburnum knew anything about it or  
 had anything to do with it. I submit that the case comes  
 right within the confines of the general run of cases like this  
 where in every case of great public interest which is given  
 notoriety by virtue of the figures involved, like Mr. Lewis, you  
 can not prevent newspapers from publishing news items and  
 writing editorials generally which anybody may apply to this  
 or any other like case.

If Your Honor wants any authority on that subject, I think  
 all the authorities were reviewed by Judge  
 page 2183 } Parker in that case, and they were reviewed by  
                   those judges up there in the United States Court  
 of Appeals in New York. We have had one or two cases in  
 Virginia on the subject, and if Your Honor has any particular  
 doubt about this proposition, we want an opportunity to show  
 Your Honor what the law is. We believe it is with us. I have  
 been trying cases for 40 years and this isn't the first time I  
 have had the thing come up like this to contend with.

The Court: Mr. Moore?

Mr. Moore: I have just one more observation. I was im-  
 pressed in listening to Your Honor read it by now much of it  
 was direct quotes from Mr. Lewis. The whole tenor of their  
 argument has been that Mr. Lewis has never heard of the  
 Laburnum Corporation and it is such small peanuts. If he  
 is going to come out and make a statement like that during  
 the trial I can't see any possible reason why we should be  
 penalized for it.

Mr. Lowden: One other fact. I think if you go back in  
 the last week or so, you will find that this thing that is quoted  
 was put out on one of the wire services, either the AP or UP,  
 and nobody complained down through the first two para-

graphs when Mr. Lewis said all this. It was obviously designed to publicize the other side of the story, and I think you will find that was carried in the newspapers verbatim. I have read the article before somewhere, if my memory serves me, without any editorial comment.

The Court: Are you gentlemen through?

Mr. Robertson: Yes.

Mr. Mullen: If Your Honor please, this is a matter of protecting the rights of these defendants. The statement that he had made this assessment is a news item and no one paid any attention to it and couldn't take exception to it. You say it in the papers. But that is very different from editorial comment that makes these charges against Mr. Lewis and against the miners. These are serious charges. They are bound to affect it. We would like to have Mr. Bryan put on the stand and ask him what his interest and connection with the News Leader is. This is a very serious matter, not to be lightly put aside. Mr. Robertson has been obsessed with the idea we didn't want to try this case. Your Honor has seen nothing of that. We have always wanted to try it. He is obsessed with the idea that Mr. Lewis wouldn't come here. They summoned him and didn't dare call him. All through we have cooperated. I didn't want to put the case off. I wanted it tried. My instructions were to try it. There is no witness who can make any such statement as that, compared to what may have happened in Luray. We are not charging that these attorneys had this published. Of course I know they didn't. I wouldn't think of making such a charge. But it was done, and the effect is there.

We have a case here on the subject. They say page 2185 } they didn't notice. I didn't know it until last night. I didn't have time to give any notice.

As to Mr. Robertson's talking about renewing the motion for mistrial, we decided not to do it. We had a right to decide not to do it. It was a motion to strike that we had. A motion to strike is more properly a motion to set aside the verdict. For that reason we decided not to do that because it wasn't our practice.

As for the other notice of motion for mistrial, it was done to stop Mr. Robertson from making side remarks. If Mr. Robertson wants to know what it was done for, that is what it was done for. It had a little effect for a while. It didn't have very long. He continued to make side remarks.

Mr. Robertson: I had to reply to yours.

Mr. Mullen: It was done for that purpose rather than as anything against Mr. Robertson himself.

I think Mr. Bryan ought to be asked about this.

Mr. Robertson: I think it all depends on what the Court wants to do. I don't know about Mr. Bryan's connection with the News Leader.

The Court: I don't think the Court will require him to answer what his interests are but you might ask him if he has any interest in the Richmond Newspapers.

Mr. Mullen: Mr. Bryan, have you any interest either through stock ownership or beneficiary trusts in the Richmond Newspapers, Inc., or the News Leader?

Mr. Bryan: I have a small minority stock interest in Richmond Newspapers, Inc.

Mr. Mullen: Has your family an interest in it?

Mr. Bryan: Yes, my mother, brothers and sisters, have similar interests.

Mr. Mullen: The publisher of the paper is your first cousin?

Mr. Bryan: That is right.

Mr. Mullen: Do any of them have an interest in Laburnum?

Mr. Bryan: Tenant Bryan does not.

Mr. Mullen: Who?

Mr. Bryan: Tenant Bryan does not.

Mr. Mullen: Do members of your family having an interest in the News Leader also have an interest in Laburnum Construction Corporation?

Mr. Bryan: Stewart Bryan, Jr., does and Tommy Bryan.

Mr. Mullen: They also have an interest in the News Leader or Richmond Newspapers stock?

Mr. Bryan: None of us have any more to do with what is written in that paper than you do or Judge Snead does.

Mr. Mullen: Mr. Bryan, I am not charging that you had this written.

page 2187 } Mr. Bryan: I don't know any more about it than you do.

Mr. Mullen: It was just somebody in the paper, but the responsibility is there still in connection with this item.

Mr. Pollard: Judge, we are going to point out also that the increase paid by the Mine Workers and the letter spoken of in the editorial all came about prior to the commencement of the trial of this case, which was over three weeks ago, and it is most singular that the owners of the paper would wait until the evidence has been taken and the jury is getting ready to be charged before they write an editorial about it.

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The Court: Our understanding is that we are going to operate on that rule today, giving each side a fair opportunity to express themselves and then the Court is going to rule.

Gentlemen, the Court overrules the motion, and if the verdict goes against you, you may renew your motion at the end of the trial and the Court will take the matter under further consideration.

Mr. Mullen: We except.

Mr. Allen: Do you think it wise to inquire of the jurors if they read the editorial and if they did, then instruct them to disregard it or ask them if they can try the case without prejudice or bias irrespective of having read the editorial?

I think it would probably be proper to do that page 2190 } and give them an instruction that they must disregard it.

The Court: If you gentlemen will prepare such an instruction, the Court will consider it.

All right, gentlemen.

Mr. Pollard: We except to Your Honor's ruling.

The Court: An exception is noted.

Mr. Robertson: Mr. Mullen, we have rewritten No. 8 of our instructions and we have distributed copies of it.

Mr. Mullen: There was another one that we had not disposed of.

Mr. Pollard: Your Honor, I wonder if we might turn to No. 7 just for one second.

The Court: Mr. Pollard, we are coming back to those. Let's go on through and then come back to those which are rewritten.

Mr. Mullen: Yes. I never stated my objection to that.

Mr. Allen: We are going to withdraw No. 6. No. 5 was rewritten.

The Court: Yes, you withdrew No. 6.

Mr. Pollard: Temporarily or permanently?

Mr. Allen: Permanently.

Mr. Mullen: Now we are on No. 8. page 2191 } Mr. Lowden: No. 8 has been rewritten since yesterday. I don't know whether you got a copy or not. We gave you four.

(Plaintiff's requested Instruction No. 8 follows:)

"The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting for all the defendants for the purpose of 'organizing the unorganized,' and (2) that in furtherance of that purpose he was going

about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force the workers on such jobs to join one of the Defendant unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the Defendants, and (4) that in furtherance of this design Hart led men to Plaintiff's job site in Breathitt County for the purpose of compelling the employees of Plaintiff to join one of the Defendant unions, irrespective of such employees' wishes, and (5) that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of Plaintiff to 'sign up' with one of the Defendant unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of 'taking over' Plaintiff's job or forcing

page 2192 } Plaintiff to get out of the territory, then Defendants are liable to Plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court."

The Court: All right, I am going to tear up this old No. 8 so it won't get mixed up in the papers.

Mr. Pollard: Your Honor, the first objection we will make to this instruction is that this, being a finding instruction, there must be at the end after (6) a further instruction to the jury that they must believe that this is the sole cause of the plaintiff's injuries, because a finding instruction is one which covers all possible theories of the case, and if they are going to find on this instruction alone, then they must also believe that these acts, if they believe them, were the sole cause of injury.

I don't know whether Your Honor wants to take these points one by one or whether you want to hear all of our objections.

The Court: I suspect it would be better to hear all of them and let them answer them and then you reply. I believe that will save time.

Mr. Pollard: That is our first objection.

The Court: You gentlemen might make a

page 2193 } memorandum of these objections.

Mr. Pollard: Coming down from the top, Item No. (2), we object to that for two reasons, first, that this charge is not supported by the evidence and, second, that such

evidence should not properly be before the jury. I would like Mr. Rogers to discuss the point of whether or not the jury can properly consider evidence of other acts of the defendant, that is, a course of action.

Mr. Rogers: The second article of this instruction is framed to refer to the possible activities of Hart in going to various job sites throughout Eastern Kentucky for the purpose of compelling by intimidation, coercion or force, the workers on such jobs to join one of the defendant unions or, failing that, to stop the jobs. As I understand it, evidence of activities in connection with other jobs was offered in evidence but was excluded by the Court.

Mr. Pollard: Excuse me, Walter.

The Court: I think it was admitted, wasn't it?

Mr. Pollard: It was admitted, but we say that doesn't prove it. But go ahead.

Mr. Rogers: The evidence of what this individual might or might not have done on other occasions unrelated to the particular job in question here is not evidence that the jury should consider in determining whether or not such acts were committed on this occasion. It is the generally accepted principle that you can not prove the particular charge directed here by proving that there was any habit or that he had committed acts of similar nature to that charged here on other occasions. Otherwise, a man would be convicted of doing an act here because he may or may not have done it on some other occasion. The question is what did he do in this instance. The fact that he may or may not have had such a purpose at other jobs is not a matter to be considered here. Certainly it is not a matter to be commented upon in an instruction directed to the jury. There are some exceptions to the general rule that other acts are inadmissible in a case. They are admissible for certain purposes, but certainly limited purposes. If they are admissible at all, it is merely evidence to deal with the situation in hand and certainly should not be commented upon in a particular instruction, because the question before the jury here is what was done in connection with the work being done by Laburnum Construction Company. Whether or not he did it to somebody else or on other occasions if under any circumstances prior acts were properly admissible as an exception to the general rule, it then becomes simply a matter of evidence, not a fact in issue in this case, but simply a matter of evidence coming within one of the exceptions, and that would reduce it to a matter of evidence, a specific item of evidence that possi-

bly could be considered under some circumstances, but which should not be commented upon or called attention to in an instruction, as this does. It is particularly objectionable when embodied within instructions which go to the jury in a consideration of the question of whether or not the acts were committed here.

Mr. Pollard: Do you want to cite any authorities?

Mr. Rogers: It is a generally accepted principle quoted by numerous Virginia authorities, both in civil cases and in criminal cases, and to some extent the nature of the offense charged here partakes of a wrong. The rule in criminal cases is particularly applicable, that proof of prior conduct, actions taken in other cases can not be used to show that the man did the offense charged in the particular case at hand. Virginia authorities are: *Turpin v. Branaman*, 180 Va. 818, *Radford v. Calhoun*, 165 Va. 24, and *Barber v. Commonwealth*, 182 V. 858, which was a very recent criminal case which went into an extensive review of the question of whether or not other acts could be shown at all or not. It was held in that case, which was a rape case, that his conduct on previous occasions with other complainants could not be shown at all. Other cases that have been cited are civil cases, some of them negligence cases and things of that sort. The principle is so well established that you can't convict a person of the particular charge made here by showing that he committed similar offenses on prior occasions that it hardly needs citation or explicit authority for that. It is a general rule stated in American Jurisprudence on evidence, Sections 302 and following, and the whole principle of the exception as to when they are admissible is dealt with there as well as in *Michie's Jurisprudence on evidence* in Volume 7 at page 383 and following.

When they are admissible it is simply a matter of evidence sometimes to show knowledge or that there is a series of acts directed against one person to show a particular design to do him injury, but then they become only matters of evidence tending to support the charge in question. The fact that they may have been done does not as a matter of law go to establish the liability or the responsibility for the act in question. It can only be considered as tending to prove knowledge of the particular fact involved and then it becomes just a specific item of evidence which should be commented upon in an instruction as a particular matter that can be considered by the jury.

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Mr. Rogers: It might be stated somewhat this way: The responsibility of this defendant in this case to this plaintiff cannot be increased or decreased by what he did to somebody else. This plaintiff would not be entitled to recover anything for what this defendant may have done to me, say, and certainly nothing in an instruction that is telling page 2198 } them what they can find for the plaintiff should refer in any way to what has been done to others.

Mr. Mullen: This takes in the whole of Eastern Kentucky. As I said, they referred to a couple of instances. They referred to two of them by saying there was trouble at such and such a place. They used "drive off" when the whole purpose of a strike is to close down. Everybody knows what a strike is for, to close down, to shut down, not to drive off. In this particular case the plaintiff's own testimony showed that it didn't want to drive them off because on August first he admits Hart said "If you recognize these common laborers, these 15 laborers, you can go on back to work." So it wasn't the purpose to drive them off and it wasn't the purpose to destroy the business. They didn't want to destroy their own jobs.

That is on (2). Is there anything more you want on No. (2)?

Mr. Pollard: Do you have anything you want to add on that, Colonel?

Colonel Harris: Yes, I have.

If Your Honor will look at the instruction it says, "He was going about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force \* \* \*". There is not a word of testimony in this case that any intimidation was ever used. One man page 2199 } testified that at one job 2 or 3 hundred men came up, but he did not say that any threats were made. he did not say how many men were working on that particular job. There is no evidence in this case of any form of coercion. One man testified that they came to a job and demanded that they have it. A demand is not coercion. There is no evidence that force was used in any other labor dispute in Kentucky. There is no evidence that anybody was beaten, no evidence that anybody was slashed with a knife or shot at with a pistol. This instruction is grossly misleading and is abstract. It does not apply to the facts of this particular case.

Is it your Honor's idea to go on with (3), (4), (5), and (6)?  
The Court: Yes.

Colonel Harris: Then in (3), the last clause of (3) is, "Or reasonably should have been known to the defendants." Counsel have cited no case adding that as a principle of agency, and the only responsibility is on principles of agency for this man. It does not take into account any action taken by the defendants. If they had known of such facts, it doesn't hypothesize anything of that sort.

On (4) it adds the phrase "irrespective of such employees' wishes." The undisputed evidence shows that laborers did sign up. This case is very singular in that they did not put on a single one of those laborers who signed up page 2200 } to show what that man wished, and the only way you can prove what a man wished, what his mental operations were, would be to put that man on the stand and prove it by him.

Then in (5) it says "that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force—"

There isn't any evidence whatsoever that he was backed up by overwhelming force, that is, no credible evidence, if the Court pleases, because I don't think this court should be misled by something that was palpably a gross exaggeration. The testimony was that there were from 30 to 50 men in the party. Other men testified that it was 50 to 75. One wild man testified there were 150. If there were 30 to 50, there were that many men working on the job for the Laburnum Construction Company. It isn't overwhelming force when the number of visitors is less than the number of workers.

Now take (6). It says, "that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of plaintiff." The plaintiff would not be entitled to any punitive damages on account of Hart's attitude toward the employees. It would have to be Hart's attitude toward the plaintiff. Furthermore, (6) does not hypothesize the law authorizing the award of punitive damages in the State of Kentucky. This is a relaxation of the Kentucky law as to what must be proven in order to justify the award of punitive damages and would make it much easier for the plaintiff to get a verdict for punitive damages than the Kentucky law would allow him to do.

Was there some suggestion you had there, Mr. Owens?

(Counsel conferring.)

Colonel Harris: It has been suggested that I call to the attention of the Court that (6) is in the alternative, and that is "with the express and avowed purpose of 'taking over plaintiff's job or forcing plaintiff to get out of the territory.'"

I don't recall any evidence that anybody was trying to drive the plaintiff out of the territory, and to come to a job in a labor dispute for the purpose of taking over the job does not authorize the award of punitive damages.

We also submit that these various instructions as worded do not meet the requirements of the law so as to authorize the award of compensatory damages and the total effect of this charge taken as a whole is practically to direct a verdict for the plaintiff.

That is all I have to say.

Mr. Pollard: There is one other thing, Your Honor. (4) starts off that "in furtherance of this design". That is the first time design has been mentioned, and it creates the presumption that they have found there is a design page 2202 } when design hasn't been previously mentioned.

Following No. (6) starting "then defendants are liable to plaintiff not only for all damages proximately resulting from such action, but also punitive damages—"

The law is not that the defendant is liable for punitive damages, but it is that the jury may in its discretion award punitive damages, which is an entirely different thing. This amounts to an instruction that they must find punitive damages.

Mr. Mullen: Finished?

Mr. Pollard: Yes.

Mr. Mullen: If Your Honor please, I would like to comment on a few of these. I am going down to (5) now where he uses "backed up by overwhelming force." The testimony is that they had 64 people on the job on the 26th. That is Mr. Bryan's testimony, and it is in evidence. Henry Starr said there were between 50 and 75 people. Bert Preston said there were 40. The Hackworth Brothers, whose stories were remarkably alike in all respects, John said 35 to 50, Norman 35 to 40, Robert 30 to 40. The only man who put it up higher was that man Chester Trimble, and nobody agreed with him. Paris Trimble said 60 men. Hart testified he had between 20 and 30 men. Lee Bach said 20 to 25 men. Burl King 20 to 30 men. Haslam, the superintendent of the mines there, said it was between 25 and 30 men.

page 2203 } There is no evidence there of overwhelming force. On the contrary, the men brought there

were less than the number of the employees working there. There is no basis to say that they came there backed up by overwhelming force.

On (6) there is no proper basis for saying they came "with the express and avowed purpose of 'taking over' plaintiff's job" in the face of the plaintiff's own testimony that on August first Mr. Hart said, "If you recognize the laborers, go ahead with the work," and also the testimony throughout that they only wanted to take over the laborers. Even Plaintiff's witnesses deny it, they let slip a word here and there showing that they were laborers. Mr. Bryan immediately recognized it was a question of laborers. He phoned trying to get the laborers in the other union. All of the testimony that they tried to bring out, they say that one man was a laborer that they were trying to force to sign. Mr. Bert Preston recognized that they were after the laborers. You can go through their evidence and find out that those who said they were after all of them let slip a word here and there that they knew it was the laborers they knew they were after. There is no basis for saying "with the express and avowed purpose of 'taking over' the plaintiff's job," in the face of the plaintiff's own testimony to the contrary.

The Court: Are you gentlemen through?

Mr. Pollard: Yes.

page 2204 } Mr. Mullen: Yes, we are through.

The Court: All right.

Mr. Robertson: I am going to ask Mr. Lowden to lead off for us, Your Honor.

Mr. Lowden: I think, first of all, if Your Honor noticed the way this thing is drawn, the jury must find all of these matters as facts. I drew it, and my idea was to stay well within what we are entitled to ask for. Therefore, as in the instructions as to agency, in this instruction they must find more than is necessary.

When you come down to the remarks of Mr. Rogers with respect to finding No. (2) he said that in a criminal case—and I agree with him—the matter of how fast I was driving this morning has nothing to do with how fast I am going when the cop pinches me on the way home tonight. I agree with that. The finding No. (2) that we are asking them to make hasn't anything to do with what they did on this particular job. The fact of what he did goes to two other points, which I think are significant. First, it has a bearing on the question of agency. I think Mr. Rogers said for that purpose other occasions are permissible. Secondly, in this case we are asking for punitive damages, and it seems to me that if the finding No. (2) is made coupled with some of the other

findings which they must also make, they will have them found  
malice and express design to go around the coun-  
page 2205 } try not only for us but for everyone else and run  
them off the job.

Now, we come down to the question of whether or not there was overwhelming force. The testimony of our witnesses, if you believe them, was that they were outnumbered 3 to 1, 4 to 1, 5 to 1, 6 to 1. It may be that we had 65 people on the job, but 8 of them were over at the schoolhouse, another group were at the tipple, and another bunch were up on the hill three miles away, which you could get to only by going around the mountain. If there were 65 altogether and they were all together at the same time, maybe there wouldn't have been overwhelming force, but Mr. Hart testified, and if you look at the record this is true, that when he came to the schoolhouse he had 25 to 30 men, 25 to 30 against 8. He admitted that, but he never denied that he had more than that. Never did he testify that that was the number that he took to the tipple. Our evidence is that there was a different number of people at the tipple than there was at the schoolhouse. Mr. Hart didn't deny that because he only testified—and I think I am correct on this—that when he had 25 or 30 men that was at the schoolhouse only, and he very carefully didn't say how many he had at the tipple.

So if you believe our people—and I think it is almost admitted by them—certainly at the schoolhouse they did have them three or four to one. Contrary to what  
page 2206 } Mr. Harris said, there is plenty of evidence to support that statement.

There was some statement made by Mr. Pollard that the last part of the thing required them to find punitive damages. It was written with the intent, and I think it expresses it, that they may find punitive damages if they find all those facts, and they may not, but there is another instruction telling them what they may do about that. It doesn't require and was not intended to require the Court to tell them to award punitive damages.

There was something said that there was no evidence that Mr. Hart came there with the express purpose of either taking over the job, not in those words, or running Mr. Bryan out of the territory. If you believe Mr. Bryan, that is what he expressly said he was going to do, and that is exactly what he did do. Hart denies that. But the Court is not instructing the jury that that is the fact. It is asking them if they believe it; it is asking them, "Do you believe Mr. Bryan or do you believe Mr. Hart?" If they believe Mr. Hart, then that paragraph would fail and the answer would be "No."

I think this particular instruction was drawn with the purpose in mind to make the jury find more than it is then necessary for them to find in order to give us both compensatory and punitive damages if they find all that. I page 2207 } agree that some of the points are in issue. All we are doing is asking them if they believe this. If they don't, then under this instruction they couldn't find for us. But I don't see in there any place where it is unfair or any place where it is not supported by what I consider to be proper evidence. Of course if I didn't think the things we were asking were all going to be answered "yes" on the basis of the evidence, I wouldn't have drawn this instruction. That is all I have to say.

Mr. Robertson: All right, Mr. Moore.

Mr. Moore: I would like to make one comment on Colonel Harris' remark about the words "utter disregard for the rights of the plaintiff," not being sufficient to meet the Kentucky law on punitive damages. Those words are almost identical to an instruction given in a Kentucky case, *Kentucky Heating Co. v. Hood*, 118 S. W. 337, where the Court in stating the instruction on punitive damages stated it as follows:

"I further instruct you gentlemen that if you believe from the evidence that the agents or employees of the Kentucky Heating Company, the defendant, maliciously or in wanton disregard of the plaintiff's right—" and so forth, then enumerating the points charged against them. There it is a "wanton disregard," and here we say "utter disregard." I think we would change "utter" to "wanton" if they want to go that far. I think it is exactly right under the page 2208 } Kentucky law.

The part about the pattern in addition to the elements of malice and agency, which Mr. Lowden has discussed, we believe is shown in our trial brief, the same authorities that Mr. Rogers cited in *American Jurisprudence* and *Michie's Jurisprudence*.

Mr. Allen: May it please your Honor, from a practical point of view what they are saying is that there is not sufficient evidence in the record upon which to base this instruction, that is, not sufficient competent evidence. Mr. Rogers admits that there is evidence in the record, but he contends that some of the evidence on which it is based is incompetent.

Colonel Harris' argument is addressed to the point that there is not sufficient evidence in the record about these other instances and according to Mr. Rogers, if there were, the evidence is inadmissible. I am not going to say much about

the admissibility of it because I consider that Your Honor has passed on that. I am coming to it in just a moment.

But as to whether there is evidence in the record of these other instances, I rather suspected something like this would come up, and I went through their own records on the subject. Mind you, our testimony shows that Mr. Bryan stated that Hart told him that he had closed down people at Beckett Construction Company and Link-Belt Construction Company and the Rust Engineer Company. Nelson Baldrige testified with reference to the instance at Wheelwright. Some of these instances are mentioned in their written reports which are in evidence, and here is what some of those reports show.

They show in the answer to Interrogatories (2), question 27, 4.9, that the job at R. H. Hamill Company was closed down at Ragland, Kentucky. That report shows that they had been working an A. F. of L. labor crew, and when they forced those people to sign, then the job was resumed. The same interrogatory, sub-answer 4.20 refers to closing down the job of Livingstone Construction Company at Toner, Kentucky. That report shows that they refused to recognize the defendants' unions and that they closed the job down.

The same report, 4.28, shows that the Associated Construction Company at Jeff, Kentucky—I forget the name of the president of that company—objected to signing with the United Construction Workers because his sub-contractors were A. F. of L. laborers, and he didn't think that the A. F. of L. and these people could get along together, so he refused. The report goes on to say that they gave him a week to think it over, and it added, "I intend to close the job at Jeff." That is Hunter.

Those same reports showed that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, because they had failed there to recognize these defendants' unions. They say in that report that they closed the job down.

Mr. Pollard: Your Honor, may I ask Mr. Allen a question?

Mr. Lowden: We didn't bother you.

Mr. Pollard: I am asking the Court if I may do so.

The Court: I suspect it would be better, Mr. Pollard, to make a memorandum of it and then when he gets through ask him the question.

Mr. Allen: Ask me when I get through. I will not take long. I don't want to cut you off but I will answer.

What is worse, in that same interrogatories, in sub-answer 4.22 there is a report in the exact language: "We were un-

able to get the job until Fleming"—who was one of their representatives—"whipped the bully on the job." That is in their written report.

Then you come right back to the issue in the case as to whether Hart went to the job site in this instance with the very peaceful intention of just by persuasion talking to these people and persuading them to join his unions, or whether he went therewith the intention that we say he went there with.

All of the law on the subject is to the effect that page 2211 } when a matter of intention, plan, program, or pattern is involved, you can go into these other instances. I don't think it is necessary for me to read the paragraph that I read from Wignore the other day but if Your Honor wants your mind refreshed, I will read it. It is in your trial brief there also.

You will remember that Frank Dixon, the International representative in that section for the A. F. of L., testified that that was the policy of these people. He was in position to know. He was dealing with them. He was locking horns with them all the time. He said it was their policy to run A. F. of L. men off the job and force people to sign contracts.

You come to the latter part of the instruction and they criticize it because it winds up by saying the "defendants are liable to plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court."

Punitive and compensatory damages are defined and exactly the circumstances under which each may be awarded are stated clearly to the jury. That is the reason why I insisted this instruction not close without a reference to the others, else you would have to repeat the whole definition of compensatory and punitive damages in every instruction.

If you want to ask me a question, Mr. Pollard, page 2212 } I will be glad to answer you.

Mr. Pollard: I just wanted to ask you if any of the reports which you referred to in the interrogatories showed that these jobs were shut down or were organized, the reports that you referred to, and if there is anything in the reports that shows intimidation, coercion, force or violence.

Mr. Allen: There is nothing in the reports to show expressly whether the job was shut down as a result of a strike or whether it was shut down by force or violence, except that report there which says that one of the representatives of the defendant union went there and whipped the bully on the job and then they got a contract.

Mr. Mullen even asked some of your witnesses what they

meant by closing down, and they said they meant by closing down, as the result of a strike. They have answered the interrogatories in this case, and the specific question was asked them as to whether there was a strike and the answer in the interrogatories was that there was no strike on this job.

Mr. Mullen: There is no such thing as this in there.

Mr. Allen: All right, I will show it to you.

Mr. Robertson: We are getting away from the procedure that we were going to follow.

The Court: I think counsel can ask a question of other counsel.

page 2213 } Mr. Allen: He said I was wrong about that.

I will show it to him. Look at Interrogatories (2), question 56, to the UCW. It is right in there.

The Court: Let's recess for five minutes, gentlemen.

(Brief recess.)

Mr. Allen: What was that question you asked, Mr. Pollard?

Mr. Pollard: Mr. Mullen asked the question.

Mr. Mullen: The question was whether there is anything in the record saying on our part that there was no strike.

Mr. Allen: Yes. Read the question there. Do you have it, Mr. Robertson? I will read the answer. It is question 56.

Mr. Robertson: Interrogatories (2), Question 56:

"When and upon whose authority did United Construction Workers local Union 778-A decide to take strike action against the plaintiff in connection with the plaintiff's work at Breathitt County, Kentucky? Was the so-called strike against plaintiff that took place at Breathitt County, Kentucky on July 26, 1949, sanctioned by the National Director of United Construction Workers or his designated representative and if so, when and by whom was such action given?"

Mr. Allen: "Answer: No formal strike action was ever taken by Local Union 778-A and consequently there was no occasion for nor was any request made to sanction any strike action."

Mr. Mullen: No. The individual members of the laborers struck. I knew it didn't say that.

Mr. Allen: I don't think, Your Honor, that a discussion of that is material to what we are discussing here now. I am not accepting my good friend Mr. Mullen's statement about that in view of the evidence in this case, but I don't see where we should at this time go into a discussion of that in

view of the admissibility of the evidence upon which this instruction is based and the sufficiency of the evidence before the jury as a basis for the granting of that instruction.

I will be through in just a moment.

You remember that Hart testified that while some *cuss* words were used there, everybody was laughing and Hart admitted he did mention bringing 300 men there, but he said that was all just a laughing matter and a joke. You remember the testimony in the record to the effect that Mr. Bryan's men would be afraid to work and that if some of them should undertake to work he would have enough men there to stop them. He mentioned also to Mr. Bryan that he had run other people off the job and he saw no reason why Mr. Bryan should complain, that his company wasn't in any different position

from the others. He told Mr. Bryan over the page 2215 } phone on July 14 that if he did not recognize his union, he would close down the job, just like he had closed down jobs of Link-Belt Company and Beckett Construction Company and the Rust Engineering Company at Wheelwright, West Virginia. Nelson Baldrige testified to the same effect, and furthermore several witnesses testified that the reputation of these defendants for running people off the job unless they employed their men was bad, their reputation in Kentucky. If I am not mistaken, Frank Dixon testified to that, but I know Frank Dixon testified that to his knowledge it was their policy to do it. That is all before the jury.

That goes to the question of intent and motive and purpose for which Hart went to this place on July 26.

I think that is all I have to say.

Mr. Robertson: Judge, I will take just a minute. I want to point it up a little bit on the facts.

Since I had to prepare myself to examine these witnesses I ought to remember the evidence pretty vividly. In the first place, this whole instruction is predicated on a finding of fact by the jury, if you believe so and so. All those six elements are in the conjunctive. In other words, if they fall down on any one of them, the jury cannot find under this instruction. As Mr. Lowden has said, it was drawn that way purposely to play safe.

Take No. (1), organizing the unorganized. page 2216 } There is no use going into that. That was the purpose of all three defendants.

That he was going about Eastern Kentucky. You remember the first day he called Bryan on the telephone on the 14th and said, "It is in our territory. If you don't recognize us and don't use our men, we are going to run you out of East-

ern Kentucky just like we have done so and so." You remember when Bryan telephoned him from the service station in Huntington, and couldn't get Hart but got David Hunter and he said he would get the message but it was too late, that they had already gone. He got them down at the railroad crossing on the afternoon of the 26th and said he would bet him \$500 he would never quit, and he said, "Nobody has ever been able to buck the United Mine Workers yet, and you can't either."

It was said here about Dixon and all these others about their going around Kentucky. It shows the pattern of what they were doing.

As to whether they were known—and all this is an issue of fact—whether they were known or should have been known to the defendants in view of the set-up out there in Pikeville and Tom Raney out in Pikeville, it comes back to the fact that they have accepted the benefits of it, they have never repudiated it, and it was in furtherance of their purposes.

The Court: Let me interrupt you. Go on and page 2217 } finish and then I will ask you this question.

Mr. Robertson: I don't think it is necessary to say anything more about the force except that they had a hall full of men here, and after they put on two or three of them they quit. They put on one fellow who said that he was at the union meeting and the men were scared to go back. The most vivid one they put on was that red-headed fellow that was working on the high line named McClellan. They asked him was anybody scared and he said "Sh-h! trouble, trouble." They were going to bring 500 people from Beaver Creek. That is in evidence.

The evidence is just shot through with evidence to that effect. The whole issue is put up as an issue of fact to the jury, all six of them in the cumulative.

The Court: What about No. (3), "that such activities of Hart were known or reasonably should have been known to the defendants"?

Mr. Robertson: Here is our theory on that, Your Honor. You can even go further back if you want to than that. Fohl, whose wife is a niece of John L. Lewis, got on Laburnum's trail, working through David Hunter over in Hopewell. They said that job was about finished, that wasn't big enough potatoes, so they let that wither on the vine. Then when they got out to Kentucky and this fellow down at the  
page 2218 } Codell company wrote that letter to Tom Raney and that got to David Hunter, then they started going into action. I say it is a fair issue to submit to the jury in view of this background with Fohl here in Richmond

and in Hopewell. Then in view of the fact that you have Tom Rancy out at Pikeville, who says that he is hired and fired by John L. Lewis and is responsible to John L. Lewis, and what else does it say? All about the office lay-out there. There is no use going into that. They say all about the post office boxes and the telephones. We don't have to talk about that. That was just utterly amazing to me when he testified to this. He said, "I help David Hunter whenever and wherever I can. He calls on me to help him and for advice and guidance whenever he wants to. He is in and out of my office when I am in town several times a week. Whenever he wants me to go out over the territory and help him organize the unorganized or help him in his purpose, I do it."

The Court: I remember what you are stating, but I am thinking about the law on the subject.

Mr. Robertson: I am saying it all leads up to this: If a member of the Executive Board is there, if there is that hook-up which Your Honor says you remember, isn't it a fair proposition as circumstantial evidence for the jury to decide whether or not that went home to all three parent companies?

They admit that David Hunter was the agent  
page 2219 } of two of them, and so you get it back to United  
Construction Workers, and you get it back to  
United Mine Workers. I believe I would be on sound grounds as an issue of law, but I haven't put it up there, that if it goes back to District 50 of the United Mine Workers, it goes back to United Mine Workers. Not taking that advanced a stand, isn't it a matter of circumstantial evidence and a fair inference and an issue for the jury as to whether all three defendants had knowledge of it or should have had knowledge of it?

Mr. Moore: Isn't this proposition putting the agent in the position of acting for you and then making the principal responsible for the acts of that agent? This general point is covered in American Jurisprudence under the heading "Estoppel of Principal to Deny Authority," at page 86, 2 American Jurisprudence. It is stated:

"\* \* \* Accordingly, stating the rule as one of estoppel, where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority; he will not be permitted to prove that the agent's authority was, in fact,

less extensive than that with which he appar-  
page 2220 } ently was clothed. \* \* \*

The Court: Do you gentlemen have any further observations you want to make?

Mr. Robertson: I have none.

The Court: Do you have any, Mr. Lowden?

Mr. Lowden: No.

The Court: All right, gentlemen. Is there anything further you wish to say?

Mr. Pollard: Yes, if I may. May I go ahead?

First, plaintiffs have said nothing with regard to the point that this is a finding instruction and therefore should contain after Item No. (6) an instruction "If you further believe that the foregoing was the sole cause of the plaintiff's injuries." In other words, a finding instruction must cover every theory of the case and therefore the jury must believe that these were the sole causes of the injury.

They didn't touch on the use in paragraph (4) of the phrase "this design", and there was been no previous reference to the design. There has been no instruction asking the jury to first find that there was a design.

The instruction in my opinion should not mention punitive damages. It should not go any further than the word "liable" on the bottom line of the first page, but if it does it should  
page 2221 } certainly fairly state the law with respect to  
punitive damages, which it does not now do because it gives the jury the impression that they must find, whereas punitive damages are solely within the province of the jury.

Colonel Harris: If the Court pleases, after listening to Mr. Allen, there is only one instance that he mentions in which there was any violence whatsoever, and that I submit does not show violence. He said he whipped the bully on the job. A bully is a man who tries to trample on other people, and the statement that he had whipped a bully in one instance doesn't justify the argument that they were going about Eastern Kentucky driving men off by intimidation, coercion or force.

I call your attention also to the fact that the words "close down" are a very different thing, that that phrase is very different from the allegations of paragraph (2).

Then with reference to what Mr. Moore said, he read from 18 S. W. 337, and the very case that he read from on punitive damages required that a man act maliciously and wantonly. Both those were in there, and his No. (6) does not come up to the requirement of the case that he read from himself. It

doesn't show malicious conduct and it doesn't show wanton conduct.

Mr. Mullen: Finished?

Colonel Harris: Yes.

page 2222 } Mr. Mullen: If Your Honor please, I think that (3) is wrong by using "or reasonably should have been known," as Your Honor called attention to. Mr. Raney said that if he was requested to help, he would help, that he would help the United Construction Workers, that he would help any other union in the union movement. I think the word reasonably should have been known" are wrong.

I want to speak about taking over plaintiff's job. Mr. Bryan never testified any such thing. I went all through Mr. Bryan's testimony purposely to see if he used "Taking over" or if he used "close down," which is a very different thing. Here is Mr. Bryan's testimony: (Testimony 233-234)

"I told Mr. Hart that he was correct; that Pond Creek Pochontas Company had awarded to us a lot of additional work in Breathitt County.

"Mr. Hart said that he had just closed down, or rather, United Construction Workers had just closed down a job which the Beckett Construction Company and the Link-Belt Company were performing for Inland Steel Company at Wheelwright, and that unless we recognized United Construction Workers, they would do the same thing to us on our work in Breathitt. Mr. Hart said that he thought we might like to discuss the matter with him and negotiate an agreement with United Construction Workers.

page 2223 } "I told Mr. Hart that we had an agreement with various A. F. of L. local unions and the Richmond Building Trades Council, and that I didn't see how we could make an agreement with the United Construction Workers.

"Mr. Hart then said that he was intending to organize all of our workers, including the carpenters, electricians, iron workers, millwrights, laborers, and everybody else.

"He said that if we didn't make an agreement recognizing the United Construction Workers, he would close down our job."

Mr. Bryan used all that. "Taking over" is Mr. Robertson's language and not Mr. Bryan's language.

Mr. Robertson: I think he used it in other places, but I am not wedded to that. I don't think there is any sanctity in those words. I don't remember it verbatim. I think he used the words "take over," but I can't cite the page.

Mr. Mullen: I read through—

Mr. Robertson: You didn't read it all. He testified for 2½ days, and I think you are wrong.

Mr. Allen: I know he testified about that.

Mr. Mullen: You mean in the end you may have gotten him to use your language, but there is his original language of what Mr. Hart told him on the phone and that is what he stated.

Mr. Robertson: I understand you have made page 2224 } your motion for a mistrial to make me quit talking back at you, so I am going to quit.

Mr. Mullen: You have a right to talk here. You don't have a right to make side remarks before the jury.

Mr. Robertson: I am afraid you will make another motion.

Mr. Mullen: That is all.

Mr. Rogers: Just one further point on paragraph (2). The objection stated there doesn't go at this point to the admissibility of evidence in connection with other jobs at all. It goes to the question of whether or not the jury should consider those in determining the liability of this defendant on this plaintiff. The question of what their purpose was in other cases is not the issue. The question is what was done here. Certainly even if some improper purpose had existed in other cases, the plaintiff here is not entitled to instruct the jury that the defendants if they had such purpose, would be liable for all damages proximately resulting from such action.

I think Mr. Lowden misunderstood me on the question of the admissibility of evidence in other cases, and incidentally the same principle is applicable whether it be on the question of the agents or the man himself involved.

As far as the instructions are concerned, under what circumstances the jury can award damages to the page 2225 } plaintiff, what has been done in other cases is not a matter for them to consider. Under some conditions in some circumstances that are clearly defined by the cases setting up the exception, that may be considered as a matter of evidence to prove one thing in one case and another thing in another case, but it is not a question that goes to the liability of the defendant and certainly should not be commented upon in any way. A particular matter that might tend to show what their purpose was in this case should not be brought out in an instruction, certainly not to the extent of declaring that the defendant is liable for such actions.

Mr. Robertson: Your Honor, may I rise to a point of per-

sonal privilege here in view of what Mr. Mullen said to me and I think this will clarify it.

The Court: What is that?

Mr. Robertson: I want to read one question and one answer. I refer to the testimony of Mr. Bryan on February 12, 1951, at pages 1992 and 1993.

"Question: You testified about your conversation over the telephone with Hart on July 14, 1949, and at subsequent times. Did you ever question Hart's statement that he represented the common laborers?"

"Answer: He told me on the 14th of July during our telephone conversation that he represented the laborers. Frankly, I didn't believe him. It has turned out from his page 2226 } testimony that at that time he only represented four laborers. The next time I talked to Mr. Hart was on the afternoon of July 26 at the railroad crossing, at the job site, and at that time I told Mr. Hart that all of our laborers, that all of our workers, practically all of our workers, were members of A. F. of L. unions or had made application to become members of A. F. of L. unions. Mr. Hart then said that the laborers were not in the union, and I said 'Well, they have all signed application blanks to get in the union, I understand.' Mr. Hart said that didn't make any difference to him, whether they were in the A. F. of L. or not, he was taking over, that we were working in United Mine Workers territory, and he was going to take over the whole show."

Mr. Mullen: I say you finally got him to use the words "take over," but all through his own testimony he didn't do it.

The Court: You gentlemen are offering this?

Mr. Lowden: We will make a couple of little changes in it that will meet some of their objections if they want to. I don't know what they want to do about it. In (4) about the word "design" I think maybe we could fix that to eliminate Mr. Pollard's objection to that word.

The Court: What word do you offer in place of it?

Mr. Lowden: I think you will just have to re-page 2227 } write Section (4) a little bit to meet it. I don't have it done yet, Judge, but we can change (4).

Mr. Allen: Just say "in furtherance of said purpose." You has "purpose" up there in the beginning, went there for the purpose. Just say "in furtherance of their purpose."

Mr. Robertson: I don't see any sanctity in "design."

Mr. Allen: Just put "purpose" there.

Mr. Robertson: All right.

The Court: What else do you have in mind?

Mr. Robertson: In next to the last line from the bottom to meet one objection change "or" to "and".

The Court: You want to change the "or" to "and", in No. (6), next to the last line, first page.

Mr. Allen: Yes, put "and" in there.

Mr. Lowden: I don't think that is right.

Mr. Robertson: Leave it as it is, then. I think I offer this as it is.

The Court: Mr. Lowden said he had a couple of suggestions.

Mr. Lowden: I also would like to insert one. They didn't object to this but I think it ought to be in there that William O. Hart was acting within the scope of his authority and employment and was acting for all of the defendants. page 2228 }

Colonel Harris: Judge, may I ask a question?

The Court: Yes, sir.

Colonel Harris: I am in a state of confusion as to whether they changed the "or" to "and."

The Court: No, they didn't ask for that.

Mr. Lowden: No, we did not, because I think that is right as it is.

Mr. Robertson: Did you have something else, Mr. Lowden?

Mr. Lowden: I wanted to change the words "taking over," which will make Mr. Mullen unhappy.

The Court: What did you want to substitute for "taking over"?

Mr. Robertson: Running plaintiff's employees off plaintiff's job. That is what it was. "Forcibly taking over"?

Mr. Lowden: No.

Mr. Allen: "Forcing plaintiff to recognize them or get out of the territory."

Mr. Lowden: "And with the express and avowed purpose of forcing plaintiff to recognize one of the defendants' unions or, failing that, forcing plaintiff to get out of the territory."

Mr. Mullen: Now, how have you revised it?

(Court handing original requested instruction page 2229 } to Mr. Mullen.)

Mr. Lowden: Then as to the part that Mr. Pollard objects to about punitive damages, I don't think we can insist on that language. If there is any possibility of its being unfair, I don't think we are trying to get any unfair advantage on the

question of punitive damages. It is a matter for the jury to grant or not grant in their discretion.

Mr. Pollard: Why not put a period after "liable" in the bottom line of the first page.

Mr. Allen: You mean you want to stop at "liable"?

Mr. Pollard: Yes, or put it after "Plaintiff."

Mr. Lowden: I don't think that goes as far as we are entitled to go. If the jury makes all these findings, I think we are entitled for the judge to say to the jurors if they find all of these facts, they then may grant punitive damages. The purpose of putting in (1), (2), (3), (4), and all of them was to make them find as facts elements which create the necessary malice for punitive damages. If they do make those findings, I think they are entitled to an instruction, and if they do so find they may find punitive damages.

Mr. Robertson: That was Mr. Allen's purpose in adding that, as I recall.

Mr. Allen: That is right.

Mr. Lowden: If they make all of those findings, then I think we are entitled to have them told that un-  
page 2230 } der such circumstances that they may find punitive damages.

Mr. Allen: That is right.

Mr. Lowden: But don't have to.

The Court: "But also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court." It is in their discretion.

Mr. Robertson: We can put it in their discretion, "if you deem it appropriate."

The Court: Gentlemen, I will give Instruction 8 as amended.

Colonel Harris: Does the agreement as of yesterday as to the exceptions embracing all of the objections made in argument still obtain?

The Court: That is true. There is no objection to that, is there, gentlemen?

Mr. Robertson: No.

Mr. Mullen: And the objection covers the instruction as rewritten here today.

The Court: It will be rewritten and, as presented, the objection and exception will apply to the instruction as rewritten.

Colonel Harris: And that applies to all of them?

The Court: Yes.

Mr. Pollard: For the record we do object and note an exception to grant Instruction 8.

page 2231 }

. . . . .

(Plaintiff's requested Instruction No. 9 follows:)

"The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of—

"(1) Profits under its contract dated October 28, 1948, with Pond Creek Pocahontas Company;

"(2) Profits under its contract dated December 15, 1948, with Spring Fork Development Company;

"(3) Profits the plaintiff would have realized from promised cost plus 5% contracts with Island Creek Coal Company and its subsidiary companies, including Pond Creek Pocahontas Company and Spring Fork Development Company, provided you believe such profits are reasonably certain as defined in other instructions;

"(4) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with  
page 2232 } Island Creek Coal Company and its subsidiary  
                    companies, including Pond Creek Pocahontas  
Company and Spring Fork Development Company; and

"(5) Any loss to plaintiff from impairment of plaintiff's business reputation.

"And you should return your verdict in such amount of compensatory damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as the proximate result of the wrongful acts of the defendants or any of them."

Mr. Pollard: In the paragraph at the beginning, the last two lines of the opening paragraph: "then in order to determine the amount of such damages, you should consider any actual loss to the plaintiff of"—

"(1)" I think should be eliminated entirely because he is asking for profits under the contract of October 28, 1948, with Pond Creek Pocahontas Company. Under that contract the plaintiff's maximum fee is limited to \$12,000 and the testimony is that that fee has been paid in full. So he couldn't get any damages under that contract.

"(2) asks for profits under its contract dated December

15, 1948, with Spring Fork Development Company. That contract provided for payment of a fee of 5 per cent of the work done, with a maximum fee of \$2,500. I think they are asking on that contract for \$534. The testimony is that page 2233 } the contract was cancelled before it was finished.

There is no testimony to show how much additional work the plaintiff would have had to have done on that contract. The maximum he could have gotten was \$534.00 and if he had to do \$100,000 worth of work certainly he wouldn't have had any profit on it. The \$534 amounts to a little over \$10,000 on the basis of cost plus 5 per cent. If he had had \$100,000 worth of work he certainly wouldn't have had a profit. That 5 per cent payment was gross profit, so the plaintiff certainly is not entitled to recover gross profit. It is entitled to recover only the net profit it would have made if it did the work.

To No. (2) should be added the proviso in No. (3), "provided you believe such profits are reasonably certain as defined in other instructions."

"(3) is wrong because it says "Profits the plaintiff would have realized from promised cost plus 5 per cent contracts."

First, the jury has to believe it was a contract. A promised contract is not a contract. They first have to believe that there was a contract. The next objection is that it describes the contract as being with Island Creek Coal Company and its subsidiary companies including Pond Creek Company and Spring Fork Development Company. The evidence is that

page 2234 } Pond Creek Pocahontas Company is not a subsidiary of Island Creek Coal Company, and the only evidence is that the two companies had common managements, that they had different boards of directors. There is no relation of stockholders. They had common management. They had the same president. They used the same office force.

Again in No. (3) it should be the net profit which the plaintiff would have earned.

"(4) is a request for an instruction with regard to the destruction of the plaintiff's business relationship. Again the coal companies are incorrectly described.

The alleged cause of action took place in the summer of 1949. This suit was instituted on November 16, 1949. Thereafter the plaintiff continued to bid with the coal companies. I know there was one bid on November 23, 1949, a week after the suit was brought, wherein the plaintiff said, "We thank

you for letting us bid on this work." So the business relationship was still in existence at the time the suit was brought.

If we go on until May, 1950, Mr. Bryan testified he had the following conversation with Mr. Hunter, and this is on page 724 of the transcript:

"Question: Will you turn to page 3 and read that last paragraph on that page, which paragraph extends over to page 4?"

This is Mr. Bryan reading from his memorandum, page 2235 } dum, his prepared statement:

"Answer: Mr. Hunter said if we got additional work in Mingo, Paintsville or elsewhere in his area, he would attempt to organize our laborers and other workers, and that if he was successful he would expect us to make a contract with UCW granting recognition to it. He said he would not undertake to tell us that we could not bid on the work in Mingo, that as American citizens we had a right to bid, but that if we got the work he would expect it to be done with UCW workers. Mr. Hunter said he would not permit us to bring in outsiders, that we would have to use local UCW labor."

The next question: "Will you also read—"

Mr. Allen: What page?

Mr. Pollard: 724. The date is January 29.

The next question: "Will you also read the last paragraph on page 4, 'Mr. Hunter again emphasized \* \* \*'?"

"Answer: 'Mr. Hunter again emphasized that it would be o. k. for us to begin the work in Mingo County, that if we got it, he would try to organize the job and have us sign an agreement with UCW.'"

There is nothing illegal about that. Mr. Bryan testified or the evidence shows that it was at this point that they claimed the destruction of the business relationship, in May, 1950.

Here is what Mr. Salvati said Bryan told him page 2236 } about that same conversation. On page 25 of

Mr. Salvati's direct testimony in his deposition dated September 18, 1950, the first question on the page was: "Go ahead."

"Answer: He said that Mr. Hunter told him if he bid on

the job and came over to Mingo County to put up these buildings, he would—without any contract with our organization—that he would absolutely do everything in his power to see that they did not build those buildings.”

Next question: “Did he indicate what kind of thing in his power he would do?”

“Answer: I don’t recall specifically just exactly what he said in that regard other than he certainly wasn’t going to let them build the buildings.”

First, Your Honor, we want to point out as a matter of evidence there is a pretty big conflict between what Mr. Bryan’s notes said and what Mr. Salvati said that Mr. Bryan had told him what Mr. Hunter had said. Anyway, regardless of that conflicting evidence and where the stories got mixed up, Mr. Salvati wrote Mr. Bryan a letter on the 18th of May, 1950, about three days after this supposed conversation, and Mr. Salvati said in that letter to this effect: “From what you have told me about these conversations, I don’t think that you had better bid any more.”

page 2237 } So, first, we have this situation: The business relationship was still in existence when the suit was brought. Secondly, if it was ever destroyed by us, by the defendants—and we don’t think that we destroyed it—it was not destroyed until May, 1950, and if it was destroyed by what we say we would have done in May, it is not our fault anyway because it was actually destroyed by what Mr. Bryan told Salvati, because Mr. Salvati said, “From what you have told me about this situation, I don’t think you had better bid any more.”

Based on that, there is nothing in this suit on which the plaintiff can claim damage to his business relationship.

“(5)”, the plaintiff is claiming loss from impairment to plaintiff’s business reputation. On that point there is not one iota of any evidence. We have to keep in mind that this is a suit for the loss of future profits. You can have damage to reputation in a libel suit, where I have called you some horrible name, and you put on witnesses to prove that what I called you has hurt your reputation, or you can have damage to reputation in a suit where I have destroyed your credit, where I have gone around and spread the word that your credit is no good and as a result of my spreading that around you have gone to the bank to get a loan and the bank has

turned the loan down because of the reputation  
 page 2238 } I have given you. You say your business has  
 failed and I have damaged you. But in this case  
 to show impairment of the plaintiff's business reputation my  
 idea is that they would have to have brought a witness here  
 and said, "Yes, I knew Bryan's reputation out there in Ken-  
 tucky, and he did good work, and I was going to give him  
 some work, but the defendants here have given him a bad  
 reputation, have given him a reputation of not being able to  
 get along with his employees."

There is no evidence that he has lost any business because  
 of the reputation he got out of these alleged acts, that is credit  
 has been impaired. He says that he has lost other work with  
 the coal companies, but he is claiming separate damages for  
 that, and he is not claiming that that hurt his reputation. He  
 just says "I would have gotten other contracts and I would  
 have made this much profit on them." But there is no evi-  
 dence that anybody has hurt the reputation of Laburnum Con-  
 struction Company and that any damages have been caused.

The last paragraph uses "and you should return your ver-  
 dict in such amount of compensatory damages as will fairly  
 and fully compensate the plaintiff for any of the aforesaid  
 losses—"

I think heretofore he has spoken of nothing but profit, so  
 instead of saying "aforesaid losses," it certainly should be  
 consistent and say "aforesaid profits," "net  
 page 2239 } profits," or at least it should contain an instruc-  
 tion that if the jury believes that these alleged  
 profits were lost.

That is all I have on it.

Colonel Harris: I have nothing to add to what Mr. Pollard  
 has said.

Mr. Mullen: We ought to cite the cases on that particular  
 one. Do you have the cases on the fifth section there?

Anyhow, you can have injury to the reputation of a cor-  
 poration, but to have that and to show it you have to bring  
 evidence of specific damage and damage that resulted in in-  
 jury, and the injury resulted in damages to you, such as when  
 you work with other people and the acts prevented you from  
 continuing to get the same kind of business. There is not one  
 word of evidence put in, not a witness brought, that their  
 reputation was impaired so that they couldn't go wherever  
 they might be doing business and get business. That is over  
 and above the claim of loss of contracts with these particular  
 customers. It is an entirely different claim and they haven't  
 introduced one word of evidence to show any damage to

reputation in their general business dealings. There can't be a duplication there.

The first one says "Profits under its contract dated October 28, 1948." They have received the full amount of that.

He claimed that he got the additional school-  
page 2240 } house, but that was not under the contract. The  
contract was specifically limited to that one thing  
and he got his full pay on that.

He got most of his pay on the next one. Under that contract most of his profits, some \$1,900—and some of the \$2,500 was paid him, and he claims therefore for finishing that work and for putting on the shingles. I agree that the shingles were an ordinary change in the contract. It is not a change in the contract. It may have been an independent contract given to him verbally, but it was not any part of the contract of October 28, 1948. On the second one he had gotten most of his pay except the remainder of the \$2,500 and anything that he might have made from putting on the shingles at 5 per cent of the cost thereof. It is not shown what that cost was.

No. (3), "Profits the plaintiff would have realized—" I think the word "would" is wrong. It should be "might have realized." It is all an uncertainty. Also, as Mr. Pollard says, the promise of a contract isn't a contract.

Those are the objections I have to those three, and we object to No. (5) because we say absolutely no evidence has been put in on that point.

Mr. Pollard: You agree with me on No. (4)?

Mr. Mullen: I agree with you on No. (4), yes.

Do you have anything you want to say about  
page 2241 } this, Colonel?

Colonel Harris: Not a thing.

The Court: All right, gentlemen.

Mr. Robertson: If Your Honor please, the underlying approach to the capacity to get business and business reputation of course is based on your character and your good will, and I think the cases hold time and again that good will is nothing more than the expectancy that the old customers will come back and do business at the old stand.

We claim that the business relationship was destroyed on July 26, that that is the last time he ever made a dollar out of this business relationship, and everything subsequent to that is merely proof of the destruction of the relationship. The fact that they didn't write us until a subsequent date "don't bid any more," doesn't show anything so far as our capacity to make any money, which was destroyed, according to our theory, by virtue of Hart's actions on July 26. Every-

thing else was merely proof of that situation which resulted from his actions on the 26th.

Taking it item by item:

"Profits under its contract dated October 28, 1948, with Pond Creek Pochontas Company."

We admit of course that we collected the full \$12,000 that we were entitled to collect under that contract as written there on that date, but as these parties went along the page 2242 } contract was modified.

Your Honor, you remember the clause in the contract that there are no side agreements or secret understandings, some phrase that you put in contracts. During the trial I remember one of counsel on the other side read that expression. I think it was Mr. Mullen. Your Honor asked from the bench, "Do you mean that this is a modification or something in addition, not a secret limitation or changing of that contract when it was negotiated, but that something had developed from it?" And we said "Yes."

I speak now subject to correction. My recollection is that there was quite a lot of repair work to be done on this No. 1 tripple thing, that developed after it was over, something about a steampipe, putting it in there to thaw out coal that would come along or some repairs to it or an addition to it, subsequent to the time the contract was executed. If we try to say that we were entitled to any part of that maximum fee on the work originally contemplated, I think the defendants are right. We have no right to claim a dollar of that work. But the whole basis of this negotiation was that this was a very unattractive job on account of the difficulty of getting in there and the hardships of doing it, and therefore we weren't going to make very much money on the original one.

So far as that \$12,000 limitation we can't get page 2243 } a thing more than that unless we show that subsequently there was something else that was added to and developed from that original contract. That is the purpose of that first item.

We have no objection at all to putting after every one of them if they want it, "provided you believe such profits are reasonably certain as defined in other instructions." We have no objection to putting that it has to be something different from the \$12,000 and saying that we got the \$12,000, because we did get it.

Coming to No. (2), "Profits under its contract dated December 15, 1948, with Spring Fork Development Company."

I am perfectly willing to add there, "provided you believe such profits are reasonably certain as defined in other instructions."

Mr. Mullen admits we didn't get paid all that, and there were shipping also and other things superimposed afterwards which developed from it. This thing started out and grew and developed and evolved into what Salvati said he had promised.

The Court: Didn't Mr. Pollard suggest it should be net profits? Did I understand you to take that position, Mr. Pollard?

Mr. Pollard: I did.

Mr. Robertson: I don't know. I haven't had a chance to confer with my associates. I don't know that I would object to putting it that way. We have something page 2244 } about future profits. You remember in the trial brief, they don't have to be computed with mathematical certainty, and Baird said that he would expect from this point on that your gross profit would virtually be net profits. You have an issue of fact there.

The Court: That would be a question for the jury.

Mr. Robertson: Yes, sir; that is our point.

Then coming along to (3), I am perfectly willing to change the "would" to "might," "Profits the plaintiff might have realized from promised cost plus 5 per cent contracts—"

I thought it was very helpful the way Mr. Lowden spoke here this morning as to why the instructions were written the way they were. We realize in view of the Virginia decisions about the limitations on future contracts, that you have to keep yourself out of the realm of speculation and uncertainty, within the limits set forth in this case cited in our trial brief. Therefore, we just didn't say any kind of contracts. We said promised contracts, and promised 5 per cent contracts, because that is what Salvati said he had promised to us.

"—cost plus 5 per cent contract with Island Creek Coal Company." We are perfectly willing to put "and its associated and subsidiary companies." I think they did say Pond Creek was an associated company.

The Court: What do you want to change page 2245 } there?

Mr. Robertson: Just say "its associated and subsidiary companies."

Mr. Pollard: Including, you say?

Mr. Robertson: The evidence here is that the Pond Creek Coal Company is an associated company with the same management. I have forgotten whether they said the same ownership or not. I am certain they said the same management.

The Court: How did you amend it, before you go further?

Mr. Pollard: I might save some time by making this observation.

The Court: Wait, and let them hear you.

Mr. Robertson: It was called to my attention it should read this way, Your Honor: "With Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated or subsidiary companies."

The Court: What about Spring Fork? Just scratch that out?

Mr. Allen: Yes.

The Court: "Profits the plaintiff might have realized from promised cost plus 5 per cent contracts with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated and subsidiary companies."

Mr. Lowden: Associated *or* subsidiary.

The Court: "Associated or subsidiary company 2246 } panies."

Mr. Robertson: "—provided you believe such profits are reasonably certain as defined in other instructions."

Are you ready for (4), Your Honor?

"(4) any losses, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated or subsidiary companies."

I am perfectly willing to put in there, "provided you believe such losses are reasonably certain." I suggest that we do put that in there.

The Court: Do you want to put that in there?

Mr. Robertson: Yes.

The Court: Let me look at No. (4) again. "Any loss, as defined in other instructions, to the plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated companies," and you are going to put in there "provided you believe such losses are reasonably certain as defined in other instructions."

Mr. Moore: That is included at the top, you see.

Mr. Robertson: We can rewrite that, Your Honor.

Mr. Allen: I think probably if you put that proviso at the end of all four then it would apply to all of them, you see. You have to add it to each paragraph. You could write it

in there once and make it applicable at all places  
page 2247 } that you want it applicable, to avoid repetition  
of it.

The Court: Did you want to say something, Mr. Pollard?  
You said you had something that might help.

Mr. Pollard: With respect to the change of the names in  
(3), plaintiff's Exhibit No. 33 defines the work as "additional  
work in Breathitt County, Kentucky, which plaintiff claims  
Mr. Salvati agreed Laburnum Construction Corporation  
would handle on the basis of five per cent." So rather than  
having any company in there, it should be Mr. Salvati.

Mr. Allen: He represented them all.

Colonel Harris: And the additional objection to that  
change to include the word "associated" companies. There  
are no associated companies. They are either subsidiaries  
or they are not.

Mr. Robertson: Salvati said it was an associated company.  
That is what he said. He was the head man in all of them.  
He made that distinction between an associated company and  
a subsidiary company.

The Court: One was subsidiary and the other was a wholly  
owned corporation, wasn't it?

Mr. Pollard: No, sir.

Mr. Robertson: That is what I understood, Your Honor.  
Subsidiary would be wholly owned, and associated would be  
be entirely under one management. I under-  
page 2248 } stood from the testimony that Pocahontas was  
not necessarily entirely wholly owned by Island  
Creek but was completely under the same management.

Mr. Pollard: But with different boards of directors, Your  
Honor. Both of them are on the big board.

Mr. Robertson: They are both under the same manage-  
ment. He controlled them all. I would suggest that we write  
that up, Your Honor, except that I would like to go to (5)  
here for a moment.

The Court: Yes. I would like to hear some discussion on  
No. (5) now. I don't recall any evidence in the record.

Mr. Robertson: There is not any evidence in this way,  
Your Honor, that we brought somebody here and they said,  
"No, I heard about your trouble with the union, and I would  
not give you any contract." We haven't any evidence more  
than that. If a person says a woman has no chastity and  
brings forward a man who says "I wouldn't want to marry  
her," you just don't get it that way, but it still would be per-  
fectly good evidence. (Laughter). What we do say here is  
that the nature of the wrong done necessarily carries with it  
an impairment of business reputation. What do we have

here? What did Salvati say? What about Salvati? The Island Creek Coal Company is so big that it is spoken of as the Island Creek Empire, the third biggest company page 2249 } merical coal company in America, the biggest one in West Virginia and Kentucky. So if you have been doing work with a thing of that size and lost your relationship with that empire, necessarily it impairs your business reputation.

What else have you got? You have the United Mine Workers with 600,000 members, you have District 50 with 112,000 members, you have United Construction Workers with 45,000 members, and Hart's actions, according to our theory, have run us clear out of West Virginia coal field, have run us out of the Kentucky coal field. If they hang it on all three defendants, it is necessarily known among the executive people of all three defendants, I think it is fair argument that they have run us out of construction work anywhere in America where any one of these three defendants operates at all, because it just goes with the nature of things here that people are not going to hire this Laburnum Company any more and endanger themselves in getting embarked on labor trouble with the United Mine Workers and these two component parts of it.

So we say it is inherent in the nature of things. Do you think there is anybody in Paintsville or Pikeville or Prestonsburg or any of those towns around there in Eastern Kentucky that doesn't know about this thing? Do you think any of those laborers who said they were scared to work for us before would come back and work if we went back? page 2250 } Do you think we can go back into that territory and do work? "Nobody else has been able to buck the United Mine Workers and you can't do it either." You have to buckle under if you come back in the territory, and even if you do you can't row with them. "Your name is mud and you had better stay out of here."

We say it is inherent in the very nature of the wrong that is done.

I understand Mr. Allen has had cases which had the very question up, and I will ask him to go on from there.

The Court: Before you start, Mr. Allen, I am concerned about No. (1), too, the profits under its contract dated October 28, 1948, with Pond Creek Pocahontas Company. The maximum was \$12,000, and he has been paid \$12,000 under that contract, hasn't he?

Mr. Robertson: Yes, that is true. We might say incident to or collateral to or which grew out of. We got the \$12,000.

Mr. Mullen: Mr. Bryan testified in response to my ques-

tions that this additional work was verbal, that he had no written contract for it. It is a separate matter.

Mr. Robertson: That is right. You can modify a written contract verbally.

Mr. Mullen: But he said it was an additional job of work.

Mr. Robertson: We can reword that.

page 2251 } The Court: These subsequent arrangements that Mr. Bryan had were verbal contracts, weren't they? He went on and did some work.

Mr. Allen: Your Honor, let me suggest this here. We have to discuss (5) which is a different proposition and by that time it will be lunch hour, and I want to confer with Mr. Robertson and Mr. Bryan a little bit more before discussing these others, and particularly No. (1). I think we can clear up some matters.

The Court: All right.

Mr. Allen: No. (5) deals with loss to plaintiff from impairment of plaintiff's business reputation. You can state that any way you want to. You can use the word "impairment" or "damage" or any other way. The idea is damage to plaintiff's business reputation.

This is a tort action, and in a lot of tort actions there are damages of a type that not only can't be proven, but the law doesn't require proof of them, and in some instances doesn't even require detailed allegation of them. The law presumes damages in cases where the damages can't be proved and the case is of a nature that damage may occur that can't be proved.

For instance, you can illustrate that to begin with by this old case of *Wilkinson v. Allen*. While that was page 2252 } an assault and battery case, the principle is exactly the same and the instruction given there was this—

Mr. Pollard: What is the citation, Mr. Allen?

Mr. Allen: 136 Va. 607.

"Actual or compensatory damages." That is what they are talking about. "Actual or compensatory damages are the measures of the loss or injury sustained and may embrace shame, mortification, humiliation, indignity to the feelings and the like, and need not be alleged in detail and require no proof."

That is an instruction, and the court of appeals said that was proper.

How are you going to prove that a man was humiliated? How are you going to prove that he was mortified and shamed? How are you going to prove injury from those things? It is inherent in the nature of the case. You can't do it, and the law doesn't require it.

When you come to damage to reputation, it is exactly the same thing. You take your old case of *Ramsay v. Harrison*, and just dozens of slander cases and assault and battery cases and malicious prosecution cases, and all those sorts of cases, you never have to prove that a man's reputation has been damaged, and witnesses will take the witness stand and testify that a man's reputation was just as good as it was before, and the court of appeals answer to that page 2253 } is that that is not because of your action; it is despite your action that the man's reputation has remained good. That doesn't lessen damages to you. The law presumes damages to reputation from things of this kind.

When you come to business it is the same thing. You come to a man's store, and his business is interrupted by a wrongful act, and you can't prove to save your life that he has lost customers by it, and the court says in that old *Peshine* case that nevertheless damages are recoverable. That is a famous case. I had forgotten it until it was shown to me, and I found I had used it before. The case is *Peshine v. Shepperson*, 17 Gratt. 472. I think Mr. Mullen cited it for some purpose here in the early part of this trial on some other proposition.

Mr. Mullen: I don't recall it.

Mr. Allen: Someone on your side cited it for some purpose in this case some days ago. Let's see what the facts in that case—

Mr. Pollard: May I make an observation? All we are here concerned with is the law of Kentucky on this particular question.

The Court: The law of Kentucky does apply.

Mr. Allen: Certainly the law of Kentucky applies, but we are talking about the method of proving damages. We are not talking about the actual right to recover page 2254 } damages. That is the substantive law. We are talking about the method of proving damages, and I say when you come to presumptions taking the place of proof, it is procedural.

The Court: I think you are probably right about that, Mr. Allen.

Mr. Pollard: Yes, but wouldn't whether or not you are entitled to damages to reputation where there is no proof of damage be a matter of substantive law?

The Court: Whether or not you are entitled to damages to reputation would be substantive law, would it not?

Mr. Allen: Certainly.

The Court: But the method of proving it is procedure, and I think the Virginia law would apply.

Mr. Lowden: Might I say that up to now the only objection I heard by Mr. Pollard was that he hadn't proved it. He didn't argue we weren't entitled to it.

The Court: That is the question we are discussing.

Mr. Pollard: My objection was that there was no evidence.

Mr. Lowden: But you didn't make any statement up until this moment or even suggest that you denied our right to recover it. As a matter of fact, I think Mr. Mullen said we did have a right to recover it.

Mr. Mullen: I said you did not.

Mr. Pollard: You have no right to recover if page 2255 } there is no evidence. -

The Court: I didn't understand your remarks that way, Mr. Mullen.

Mr. Allen: The facts in that case according to headnote 3 here were as follows:

"Sale of goods by agent—no authority—liability of purchaser.—A salesman of a merchant agrees with a creditor of his principal to sell him goods in payment of his debt; and at night, without the knowledge of the principal and against his wishes, known to both of them, the goods are selected and sent off by the purchaser. The purchaser acquires no title to the goods by his purchase, and is liable to the merchant for the value of the goods, and for any damages he has sustained by the taking and carrying away of the goods."

That merchant claimed that his reputation was damaged by that man coming there and taking those goods away from his place at night like that. The court of appeals goes on and says:

"The question, then, is whether such damages as are contemplated in this instruction, fall within the description of natural and necessary consequences of the acts complained of. That such acts are well calculated to injure the credit and business standing of a merchant, and that such page 2256 } will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity.

And to take away a large part of a merchant's stock of goods, if it does not break up and destroy his business, must, to a greater or less extent, injure it, by impairing the means of carrying it on and diminishing its profits.

"The damages resulting from injury to the credit and business standing of the plaintiff, and from the injury to his business, were, therefore, properly recoverable, as natural, proximate and necessary consequences of the acts of the defendant."

There is considerable discussion of it there, and then they go into a discussion of the aggravated feature of it, which would apply here to some extent. I don't know whether Your Honor wants to hear the rest of that read or not, but our point is that damages are the natural and proximate result of a thing of that kind, and as the Court said in that case they don't even require any allegation in detail and certainly require no proof, as the expression goes, need not be alleged in detail and require no proof. They require no proof because the cases say it is difficult to prove, you can't prove it, and yet it is a thing that just naturally and inherently follows from the acts that were done.

page 2257 } I can read the rest of it here.

The Court: If you don't think it is necessary, don't read it.

Mr. Allen: I believe I have read it sufficiently.

He deals with an attachment here which attaches a man's business. The same principle applies:

"\* \* \* such damages were held to be recoverable as general damages for maliciously suing out an attachment against a merchant, which was levied on his stock of goods.

"In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry."

That is all in here. All that evidence is in.

"Without information on these points the jury will be without a guide," and so forth, "but in such a case the probable profits of the business are not the measure of damages."

They go on and discuss damages according to the rule we have stated there.

What we are contending for here is that an act of this kind—for instance, here is the situation, as Salvati said:

page 2258 } "Island Creek Coal Company as the parent company has as subsidiaries Island Creek Coal Sales Company, Island Creek Fuel and Transportation Company, Queens City Coal Company, Carnegie Coal Corporation, and the Carnegie Coal Corporation owns the subsidiary, the Carnegie Dock and Fuel Company, and the Brooks County Coal Company, another subsidiary of Island Creek is United Thacker Coal Company. They in turn own the Pigeon Creek Development Company.

"Another subsidiary of the Island Creek Company is the Aldredge Realty Company. The Pond Creek Pocahontas Company is a parent company and has as its subsidiaries Marianna Smokeless Coal Company, Bartley Land Company, Bartley Water Company, and Spring Fork Development Company."

If that isn't a regular empire, I don't know what is. This plaintiff's reputation was damaged on account of being driven out of Kentucky and having to submit to cancellation of contracts. It is a matter of common knowledge all over the country that he had the contracts cancelled on him, and things like that inherently and naturally, morally and necessarily under the law are presumed to injure his business.

I might refer to this federal case here, too, on the same subject. This case is *Aladdin Mfg. Company v. Mantle Lamp Company of America*, 116 Fed. (2d) 708, from the Court of Appeals of the Seventh Circuit, an opinion by Judge Lindley, reading from page 716:

page 2259 } "A tortfeasor is liable for all consequences naturally resulting, all injuries actually flowing from his wrongful act, whether in fact anticipated or contemplated by him when his tortious act was committed. Recoverable damages, therefore, include compensation for all injury to appellant's business arising from wrongful acts committed by appellee, provided such injury was the natural and proximate result of the wrongful acts."

They cite a United States Supreme Court case there.

"\* \* \* This includes injury to business standing or good will, loss of business, additional expenses incurred because of a tort and all other elements of injury to the business \* \* \* These are the governing principles applying to compensatory damages."

After all you might say as Mr. Robertson intimated, it is

an injury to good will. For instance, take the late case decided by our own court of appeals, *Fenson v. Rabb*. Rabb sued Fenson for damages because Fenson misrepresented his good will. He didn't say good will, but what he misrepresented was his standing with some manufacturers. He said he was in good standing with them. It turned out that with two of them, the most important of them he was not in good standing. The Court of Appeals said that was a misrepresentation, that that good standing constituted good will and if he made a misrepresentation of his good will or his standing and Mr. Rabb acted upon that, then Mr. Rabb was entitled to part of his money back.

page 2260 } The case came back and the Court of Appeals laid down the principle, and the defendants paid off and settled it.

What is involved here is a man's standing in the business world and particularly with this empire out there. The damage to reputation requires no proof but inherently naturally follows from acts of that kind, tortious acts of that kind.

The Court: Gentlemen, I think we will recess for lunch. Be back at 2:15.

(Whereupon, at 12:55 o'clock the conference was recessed until 2:15 o'clock p. m. the same day.)

page 2261 } AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: I was just saying that we would get Mr. Moore to read a case applying to subdivision (5) of Instruction No. 9.

Mr. Moore: This deals, Your Honor, with the Kentucky law, which as far as we can tell, is like the law of any other State dealing with compensatory damages in a tort action, and it is the case of *Kentucky Heating Co. v. Hood*, 118 S. W. 337. The Court states:

"Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment; and, in addition thereto, the facts

justifying it, compensation for personal inconvenience and discomfort. \* \* \*

Further down the Court states:

"It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the rule generally held to is that only such damages page 2262 } can be recovered as are actually sustained or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into.—But this measure that obtains a contracts will not be applied in action sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. \* \* \*

"It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not, at the time, have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue."

Mr. Robertson: Just before lunch, Mr. Allen said that we wanted to confer; and we have conferred, and we will strike out the first item of that Instruction. At least we can get rid of one. The thought he had in mind was that we would get rid of that one element of controversy in the Instruction, and we just ask for (2), (3), (4), and (5), and we will rewrite it to carry out the thought that has been developed in the discussion of it here.

page 2263 } The Court: Are you going to put in "net profits"?

Mr. Allen: No, sir, I don't think "net profits" belongs in there, because the profits on these contracts were 5%-plus; and as our testimony tends to show, the gross profit is practically the net profit. You can't figure the net profit on the basis of allowing any home office expenses or anything like that. The net profit on the job would be all right.

The Court: (2) and (3) start off with "Profits."

Mr. Robertson: Do you think it should be "net job profits"?

Mr. Allen: We don't want the net profits figure in any such way as Mr. Holt was talking about. That is not our

testimony. They can ask for an Instruction on their testimony.

Mr. Robertson: Wouldn't it be correct as it is? It would be a question for argument. The Jury would have a right to adopt their theory if they want to; they have a right to adopt ours if they want to. If they adopt theirs, there wouldn't be any at all. It looks to me like that is for the Jury.

The Court: Do you gentlemen have anything further to say?

Mr. Robertson: No, sir.

The Court: Mr. Mullen, you or Mr. Pollard?  
page 2264 } Mr. Pollard: Mr. Allen, have you got the  
Grattan case that you read from?

Mr. Allen: Yes. It is right here.

Mr. Pollard: While we are looking for that, what are net profits, I agree, is a question for the Jury, but what Mr. Robertson just mentioned was the phrase "net job profits." It was clearly demonstrated that what was on Plaintiff's Exhibit 34 as job profits and which Mr. Robertson has always referred to as net job profits, would carry, on the Plaintiff's analysis of the gross profit, as gross job profit. Certainly he is not entitled to recover gross profits.

What constitutes net profits is a question for the Jury, but certainly the Jury ought to be instructed that they can only award net profits.

The Court: Do I understand that the Plaintiffs are contending that 5 percent is the net job profit?

Mr. Allen: That is what we contend.

The Court: The Defendants claim that there were no net job profits.

Mr. Allen: That there was a loss.

Mr. Robertson: It says "promised cost plus 5% contracts." If they accept Holt's testimony, we had a 1.63 loss on everything, and the more we did, the more we went broke.

The Court: You argue that the whole 5 per  
page 2265 } cent is profit.

Mr. Robertson: That is right.

The Court: The Defendants argue that there were no profits.

Mr. Robertson: That there was a loss of 1.63 on everything he did.

Mr. Pollard: No, sir, that doesn't fairly state the situation.

Mr. Allen: They invite an instruction on that, too.

Mr. Pollard: The Plaintiff's own books show that what they call the net job profit is gross profit. Then you have

the question of fact whether their expert is to be believed or whether our expert is to be believed as to what you take away from gross profits to arrive at net profits.

It is admitted by all of the experts that there were certain direct expenses for which they were not reimbursable that would have to be deducted from the 5 per cent, and they say that is net profit. We say that you have to take away overhead to get net profit. I certainly don't think the Jury could fairly be instructed that they can award gross profits. If there is a dispute on the facts, what amounts to gross profits and what amounts to net profits, the Jury must be instructed that the only thing they can award is what they believe are net profits.

Mr. Allen: Neither net nor gross profit comes page 2266 } into the matter, the way we are going to redraft the Instruction. It says "Profits the Plaintiff might have realized from promised cost plus 5% contracts."

The Court: It strikes me that you may argue there are no profits at all, the way the Instruction is written. It doesn't say gross and it doesn't say net; it says "profits."

Mr. Pollard: That is the way it is drawn, Judge.

Judge, the question on (5) is not whether the Plaintiff is entitled to damages for loss of business reputation if it is proved. We say there is no evidence in the record whatsoever to prove it. The case which Mr. Moore just read, if I understood him correctly, said that those damages could be awarded; but the position the Plaintiff has taken is that those damages can be awarded without proof. Mr. Allen read from the case of *Peshine v. Shepperson*, 17 Grattan. He read this sentence:

"That such acts," speaking of the acts complained of, "are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect to a greater or less extent, seems too obvious to require proof by argument or illustration."

He cited that as authority that you don't need evidence. What this says, "seems too obvious to require proof by argument or illustration," was argument or illustration for purposes of writing this opinion, and not for evidence in the case, and there is no authority in this case that you page 2267 } can have damage to reputation without proof of it in evidence.

Coming back to No. (4), we say that the uncontroverted evidence shows, first, that the destruction of the business relationship occurred after the suit was brought; and, second, it occurred as a result of acts which took place in May of 1950.

Their position is that it ought to go back to the summer of 1949 because they never got any business thereafter, but the uncontroverted testimony of Mr. Salvati is that if Laburnum Construction Company had bid, and bid low on any work, they would have been awarded it. He testified to that in June of 1950. So they can't say just because they didn't get any work, because Salvati, who they say runs the show, said they would have gotten it if they had bid low.

In connecting this Instruction with Instruction No. 8, the Court refused, in Instruction No. 8, to add to that Instruction that the Jury must find that the injuries of the Plaintiff resulted from the alleged acts. They said that will be taken care of in the Instruction on damages; and here we are, and it is not taken care of over here.

Next, on the promised contracts, if you are going to leave "promised" in, which in my opinion is patently wrong, you at least ought to put "allegedly promised."

The Court: I think you might be right about that.

Mr. Allen: Yes.

page 2268 } The Court: That is a good suggestion.

Mr. Moore: "Allegedly promised contracts"?

The Court: Where is the other place you are going to put it?

Mr. Robertson: I believe that is the only one.

The Court: I think that should be in there.

Mr. Pollard: The only objection we have is that in the last paragraph there must be an allegation that the Plaintiff suffered losses, that the Jury must find that the Plaintiff suffered losses.

The Court: Where are you referring to?

Mr. Pollard: The whole last paragraph on the page.

The Court: "And you should return your verdict in such amount of compensatory damages as will fairly and fully compensate the Plaintiff for any of the aforesaid losses the Plaintiff has actually sustained as the proximate result of the wrongful acts of the Defendants or any of them."

Mr. Allen: I think some suggestion was made here to interline there compensatory damages "as defined in other Instructions," or "the Instruction on damages."

The Court: "And you should return your verdict in such amount of compensatory damages"—right after that.

Mr. Robertson: "—as defined in other Instructions," "as defined in Instruction 10."

Mr. Allen: They may have an Instruction on page 2269 } evidence, too, so just say, "Instructions on damages." That would refer to all of them on damages.

The Court: "—Instructions on damages as will fairly and fully compensate."

Mr. Pollard: Do you have anything to add?

Colonel Harris: No, not on that.

Mr. Mullen: I haven't anything more to add.

The Court: The Court will tentatively give Instruction No. 9 as rewritten.

Mr. Pollard: Your Honor, there have been so many changes in that, that I am not certain that I have been able to follow it. I wonder if the Plaintiffs would be willing to submit us a redraft of that in the morning?

Mr. Robertson: We will do that.

The Court: The first thing in the morning.

Mr. Pollard: For purposes of the record, we object, and except to Your Honor's ruling.

The Court: Very well.

(Plaintiff's requested Instruction No. 10 follows:)

"The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and (2) punitive damages.

"(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary page 2270 } loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company and its subsidiaries, if shown by the evidence; and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty from past experience. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjecture and probable estimates does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damages has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty. The plaintiff has a right to prove the nature of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the consequences naturally and directly trace-

able thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

“(2) Punitive damages are given, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages are given where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or where the wrongful act is accompanied by insult, indignity, oppression, or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed.

“If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way of compensation, but punitive damages must bear some relation to the injury and the cause thereof. You may, the law page 2272 { and facts justifying it, assess punitive damages against one or more, and compensatory damages against the others. The question as to the amount of damages that may be assessed against each, and whether it shall be compensatory or punitive, or both, is for you to determine.

“In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing the acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the

manner in which they were done, and did not expressly ratify the manner in which the acts were done."

Colonel Harris: If the Court please, we object to this Instruction on the following separate several grounds:

The first paragraph apparently is a direction to the jury that punitive damages are absolutely recoverable. Under the law, punitive damages are discretionary. The tenor and effect of those first three lines and two words are to direct a verdict by the jury for both compensatory damages and punitive damages.

As to paragraph (1), it says "Compensatory damages are the measure of the loss or injury sustained \* \* \*." We question whether compensatory damages are the measure of the loss or injury sustained.

Then in the next sentence: "a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company and its subsidiaries \* \* \*," that is not hypothesized upon the evidence, and the Island Creek Coal Company is not the one with whom it had its contracts. The Pond Creek Coal Company was the one it had its contracts with. It is improper to embrace both the Island Creek and the next three words, "and its subsidiaries," "and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations \* \* \*." There is a fundamental requirement that the plaintiff introduce enough evidence to enable the jury to make some calculation of the profits, and apparently that sentence is lacking in there.

Then the next short sentence: "But only such profits may be recovered as can be ascertained with reasonable certainty from past experience." That is too general and embraces an unlimited period of time, and embraces contracts of every kind and character. The business experience page 2274 } that he had and what he has shown are contracts on cost plus 5%. It is only on that basis that the jury has any evidence from which to figure profits.

Then also, it leaves out our fundamental contention that not all profits are recoverable, but only net profits.

I am not sure about the next two sentences. I will try and check with my brief. They look as if they might have been copied. I ran across a statement that looked somewhat like those two sentences in my investigation, but I haven't had a chance to check it here.

On the next page, the third line down, he has it, " \* \* \* the

consequences naturally and directly traceable thereto." That isn't the correct way of limiting or circumscribing the damages recoverable. It is the proximate consequences that determine recoverability. If they are not proximately caused by the wrong of the defendant, they are not properly recoverable.

In paragraph (2), he again starts off wording it in such way that he leads the jury to believe they are under a duty to give punitive damages. His bald statement beginning the paragraph, "Punitive damages are given, \* \* \* that isn't the law. Punitive damages may be given in the sound discretion of the jury."

Then again, in the next sentence, he doesn't limit it by the phrase "may be given in the sound discretion of the jury."

Then all of those definitions of what justifies page 2275 } the award of punitive damages it seems to me are not the true Kentucky doctrine on punitive damages. One of our requests copies of law of Kentucky on punitive damages, and we think this is an incorrect statement of it.

Taking the charge down to there, and bearing in mind Charge No. 9 which Your Honor has just indicated he would allow, the two charges taken together are confusing.

In the last line of paragraph (2) it seems to me that the limitation there in the written charge at the very end, "not exceeding the amount claimed," is an indication to the jury at that point that Your Honor expects them to give so much punitive damages that they will run completely over the amount claimed unless they are restrained, and which would have a prejudicial effect upon the outcome of the jury's deliberations.

As to the statement that compensatory and punitive damages should be separated, on that I would like to be allowed the privilege to consult with the lawyers from Virginia and Mr. Owens as to whether we want to agree to that or to object to it.

The Court: Would you like to consult now, Colonel Harris?

Colonel Harris: May I finish this and see what the last paragraph is.

page 2276 } The next statement "you may, the law and facts justifying it, assess punitive damages against one or more, and compensatory damages against the others." That is an incorrect statement of the law where liability of one is based on the principles of agency, because they could not award punitive damages against the principal and not give punitive damages against the agent. This indicates that they could. In other words, having in

mind the United Mine Workers as the treasury into which they hope to enter, they leap over the responsibility that rests upon them to prove a punitive damage case against those whom they have so strenuously denominated as agents of the United Mine Workers in all their argument before this Court.

Then looking at it still more closely, notice how suggestive and entangling the phrase is at the end of the second line on page 2: "You may, the law and the facts justifying it." That is the equivalent to some of those jurors to a statement by Your Honor that both the law and the facts in this case justify the assessment of punitive damages, and nothing justifies the assessment of punitive damages. Your Honor couldn't direct the jury that anything justified punitive damages. Damages of a punitive nature are permissive, and they are not directory.

Mr. Allen: Let's say "authorize," then.

Colonel Harris: That isn't what you have page 2277 } written, which I am discussing.

Mr. Allen: Excuse me.

Colonel Harris: I don't mind.

The last paragraph is on the question of agency, and it seems to me that it again adds still a different test to determine the application of the principle of agency. He winds up by saying that if they were committed within the scope of his employment and in the performance of a duty to his principals to organize the unorganized. He enlarges the area of responsibility.

Then take the last sentence: If, in doing the acts which he was authorized to do—" That again seems to tell the jury that the Court thinks he was authorized to do these acts. "If, in doing the acts he was authorized to do, he did them in such manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

We have to insist, of course, that the correct test of responsibility is the wording of the charge that we wrote, dependent on the Norris-LaGuardia Act, as I recall.

Let's see if you have anything else here that I left out.

An additional one that the instruction is ab- page 2278 } stract and does not correctly state the law as to compensatory damages as they relate to the evidence in this case.

Mr. Pollard: May I make two points.

Colonel Harris: Yes, sir.

Mr. Pollard: No. (2) starts off, "Punitive damages are

given, not solely as compensation, but rather with a view, and so forth.

It is my understanding that punitive damages are not given as compensation.

Mr. Moore: They are given as both, Fred.

Mr. Allen: Yes.

Mr. Pollard: I haven't seen authority on that.

Colonel Harris: I have all the cases on punitive damages in Kentucky listed here, I think.

Mr. Lowden: Why don't you let us come back to that one when it comes our turn.

Mr. Pollard: That is all we have.

Mr. Lowden: Do you all want to confer?

Colonel Harris: About the separation of damages we want to confer.

Mr. Allen: Do you want me to give you the Kentucky case that requires that to be done, that says that must be done?

Colonel Harris: I think that is procedural and not substantive. I think the procedure of Virginia *de-*  
page 2279 } termines the form of verdict.

Mr. Allen: We might help you out on that if you agree to that.

Colonel Harris: It determines the form of the verdict. I have to confer with my associates.

(Separate conference.)

Colonel Harris: On that question in the event the jury should disregard our arguments and our evidence and bring in a verdict for the plaintiff, we are willing for the jury to be instructed about separation of their verdict into compensatory damages and punitive damages.

Mr. Allen: You are not willing to instruct them to return a lump sum verdict including both classes of damages without separating the damages?

Colonel Harris: No, I wouldn't agree to that. The purpose of agreeing to separation is to see exactly what they are doing or what they have done in the event they bring in a verdict for the plaintiff.

Mr. Allen: That is right.

Mr. Mullen: In other words, we don't have any objection to that part of the instruction which says they should find each class of damages separately.

Colonel Harris: The statement, if the Court pleases, that I have made, I think sufficiently states the arguments that I have on it. If either of you gentlemen has any  
page 2280 } arguments to make—

Mr. Pollard: I have none.

Mr. Mullen: I am in agreement with Colonel Harris on the objections he has made to the instruction for the reasons given, so I won't go all over it, but there is one thing down there that I want to elaborate a little. That is in the middle of paragraph (1), "But only such profits may be recovered as can be ascertained with reasonable certainty from past experience." I object to the words "past experience" because it has been shown in this case that those contracts on which he made good profits were lump sum contract or contracts in which he had a much larger percentage, whereas what he is complaining of here now is loss from cost-plus type of contract. The contracts he put in evidence, on which he made money, on some of them he made 30 per cent. That experience doesn't go to the present claim.

The Court: Would you suggest then that you add "from past experience on cost-plus 5 per cent contracts"?

Mr. Mullen: Either that or leave out the words "past experience."

Mr. Allen: Just leave out the words "past experience."

Mr. Pollard: I think it would be better, Your Honor, to add—

page 2281 } Mr. Robertson: Some of them are lump sum.

Mr. Mullen: That is exactly the reason I said "past experience" doesn't belong in there.

Mr. Allen: Cut it out. We agree to cut out "past experience."

Mr. Robertson: Cut it out.

The Court: Cut that out then, Mr. Mullen?

Mr. Mullen: Either that or phrase it the way Fred suggested.

The Court: You are asking, then, that "from past experience" be eliminated.

Mr. Pollard: That would be all right.

The Court: That is agreed to by counsel for the plaintiff. Strike it out.

Mr. Mullen: I won't take the Court's time repeating the objections which were made by Colonel Harris. They are before you. I don't know whether you want to go over them again or not.

The Court: Do I understand, then, that you gentlemen do not object to the last paragraph beginning on page 2, with the exception of the statement made by Colonel Harris in regard to the "law and facts justifying it"? That is in the third line on the last page.

Mr. Pollard: As I understand it, Judge, there are only two changes in here,

page 2282 } The Court: Colonel Harris criticized the phrase, "the law and facts justifying it."

Mr. Allen: That was put in there, if Your Honor please, to round the instruction out as I thought it would have to be, upon objection from them by not having it in there, but if they don't want that in there, cut it out, the whole sentence beginning with "You may" down to the end of that paragraph.

Mr. Lowden: That wasn't what the Judge is getting at, I don't think. He is getting at whether or not he agreed that it was possible in this case to assess punitive damages in different amounts against different ones, weren't you, Judge?

The Court: Yes.

Mr. Allen: Yes, but my point, Judge, is that Colonel Harris objected to this part of the instruction, and my suggestion was if he objected to it and the record shows he objected to it, we might withdraw that sentence from it.

Mr. Mullen: We object to the whole sentence.

Mr. Allen: Beginning with "you" and down to "is for you to determine."

The Court: Are you asking, then, that that come out and you are not offering that?

Mr. Allen: No, I am agreeing that that may page 2283 } be eliminated at their suggestion.

The Court: Does the court understand that you ask that that sentence come out, Colonel Harris? It is two sentences, rather, at the top of page 3, beginning with "you."

Mr. Allen: Beginning with "you" and ending with "determine."

Colonel Harris: I think both of those should be eliminated.

The Court: That comes out.

Mr. Pollard: That change and the change cutting out "from past experience" are the only two changes in the instruction?

The Court: They are the only two that have been made so far.

Mr. Pollard: I just wanted to get up to date on the changes.

The Court: In No. (2) the first paragraph on page 2, if I recall correctly, Colonel Harris stated that "are" should be changed to "may be." Am I correct in that statement, Colonel Harris?

Colonel Harris: That is my recollection.

The Court: Is there any objection to changing that?

Mr. Robertson: No.

Mr. Allen: I don't think it makes any difference in the

instructions, Your Honor, but I think all of us  
page 2284 } have overlooked the object of this instruction.

We are simply instructing the jury in what kind of cases punitive damages are given. Then we say they may in their discretion give them under the following circumstances. It is the object of the instruction simply to tell the jury the kinds of cases in which such damages are awarded, and then we say if so and so took place they may award such damages. The "may" comes in at the proper place down there. I don't object to "may be" up there.

The Court: We will change that, then, to "may be".

Mr. Robertson: And in the fifth line.

The Court: In the fifth line change "are" to "may be".

Mr. Robertson: In the beginning, the third line from the top.

The Court: The Colonel suggested we add the word "proximately" and the "proximate consequences."

Mr. Allen: Where is that?

The Court: In the third line at the top of page 2.

Colonel Harris: I missed the one you made just before that.

The Court: That was on the same page, the fifth line under (2).

Colonel Harris: Yes, I had it already written. Did you leave off "in the discretion of the jury"?

page 2285 } The Court: Where is that?

Colonel Harris: Where you substituted "may be given".

The Court: "In the discretion of the jury." I believe you did suggest that.

Mr. Allen: Where is that?

The Court: The first line in (2), "may be given in the discretion of the jury."

Colonel Harris: And that applies four lines down, too.

The Court: I guess it would.

Mr. Allen: The last paragraph is written specifically to apply to the whole instruction and winds up and tells them that they may in their discretion do so and so.

The Court: It says "In all such cases the jury may assess damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed."

I am wondering whether you need to do that since you have it at the bottom.

Mr. Allen: You emasculate the instruction and make it hard for the jury to read if you keep repeating that.

Mr. Robertson: Judge, if you go back to page 1—

The Court: Let's get this settled first. What do you think about that, Colonel? It is stated in the last page 2286 } sentence of that paragraph.

Colonel Harris: Of course I don't agree that that is a correct statement of what justifies punitive damages just above it.

The Court: You are saying if that is given this should be in there?

Colonel Harris: Yes, sir. I understand I have an objection to it.

The Court: The Court hasn't ruled on any of the question yet. I am trying to work it out as far as we can.

Mr. Robertson: There is one more correction on page 1.

The Court: Do you think "in the discretion of the jury" ought to be in there in view of the last sentence in that paragraph?

Colonel Harris: Yes, I do, Judge. You mean those two up above at the top on (2)?

The Court: In No. (2) on the second page, "Punitive damages may be given in the discretion of the jury."

Mr. Allen: We are not going to be sticklers about that.

The Court: All right. Leave it in there.

Mr. Robertson: Both places.

The Court: And put it in in the fifth line, too, "may be given in the discretion of the jury."

page 2287 } Mr. Robertson: Judge, on page 1, paragraph numbered (1), the fifth line, after "subsidiaries" should be "or associates."

Mr. Lowden: And also change it from Island Creek to Pond Creek, which I believe was suggested.

The Court: Pond Creek Coal Company.

Colonel Harris: Instead of Island Creek?

Mr. Lowden: Yes, sir. I think you are right about that.

Mr. Robertson: I think it ought to be left Island Creek.

Colonel Harris: It is Pond Creek Pocahontas Company, isn't it?

Mr. Bryan: It ought to be Island Creek Coal Company, Pond Creek Coal Company and their associates and subsidiaries.

The Court: What is that?

Mr. Moore: Island Creek Coal Company, Pond Creek Pocahontas Coal Company and their subsidiaries or associates.

Colonel Harris: I understood from Mr. Lowden you were striking out Island Creek Coal Company.

Mr. Robertson: No.

Mr. Lowden: I was overruled.

Mr. Allen: We are trying to make it conform to the other instruction.

page 2288 } The Court: "business connection with Island Creek Coal Company, Pond Creek Coal Company and their subsidiaries."

Colonel Harris: We just think that makes it worse.

The Court: "and their subsidiaries or associates."

Mr. Robertson: We have the whole empire in there now.

The Court: Very well. Are you gentlemen making a memorandum of that?

Mr. Allen: Yes. We are prepared when Your Honor gets around to it, to discuss their objections.

Colonel Harris: I didn't have them written out.

The Court: I know you didn't.

Mr. Moore: You objected to the wording "punitive damages."

Colonel Harris: And to the principles of law also.

Mr. Allen: I understand that. I have a memorandum of that. I just want to know when you are through and when you are ready for us to start.

The Court: I am ready now.

Mr. Allen: If Your Honor please, this instruction was drawn of course in the light of the fact that it was to be read in connection with all the other instructions, and we couldn't insert in this instruction, repeating things said in other instructions. The sole object of this instruction was to tell the jury about the two classes of damages, to  
page 2289 } define the two classes of damages, and the circumstances under which the two classes of damages, either or both, may be awarded. We have defined compensatory damages and punitive damages as defined by the cases in Kentucky for the reason that we think the right to recover damages, whether compensatory or punitive, is a matter of substantive law.

There are two differences between the Kentucky law and the Virginia law. One is that in Virginia punitive damages are given solely for the purpose of punishing the defendant. The language expressing the idea always includes language like this: Punitive damages are not given as the plaintiff's due but solely for the purpose of punishing the defendant and deterring him and others from the commission of like offenses. But in Kentucky that is not true. Punitive damages are given in part as compensation to the plaintiff. So I had to take care of that in this instruction.

Then under the Virginia law there must be some relation between the punitive damages and the compensatory damages. Under the Kentucky law punitive damages need not

bear any relation whatsoever to the compensatory damages. So that is another thing I had to take care of.

Colonel Harris: But if I may interrupt, they must bear some relation to the injury.

Mr. Allen: They have to bear some relation page 2290 } to the injury, and that is what the instruction states. It has to bear some relation to the injury.

Another difference is that under the Virginia law a verdict cannot be rendered severally, awarding so much damages against one and so much against another, whether punitive or compensatory. The damages awarded have to be a lump sum and nobody knows how much is punitive and how many is compensatory. But the cases in Kentucky say they must separate the damages so the Court can say if the punitive damages are too much and can whip them out or cut them down, and if the compensatory damages are too much they can do likewise. They can handle the matter on appeal if they know what the jury had in mind in awarding compensatory damages and what they had in mind in awarding punitive damages. That is why the instruction is drawn as it is.

The definition of compensatory damages is that taken from the Kentucky cases. The definition of profits and the circumstances under which profits may be recovered are taken from the Kentucky cases.

Colonel Harris: What is the name of the case?

Mr. Allen: We have them in our memorandum. I was going to read them presently when I come to the cases. I will give them to you before I say anything about the cases in terms.

Colonel Harris: All right.

Mr. Allen: The statement about profit is as page 2291 } guarded as I think it can possibly be under the Kentucky law. As a matter of fact, there isn't any substantial difference between the Kentucky law and the Virginia law on the recovery of either compensatory damages or profits.

When you come to the profits you will notice that we start out with "profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty—" That is both the Kentucky law and Virginia law.

"The fact that such profits may be involved in some uncertainty and contingency and can be determined only proximately upon reasonable conjectures and probable estimates

does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damages have been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because there is some uncertainty as to the amount. The plaintiff has the right to prove the nature of his relationships with the coal companies, the circumstances surrounding the acts of the defendants, and," inserting what they suggested, "the proximate consequences naturally and directly traceable thereto. If and when that is

page 2292 } done—in other words, when all that is proven—

" it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion."

I don't think anything could be fairer under the Kentucky law or the Virginia law, either. There is no substantial difference.

When you come to punitive damages, we will use the words "may be" as he suggests.

"Punitive damages may be given in the discretion of the jury, not solely as compensation." We have to put that in there because punitive damages are not given solely for punishment.

"Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or where the wrongful act is accompanied by insult, indignity, oppression, or threats, or

page 2293 } where the wrongful act is committed in a manner so wanton or reckless as to manifest a willful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount complained."

There is objection to "not exceeding the amount claimed." I just don't know how we are going to correct that without turning the jury loose to find any amount, which may or may

not exceed the amount claimed. We are certainly limited to the amount claimed.

Mr. Robertson: Let me interrupt one moment. Our court has said that you ought not to say, for instance, \$500,000, which was suggested, but that that was the right way to do it.

The Court: This is the practice.

Mr. Allen: This is absolutely the practice in our courts. It would be improper here to say "not exceeding \$500,000," but just "not exceeding the amount claimed," which is the mildest way to express it to hold them down to some limit.

I am going to ask Mr. Moore to read that Kentucky case which contains a definition of punitive damages and when they may be awarded, and I think it contains every expression that I have in this instruction.

Colonel Harris: The name of it, first.

page 2294 } Mr. Moore: The same case, the Hood case.

The Court: What is the citation?

Mr. Moore: 118 S. W. 309, *Kentucky Heating Company v. Hood*.

Colonel Harris: It is on page 30 of my memorandum.

The Court: Before you start reading, Mr. Moore—Mr. Allen, on page 2, under No. (2), line 5, after "given" we agreed to insert "in the discretion of the jury."

Mr. Allen: That is right.

The Court: I didn't know whether you had that or not.

Mr. Allen: I have a little memorandum of that and forgot to read it.

The Court: All right, Mr. Moore.

Mr. Moore: This is very short, Your Honor.

"It is the general rule that exemplary damages in cases of this character are not allowable unless the wrong complained of is committed in a malicious, aggravating or insulting manner with reckless disregard of the rights of the injured person."

Practically the same words are used right here. Then they cite cases. The court goes on to say:

page 2295 } "Measured by this rule, we have little difficulty in reaching the conclusion that the conduct of the servants of the appellant in cutting the pipe and throwing the meter in the ash can was, to say the least of it, a high-handed, aggravating piece of business done in utter and reckless disregard of the rights of the appellees."

We have used almost identical words.

Mr. Allen: Here is the one I had reference to here. I don't know whether you have it there.

Mr. Pollard: Excuse me, Mr. Allen. I understood that you were citing a case to state the proposition that punitive damages may be awarded as a way of compenstion.

Mr. Moore: No.

Mr. Pollard: I misunderstood you.

Mr. Moore: I have the other one, Fred.

Mr. Pollard: Will you give me the citation of it, please?

Mr. Moore: 2 American Jurisprudence.

Mr. Allen: It is a Kentucky case.

Mr. Moore: Let Mr. Allen go ahead and I will find it for you.

Mr. Pollard: All right.

Mr. Allen: The case which I undertook to follow verbatim was the case of *Louisville & Nashville Railroad Company v. Ballard*, 3 S. W. 530. In that case the court said:

"It has been said that they"—referring to punitive damages—"are allowable where the wrongful act page 2296 { has been accompanied with circumstances of aggravation or if a trespass be committed in a high-handed or threatening manner or where the tort is accompanied by oppression, fraud, malice or negligence so grave as to raise a presumption of malice, or where the wrongful act is accompanied by an insult, indignity, oppression or inhumanity."

I think all the words I have used were found in this case.

Mr. Pollard: What was the citation?

Mr. Allen: That was *Louisville & Nashville Railroad Company v. Ballard*, 3 S. W. 530.

Mr. Pollard: What is the date of that case?

Mr. Allen: 1887, and it has been referred to time and again in later cases. The rule has never been changed so far as I know.

The same thing is said in *Louisville & Nashville v. Fowler*, 107 S. W. 703.

Colonel Harris: May I ask a question, Mr. Allen.

Mr. Allen: Yes, sir.

Colonel Harris: You don't claim that those two sentences beginning where you struck out "past experience" are exact quotations of any Kentucky decisions, do you?

Mr. Allen: You are talking about the compensatory damages now?

Colonel Harris: Yes, on profits.

page 2297 } Mr. Allen: No. It is practically so. I couldn't just take things out of an opinion and relate them to an instruction, but the language in the punitive damage instruction is the identical language that was used in those cases which the Court said made out proper cases for the recovery of punitive damages.

Colonel Harris: As you read it and as Mr. Moore read it, I thought I heard the word "malice" and also "with intent to injure" in the decisions, and I don't see that in either one of these.

Mr. Allen: The disjunctive "or" is used. The opinion doesn't use all of those terms in the conjunctive. It says "or". We select any of them that are sufficient. For instance, some of the cases just dealt with one or two of those things. Some of the cases even say where the conduct is so reckless as to indicate an indifference to the rights of parties, that that is a basis for punitive damages.

Mr. Moore: Fred, do you want the citation now?

Mr. Pollard: Yes. Is it in your trial brief?

Mr. Moore: It is in one spot.

Mr. Pollard: What page?

Mr. Moore: Page 17. The case is *Louisville & Nashville Railroad v. Ritchel*. It starts on page 16, but look at the quote right at the top of page 17 where it states:

page 2298 } "As the jury, even under the instructions as given, might have awarded compensatory damages, though nominal in amount, and under a proper instruction might have awarded damages for humiliation and mortification of feeling, we conclude the fact that the jury returned a verdict of punitive damages only furnishes no just reason why the verdict should not be allowed to stand, since, under the rule in force in this state, punitive damages when allowed, are given as compensation to the plaintiff, and not solely as punishment to the defendant."

That case is cited in American Jurisprudence.

"However, according to some of the cases exemplary damages may properly partake of both punitive and compensatory character in as much as in practice they are given both as compensation to the plaintiff and at the same time as a punishment for the defendant and a warning to others."

Mr. Allen: In the case of *Memphis and C. Packet Co. v. Nagel*, 29 S. W. 743, the court instructed the jury, and I am reading the language of the instruction exactly:

"If he accomplished his willful act \* \* \* or used violence or unlawful personal restraint or accompanied his wrongful Act towards his passenger with conduct insulting in words, tone or manner, he becomes liable to all the remedies of the law against tort feasers, including the liability to pay punitive damages in cases where same may be law-  
page 2299 } fully adjudged."

Here is another instruction given in that same case:

"And if they believe from the evidence that the failure of defendants' employees in charge of said boat to put plaintiff off at New Albany was willful or the result of gross or wanton or intentional neglect on the part of the defendants' employees in the discharge of their duties to carry her and her trunk and put her off, or that the conduct of defendants' employees was insulting towards plaintiff either in manner, words, or tone, they may assess the damage at any sum which they may believe from all the evidence in the exercise of a sound discretion the plaintiff ought to recover, not exceeding the amount claimed."

Note the similarity of our instruction to that.

Then in the case of *Grant v. Taylor*, 4 S. W. 2nd, a much later case, 741—

Celone Harris: Those are all old cases.

Mr. Allen: The court said in an instructions limiting the jury to compensatory damages:

"The plaintiff offered no instruction on punitive damages and no such instruction was given. If the testimony introduced in behalf of the plaintiff was true and the conduct of David, the manager of appellant's store, was cruel and oppressive and showed a reckless disregard for  
page 2300 } plaintiff's rights \* \* \* an instruction on punitive damages would have been entirely proper. Whether or not the damages awarded would be assessed as punitive damages we need not determine. In determining the amount of compensatory damages to be awarded the jury was authorized to consider any pecuniary loss suffered by the plaintiff, any mental or physical suffering endured by her or any injury to her reputation caused by the prosecution."

In the case of *Smith v. Middleton*, the court said about an instruction about destroying a man's earning capacity, the instruction read this way:

"If the jury find for the plaintiff they will fix the damages for such sum not exceeding \$10,000 as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money. And in fixing such damages the jury should take into consideration the age of the deceased at the time of his death and the probable duration of his life."

I read this case of *Louisville & Nashville Railroad Co. v. Ballard*, I believe, which is one that contained a great many definitions of punitive damages, and when and under what circumstances they may be recovered.

Let's see if I have any other memorandums here to add.

Mr. Moore: I might say the Ballard case is page 2301 { the leading Kentucky case on it. It is cited all the way through. There are pages and pages of it.

Mr. Allen: You gentlemen do not disagree with us that the Kentucky law requires the jury to separate the two classes of damages. I don't want to have to read His Honor a decision supporting this view if you agree.

Colonel Harris: We agreed that he might instruct the jury to do that in this case.

Mr. Allen: That is all we have to say.

Colonel Harris: Are you going to say anything else? If not, I want to reply to those two cases.

Mr. Robertson: I have nothing more. That is all.

The Court: All right.

Colonel Harris: If the Court please, there are a number of cases on punitive damages in Kentucky, and what they have done in this is to go through and pick out the mildest possible expressions.

Mr. Pollard: You say the mildest?

Colonel Harris:

. . . . .

page 2303 {

. . . . .

In this case when Mr. Hamilton Bryan went down and talked to Mr. Hunter, Mr. Hunter in Hamilton Bryan's own words seemed to think that he had the right to do what they did as long as they didn't expressly authorize somebody to use violence.

Under those circumstances where one man thinks he is exercising a right to strike and set up a picket line, and the

other man thinks that he is exercising a right to hire whomsoever he pleases, it seems to me that the instruction on malice and deliberate design to injure the plaintiff is a proper instruction under those circumstances and no other kind of liability for punitive damages should be imposed.

Mr. Robertson: We are perfectly willing to put "malice" in there.

Mr. Allen: It must be in all of them.

Mr. Harris: I don't agree to those disjunctives at all, if the Court please. I don't want to appear to agree to that.

The Court: Let us see. Where is the first page 2304 } place?

Mr. Robertson: The fifth line down on page 2, under paragraph (2), "punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation or committed in a high-handed and threatening manner"—I should say it should be put there, "or maliciously, or where the wrongful act is accompanied by insult, indignity, oppression, or threats or with malice." You can put it in there almost anywhere.

The Court: "Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation or committed in a high-handed and threatening manner, or maliciously, or where the wrongful act is accompanied by insult, indignity, oppression, or threats—"

Mr. Pollard: Your Honor, there is one thing that worries me about their instruction on punitive damages, and that is where they say that it can be awarded for threats, where the tort complained of is itself a threat. That would make any tort which was committed by way of a threat *per se* a tort wherein punitive damages could be awarded, and I can't conceive that that is the law.

Mr. Robertson: But the commission of the tort is in issue. Hart said they didn't commit a tort. They have to find a tort.

The Court: That is a question for the jury.

page 2305 } Mr. Pollard: Yes, but if they find that there was a tort, then *per se*, according to the way the instruction is worded, it is a case for punitive damages.

Mr. Robertson: They have to find these other things, in their discretion also.

Mr. Moore: That is the purpose of punitive damages, so they won't resort to threats.

Mr. Pollard: In other words, the instruction amounts to this, that if you believe the defendants, any defendant, committed the wrongful acts complained of, then *per se* it is a

case where punitive damages may be awarded in the discretion of the jury.

The Court: May be awarded.

Mr. Pollard: Yes.

Mr. Robertson: It doesn't say that at all.

Mr. Pollard: So long as you have "threats" in there.

Mr. Robertson: It doesn't.

Colonel Harris: They claim that we interfered with their business relation by bringing a mob over there. In one part they say we are guilty of threats, and in the other they say we are guilty of violence. If we made any threats, under that instruction they have to give punitive damages.

Mr. Pollard: Of it is a case where punitive damages can be awarded by the jury.

page 2306 } Mr. Robertson: It may do it, yes.

Mr. Pollard: It is a *per se* case.

Mr. Robertson: Suppose the jury believed that Hart came over there and was acting in good faith in the conscientious discharge of his duty, they certainly wouldn't give us one penny of punitive damages.

Colonel Harris: In the case I read from they just took the first word "maliciously," and here is the exact language of the court: "If in so doing they acted maliciously, and with a design of injuring appellee in its business—" They leave that out.

The Court: Do you have any objection to putting that in?

Mr. Allen: Put that right along with the language "maliciously" there.

The Court: Read that to me again, Colonel.

Colonel Harris: "And with a design of injuring appellee in its business."

Mr. Robertson: That wouldn't be appellee.

Colonel Harris: Plaintiff, of course.

The Court: What was it, "in its business"?

Colonel Harris: Yes, sir; in its business.

Mr. Lowden: You don't sound like you have a heck of a lot of confidence, calling us appellees.

Colonel Harris: I was reading from the book.  
page 2307 } I have a lot more confidence than you think I have.

Mr. Lowden: I don't know about that. I said it did not sound like you had.

Colonel Harris: This is quite pleasant, Judge.

Mr. Pollard: I have nothing, Your Honor.

The Court: Colonel, do you have anything further?

Colonel Harris: No.

Mr. Pollard: Did you initial this exhibit?

The Court: The Court will grant Instruction 10 as rewritten.

Mr. Mullen: Note an exception for the reasons stated in the argument.

Colonel Harris: In other words, Judge, it is our contention that the corrections didn't cure the errors that were contained in the charge.

The Court: You can state any further objections that you want at this time.

Mr. Mullen: You mean when they are rewritten and come back?

The Court: When they are rewritten, or you can do it now. If they come back rewritten and you have already stated your objection and exception, I take it you wouldn't have to renew it.

Colonel Harris: Thank you.

The Court: Now, No. 11.

page 2308 } (Plaintiff's requested Instruction No. 11 follows:)

"The Court instructs the jury if you find your verdict for the plaintiff against all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against all three defendants and assess plaintiff's damages at . . . . ., representing \$. . . . . compensatory damages, and \$. . . . . punitive damages."

"If your verdict is for the plaintiff against two defendants and in favor of the other defendant, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against the defendants . . . . . and . . . . . and assess plaintiff's damages at \$. . . . ., representing \$. . . . . compensatory damages, and \$. . . . . punitive damages; and we find in favor of the defendant . . . . ."

"If your verdict is for the plaintiff against one defendant and in favor of the other two defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against the defendant . . . . . and assess plaintiff's damages at \$. . . . ., representing \$. . . . . compensatory

damages, and \$. . . . . punitive damages; and  
 page 2309 } we find in favor of the defendants . . . . . and  
 . . . . .

"If your verdict is for all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the defendants."

Mr. Allen: That is just a form for the jury to go by.

Colonel Harris: Yes, but it is an incorrect form, if the Court please, because it direct a verdict for punitive damages if they find a verdict for the plaintiff. Yes, it does. You say "The Court instructs the jury if you find your verdict for the plaintiff against all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against all three defendants and assess plaintiff's damages at \$. . . . ., representing \$. . . . . compensatory damages and \$. . . . . punitive damages."

Mr. Robertson: They could put in zero for punitive damages.

Colonel Harris: I know, but that is a direction. Zero wouldn't be an assessment of damages.

Mr. Robertson: Yes, it would. It would be the assessment of no damages.

Colonel Harris: Nothing is not something.

The Court: What would you suggest, Colonel?  
 page 2310 } I see what you are talking about.

Mr. Lowden: The way you do it, Judge, in the first line you say "your verdict should be in one of the following forms," and then put that one and another one and let them pick them out.

The Court: Why couldn't you rewrite this instruction and have a form where you allow just compensatory damages and then have a form underneath that, "If you allow compensatory and punitive damages, use the following form for each one." Would that correct the situation as far as you are concerned, Colonel?

Colonel Harris: It would correct it on that, yes, sir.

Mr. Robertson: Let's see if we can't work out a form, then. We will work it out the way we think it ought to be, and let them work it out the way they think it ought to be and come back with it tomorrow.

The Court: I think that would probably correct the situation as far as the Colonel is concerned and you gentlemen, too.

Mr. Robertson: We agree to rewrite it and have it here tomorrow.

Mr. Pollard: Is there any other objection to this?

Mr. Mullen: There is one other objection, isn't there? There should be one other form of verdict in there.

Mr. Robertson: We will bring it back.

page 2311 } The Court: Wait, Mr. Robertson.

Mr. Allen: We will just ask for the first part of it.

Mr. Robertson: We ask for verdict against all three defendants and you can ask for whatever you want.

The Court: What did you start to say?

Mr. Mullen: We went over it and read it, and there was something here.

Colonel Harris: I don't know, but I had a note in my own mind that it lacked one of having all the necessary permutations and combinations, and I will have to check it again and see, Judge.

The Court: Suppose counsel for the defendants prepare a form and counsel for the plaintiffs prepare a form.

Colonel Harris: All right, sir.

The Court: Tomorrow we can iron that out.

Colonel Harris: If we meet at 9:30 we won't have much time to get any typing done. Are you going to meet at 9:30 in the morning?

The Court: I had planned to meet at 9:30.

Colonel Harris: All right, whatever Your Honor says.

The Court: Do you think we can arrange this now?

Colonel Harris: I would rather have a stenographer whenever I start to write something, Judge, if that is agreeable with you all.

The Court: All right.

Mr. Mullen: Does that complete yours?

The Court: There were some rewritten. I guess we had better go back over those.

No. 1 was to be rewritten.

Mr. Robertson: We went back to No. 1 as originally offered yesterday.

The Court: This is the same as you offered originally.

Mr. Robertson: Yes, because we had the statute paraphrased in another place, you remember.

Mr. Mullen: I thought the Court ruled on that.

The Court: I have a memorandum here—I am not certain about it—that the statute would be quoted in No. 1.

Mr. Allen: That is right. We have one on that.

Mr. Robertson: I have, but I think it is No. 5.

Mr. Allen: No. 5 isn't the one that quotes the statute. The first one was.

Mr. Pollard: This is a rewrite of your No. 1, is it?

Mr. Robertson: It is a rewrite of 2 that I just passed to you.

Mr. Mullen: I understood the Court ruled on No. 1.

Mr. Allen: The Court ruled on No. 1, as I re-  
page 2313 } call, that you can just simply quote the statute.

The Court: That is my recollection.

Mr. Robertson: Here is what happened, Judge. You are correct that we offered it as I am now offering it, and there was a lot of discussion here that the statute ought to be quoted. We said all right we would quote the statute and withdraw that one. Then when we went along later into the discussion of our instructions we came to one where we paraphrased the statute, and they said we ought not both to paraphrase the statute and quote it verbatim. I said in that event I would stick to the paraphrasing of the statute and withdraw the direct quotation of the statute, and we offer that first one. I will come back to it in a minute and it will clarify itself.

No. 3 was not to be rewritten.

The Court: What about No. 2 now? You have No. 2 rewritten.

Mr. Robertson: I gave that to you.

(Plaintiff's Instruction No. 2 (rewrite) follows:)

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of the United Construction Division of District 50, United Mine Workers of America, or District 50, United Mine Workers of America, or United

page 2314 } Mine Workers of America without threats of  
violence or acts of violence against such men, or  
intimidation of such men by anyone to induce  
such men to join United Construction Workers."

Mr. Pollard: May I ask you a question about No. 2. Is it the same as your original No. 2 except that Hart and his men" has been changed to "anyone"? Any other changes?

Mr. Robertson: I may have said the Division. I don't know. Let me read it back and see. I think I corrected the name to United Construction Workers Division of District 50, United Mine Workers of America, District 50, United Mine Workers of America, and United Mine Workers of America.

I made those conform in all instructions here unless I tripped up somewhere and failed to do it. I intended and tried to do it.

Mr. Pollard: I understood Your Honor that you granted instruction No. 2 as offered with the exception that you substituted the word "anyone" for "Hart and his men."

I don't think the plaintiff has any authority to make any change in the instruction as granted by the Court.

Mr. Robertson: If you don't want it that way, I will write it again. I thought you would want it to conform to that wording all the way through. The judge said that was the correct wording.

The Court: What difference would that make, Mr. Pollard?

page 2315 } Mr. Pollard: It has been our contention all along, Your Honor, that whenever any of the plaintiff's are mentioned, they should be referred to as they were referred to in the instruction No. 2 as offered when the defendants are referred to by name in instructions.

Mr. Allen: Your Honor, will you recall that when that question arose we went to the interrogatories and got the answer which they said properly described and stated it, and we took the names exactly as they said they should be properly stated. We tried to conform to that in all the instructions.

Mr. Robertson: If we hadn't done it, they would have objected.

Mr. Mullen: Do you have a copy of it as rewritten?

Mr. Robertson: I gave Fred four of them.

Mr. Allen: You have that one.

The Court: We have passed by No. 1 for the time being. I don't think it makes much difference one way or the other, gentlemen. I will grant No. 2 as offered.

Mr. Mullen: We object to it as offered and note an exception.

The Court: Yes, this is No. 2. I am going to destroy the old No. 2.

Mr. Robertson: No. 3 was not rewritten.

Mr. Allen: That was granted as it was.

page 2316 } Mr. Robertson: Here are four copies of No. 4.

(Plaintiff's Instruction No. 4 (rewrite) follows:)

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who by

the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

"It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were than also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them."

The Court: You have eliminated the last two paragraphs. That is the only change.

Mr. Pollard: Those are the only changes. Mr. Robertson?

Mr. Robertson: As far as I recall, unless I changed the names to make them correct. I changed them to page 2317 } make them correct in No. 5, which is coming up now.

Mr. Pollard: We don't have to except again at this point.

The Court: If you want to, if there is any change, I don't think you would have to except.

Mr. Mullen: We excepted to it at the time it was to be rewritten.

Mr. Robertson: Here is No. 5.

(Plaintiff's Instruction No. 5 (rewrite) follows:)

"The Court instructs the jury if you believe from the evidence that the acts complained of were committed, and that during the period in which they were committed, United Mine Worker of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50, United Mine Workers of America, while acting in the line and scope of their employment and in the course of their principals' business."

Colonel Harris: I want to add an additional objection to that, that we didn't state the other day.

The Court: All right, Colonel.

Colonel Harris: This would make the United page 2318 } Mine Workers responsible for every conceivable thing that might be done by an agent of District

50 and of the United Construction Workers, whether they were doing it in an effort to organize the unorganized or not. That is all-embracing and just makes the United Mine Workers responsible for everything an agent of the other two unions do.

Mr. Robertson: Judge, it is the best I could do according to what the Court ruled yesterday.

The Court: Let me read this instruction again.

Mr. Robertson: Read it out loud, will you, Judge?

The Court: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed, and that during the period in which they were committed United Mine Workers of America was using District 50 United Mine Workers of America and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in business other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, while acting in the line and scope of their employment and in the course of their principals' business."

Mr. Allen: Does that meet the objection, Mr. page 2319 } Pollard, that you made here the other day?

Mr. Pollard: Which one was that? Which objection?

Mr. Allen: I understood you to object to that instruction yesterday upon the ground that that permitted the jury to find against the United Mine Workers without finding against District 50 or United Construction Workers, and that that was the objection you offered to the instruction.

Mr. Pollard: Yes, sir.

Mr. Allen: Is that right?

Mr. Pollard: I want to make sure we are talking about the same one (examining document).

No, sir, that does not meet that objection.

The Court: As I see it, it is the same instruction that we had yesterday—

Mr. Robertson: No, sir.

The Court: —with a change in the names.

Mr. Robertson: Here is the sheet I worked from.

The Court: Mr. Allen suggested he was going to rewrite this to meet the objection of Mr. Pollard, as I recall it. Is that your understanding?

Mr. Allen: I did write one Your Honor, and here it is. I think that meets the objection.

Mr. Robertson: There are the notes from which I wrote it.  
The Court: Mr. Allen made the statement  
page 2320 } that he was going to rewrite it.

\* \* \* \* \*

Mr. Pollard: This is offered as No. 5? Which one of these  
are you going to offer?

Mr. Allen: We are offering this one.

Mr. Pollard: You are withdrawing this No. 5 that Mr.  
Robertson just passed on?

Mr. Allen: Yes. You said that didn't meet the suggestion  
you made yesterday.

(Mr. Allen's rewrite of Plaintiff's Instruction No. 5 was  
not furnished to the reporter.)

Mr. Mullen: You have enlarged it.

Mr. Allen: This was necessary to meet Mr. Pollard's ob-  
jection. As I understand Mr. Pollard's objection, as it was  
drawn before it provided for a verdict against United Mine  
Workers without a verdict against District 50 and United  
Construction Workers. In order to correct it, to carry into  
effect his ideas, we had to rewrite it and add a considerable  
amount to it.

Mr. Mullen: One thing, the jury won't know what you are  
talking about. They can't keep up with it.

Mr. Allen: Do you want to read it?

Mr. Pollard: Mr. Allen, it doesn't seem to  
page 2321 } meet my objection, sir.

Mr. Robertson: Does or does not?

Mr. Pollard: Does not.

Mr. Allen: Let's read it and see.

Mr. Pollard: To meet my objection all you have to do is  
to add to No. 5 as offered, to say "provided you shall first  
have found the other two defendants liable," or something  
to that effect.

Colonel Harris: He is not talking about the long one, but  
the other one.

Mr. Pollard: The one which you just threw away.

The Court: I didn't tear it up.

Mr. Robertson: I think I can fix that. Judge, get the  
short one back. Listen to this, Fred, and see if this doesn't  
meet it. Are you ready?

The Court: Yes.

Mr. Robertson: "The Court instructs the jury if you be-  
lieve from the evidence that the acts complained of were com-

mitted and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Construction Workers Division of District 50, United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America are all liable for any wrongful acts of the agents and employees—" I have it transposed there. It ought to be "United Construction Workers, Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America while acting in the line and scope of their employment and in the course of their principals' business."

I think that is it and meets the objection. I think it is better because it is not so long. They have it transposed. In order to keep the same sequence I ought to put United Construction Workers ahead of District 50 in both places to keep it in the same order.

Mr. Allen: In other words, that would be shaped so that they can't find against United Mine Workers of America without finding against the United Construction Workers and District 50.

Mr. Robertson: If they find against anybody, under this instruction they have to find against all three.

Mr. Pollard: You should say in there in the third line from the end, before "while acting" should be "and if you further believe that such acts were committed while acting."

Mr. Moore: That is up at the top.  
page 2323 } The Court: I think you start off with that.

Mr. Pollard: "Committed while acting within the scope of their authority."

The Court: "if you believe from the evidence that the acts complained of were committed."

Mr. Robertson: "—and that during the period in which they were committed United Mine Workers of America was using District 50"—I would rather change the sequence of it. Heretofore we have been naming United Construction Workers Division and then District 50. I would rather keep the same sequence of it.

Mr. Allen: If it please Your Honor, may Mr. Robertson dictate it to the reporter right here in the presence of everybody and see if we agree on the form of that? Of course I know they object to the substance.

Mr. Mullen: I think there should be a change at the very

first. "The Court instructs the jury if you believe from the evidence that the acts complained of were committed," "that the alleged acts complained of were committed."

Mr. Robertson: All right.

Mr. Pollard: Your Honor, I suggest that perhaps the easiest thing to do is for Mr. Robertson to take another try at it, and we will look at it in the morning.

Mr. Allen: It may come back here in the morning. We don't want to go on our instructions again in the page 2324 } morning. We want to take up yours.

Mr. Robertson: I can fix it in two minutes. Let me dictate it to the reporter.

Mr. Pollard: We can't look at it when he dictates it to the reporter. He told us to throw the copies away, and we threw it away. I don't know where we are, Judge.

Mr. Robertson: That suits me. I will rewrite it and bring it up in the morning.

The Court: Very well.

Mr. Robertson: I do submit when you get to the "acts complained of"—

Mr. Allen: The "acts complained of" stands in the place of "alleged acts." If you are going to say "alleged acts" cut out "complained of."

Mr. Lowden: If you believe the acts were committed.

Mr. Robertson: No. 6 is withdrawn.

The Court: For the sake of the record, we have been talking about No. 6 and No. 7. It may be better if a number is withdrawn, just to leave it withdrawn. And go on to No. 7.

Mr. Allen: In this No. 7 we have made an attempt to rewrite it.

(Plaintiff's Instruction No. 7 (rewrite) follows:)

"The Court instructs the jury that while employees may, free from restraint or coercion by employers or page 2325 } their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, collectively and individually strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

"If you believe from the evidence that William O. Hart, was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District

50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe from the evidence that while he was so acting he went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men to organize plaintiff's employees, and if you believe from the evidence that he was then acting in furtherance of the business of all three defendants, and if you believe from the evidence that while so acting he, by intimidation, threats, acts of violence, or coercion, caused plaintiff's workmen to leave their jobs, and put them in such fear as to cause them to refuse to return to work thereafter, you will find for the plaintiff against all three defendants and assess plaintiff's damages. page 2326 } ages in accordance with the instructions on damages."

The Court: That seems to meet the changes I have on my penciled memorandum.

Mr. Pollard: Your Honor, may I make an objection that wasn't made yesterday?

The Court: Yes.

Mr. Pollard: After the word "thereafter" which is in the third from the last line I suggested yesterday that there be added after that "and if you further believe that such acts caused the alleged damage to the plaintiff." I think what I properly should have requested was "and if you further believe from the evidence that such acts caused the alleged injury to the plaintiff," not damage, and the reason for that, as I stated yesterday, is that this is a finding instruction and must cover every possible theory of the case.

Mr. Robertson: He has already ruled on that.

Mr. Pollard: No, he ruled on it as to causing the plaintiff damage. They must find that this act or these acts were the sole cause of the plaintiff's injury if this is to cover every theory of the case, these acts must be the sole cause of the injury.

Mr. Robertson: It was all argued yesterday.

Mr. Allen: It was all argued yesterday and the instruction refers to the instruction on damages, and all of that is covered in the instruction on damages. You page 2327 } can't put all the conditions in every instruction.

The Court: This instruction does refer to other instructions.

Mr. Robertson: We went over all of it yesterday.

Mr. Allen: That very point.

Mr. Pollard: Judge, I don't wish to argue it any further.

The Court: I understand. You just wanted to get your objection in.

Mr. Pollard: No, I just wanted to make it plain that this instruction is erroneous unless the jury finds that all these other facts were the sole cause of the injury.

Mr. Robertson: You made your point yesterday. It is all in the record.

Mr. Allen: That has no business in this instruction. It is in the damage instruction.

The Court: I will give No. 7 as redrafted.

Mr. Mullen: We object to No. 7 as given and reserve an exception.

Colonel Harris: I want to add the additional objection there, if the Court pleases, that we are not responsible for anybody's conduct except Hart's.

Mr. Allen: What?

Colonel Harris: We are not responsible for anybody's conduct except Mr. Hart's, and this makes us page 2328 } responsible for anybody in that crowd.

The Court: Do you gentlemen have any observations to make in regard to that?

Mr. Robertson: We went over it yesterday. We went over the whole theory of the case.

The Court: I don't know that you mentioned that yesterday, did you?

Colonel Harris: I don't recall it.

Mr. Robertson: It is all through the case, Hart and his crowd. They say they came to a pink tea party, and we say they came as a mob. They denied that he brought them. They all came along together.

Mr. Allen: Hart testified that he went and got them. Of course he didn't claim he brought as many as we claim. He said he brought between 20 and 30 only.

Mr. Lowden: He didn't say that. That is what he took to the schoolhouse.

Mr. Robertson: That is what he came by the schoolhouse with.

Colonel Harris: Suppose he asked 49 peaceful men and he is expecting the fiftieth one to be peaceful, too, and the fiftieth one proves to be a bad egg, we wouldn't be responsible for it unless he had a reasonable cause to believe that he would be a bad egg.

Mr. Robertson: There is no such evidence as page 2329 } that in here either.

Mr. Allen: He could test his eggs a little better than that.

The Court: I will give it as revised, gentlemen.

Mr. Pollard: We again except.

The Court: The exception is noted.

Mr. Robertson: 8, 9, 10, and 11 were all to be rewritten. Here is the 1-A that they asked about.

(Plaintiff's Instruction No. 1-A follows:)

"The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

" 'Section 336.130.

" '(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

" '(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion.'

page 2330 } " 'Section 437.110.

" '(1) No two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, disturbing or injuring any person.' "

Mr. Robertson: Mr. Lowden says there is a correction on it, and that last section of the code is added, not what we read to the Court yesterday.

Mr. Lowden: Section 437.110.

The Court: What instruction number is this?

Mr. Lowden: That is the one they said they wanted, all the law of Kentucky.

Mr. Robertson: We offer that in addition to No. 1. They said they wanted this.

Mr. Pollard: That is not the ruling you made yesterday. There was nothing mentioned about Section 437.110.

Mr. Robertson: We are doing it like you did a moment ago. We are bringing that new section to the attention of the Court.

Mr. Mullen: 437 is the communist and Ku-Klux-Klan statute and doesn't relate to this. It is not a part of this.

Mr. Lowden: Do you want me to read you a couple of cases about the United Mine Workers under it?

Mr. Moore: Miners have been convicted under it.

Mr. Lowden: I am hoping to do that.

The Court: Is this the section we were talking about in No. 1 yesterday?

Mr. Robertson: The first one is, yes, sir.

The Court: The first one, Section 336.130. That is the section.

Mr. Robertson: That is the one we were talking about yesterday. The other one is new. Mr. Lowden will discuss that.

Mr. Lowden: I just wanted to make it plain that that part of it is not all, and I am perfectly willing to put it all in. The girl made a mistake in typing it. To show its applicability to this case, Judge, I will read you the case.

Mr. Pollard: Your Honor, before Mr. Lowden gets on that, there is no allegation in the complaint of any confederation or of any banding together for an unlawful purpose.

Mr. Mullen: This relates to conspiracy.

Mr. Lowden: I think there is.

Colonel Harris: The first two paragraphs only were what we were talking about yesterday.

Mr. Lowden: I don't think that they have any right to tell us that we can't put in all the statutes in our own instructions.

Mr. Pollard: Not in the world, but the Judge has already ruled on it.

Mr. Robertson: He hasn't ruled on this because page 2332 { cause, just as he said a moment ago when he brought up something, when Colonel Harris brought up something, Section 437.110 was not mentioned yesterday.

Mr. Pollard: That is right, and the Judge made his ruling.

The Court: The first I heard of it was this afternoon.

Mr. Robertson: That is right.

Mr. Pollard: What was that case up there in Luray?

(No response.)

Mr. Lowden: Judge, I would like to read a part of a case. There have been several in which the United Mine Workers have been involved under Section 437.110, and there is one here, *Commonwealth v. Ramey*, a criminal statute, 279 Ky.

810, 132 S. W. (2d) 342, 1939. The court stated the evidence in this case as follows:

"The evidence is further that on the particular occasion complained of, Joe Smith and Ersel Ratliff upon going to the mine for the purpose of returning to their jobs, were met at the mine entrance by the appellee, Ramey, and his associate union miners, who undertook to first persuade them not to work in the mine, but that, upon their refusal to yield to these pickets' lawful, persuasive inducements not to return to work and their manifestation of a continued will and intention to enter the mine and return to their jobs, as testified by Ersel Ratliff, the appellee Ramey climbed upon a pile of ties, 'from which he addressed and harangued his union associates and pickets substantially as follows: Members of the United Mine Workers, you heard what that man (Ersel Ratliff) said. He says he ain't going off nor ain't going to join the check-off. Are we going to let a man come in here and scab on us?' Further witnesses testified, they all said 'no.' He (Ramey) says 'I will ask two good men to step up here and take these boys off the hill', and Orison Potter stepped up in front of me and Davis Stepleton in front of Joe Smith and I told them 'I have got a right to work here,' and they said no I didn't, they were on strike there, \* \* \* that I had to join the union or not work and he (Ramey) told them the time was up, for to take us off, and Lee Ad Swinney (an uncle of Joe Smith's) spoke up and said, 'You won't have to take Joe off. I will send him off', and I told them 'Well, just let us stay around here then', and they gauged up on us and then I told them that rather than have any trouble I would go off myself."

The case came up on a question whether or not that was sufficient evidence to go to the jury to support a conviction under that statute. The Supreme Court of Appeals of Kentucky or whatever they call it, said it was and said the following:

"It may be conceded that the defendants had the right to make a concerted effort to win their strike, by using all persuasive means with the employees of the mine to get them to abandon their jobs and not return to work during the strike, for the reason that their resort to and exercise of such persuasive and legal means was but incidental to the full exercise of their conceded and clearly established right to strike for the improvement of their condition with respect to hours, labor, wages,

and so forth. But while picketing may be lawfully done, as stated, it may also mean, as it is often conducted, the banding and assembling of men at or near the plant of the employer for the purpose not of peaceful persuasion alone, but for the purpose of coercing, threatening or intimidating and turning aside their will those who would go to and from the picketed plant to work or seeking work in which instances picketing employing such methods is generally held to be unlawful and to constitute such action and conduct as come within the ban of the statute condemning as a crime the act of confederating and banding together for the purpose of intimidating, alarming, and so forth, a person or persons.

As said in 16 R. C. L., Section 33, page 454: 'The decision of the question whether picketing is lawful or unlawful depends upon the circumstances surrounding each case.' "

page 2334 } Mr. Mullen: What is the style of that case?  
Mr. Lowden: *Ramey v. Commonwealth*.  
Mr. Mullen: When was it decided?

Mr. Lowden: 1939.

Mr. Mullen: Before the Blandford case.

Mr. Pollard: That is a criminal case, Your Honor.

Mr. Lowden: Sure it is a criminal case.

Mr. Pollard: The criminal law has no place in the instructions in this case.

Mr. Allen: Criminal law prescribes conduct. If a man violates that conduct he is liable under both.

Mr. Mullen: There is no charge of criminal acts in this suit.

Mr. Allen: But the fact that an act may be a criminal act does not deprive the act of its character of violating a civil right. In almost every case criminal conduct is violative of a civil right.

Mr. Pollard: The question in this case is whether or not—

Mr. Robertson: We will withdraw the second statute. It is a criminal thing. We think it is all right.

Mr. Pollard: All right. Just that section.

Mr. Robertson: We are offering No. 1 as we offered yesterday. You wanted us to offer this. We offer this, too, in addition.

Mr. Pollard: What number are you offering this as?

page 2335 } Mr. Robertson: You wanted it, we will let you number it. It can be 1-A.

The Court: This would be 1-A?

Mr. Robertson: Yes.

The Court: Doesn't 1-A include No. 1?

Mr. Robertson: Not in our language to which we think we

are entitled, Your Honor. They said they wanted the statute. If they want the statute, we want both.

The Court: If No. 1 is included in No. 1-A, I fail to see the necessity to grant No. 1. I will give 1-A and refuse No. 1. Do you want to say something?

Mr. Moore: I thought you ought to put our No. 1 in here to pin it right down to the facts of this particular case. They have been talking about strike and picketing all the way through.

Mr. Robertson: Judge, let me do this between now and tomorrow morning. I withdraw the second statute. It is a criminal statute. I want to satisfy myself whether or not we have the right to use it. I would like to have overnight to go over that question.

Mr. Mullen: When are you going to finish yours?

The Court: We have to get to the jury sometime.

Mr. Robertson: Then I offer it as it is now. I think I have a right to offer it, but I am not dead sure.

Mr. Allen: I am satisfied we have a right to page 2336 } that statute.

Mr. Mullen: One minute you offer it and the next you don't.

Mr. Robertson: All right, I offer it as it is presented and written.

Colonel Harris: It doesn't correctly quote the statute. It doesn't give all of the statute.

Mr. Robertson: We are perfectly willing to put the part in there about going to the penitentiary if you want to.

Mr. Pollard: Your Honor, we have nothing more to say on the question and will abide the ruling of the Court, with the right to except.

Mr. Robertson: May I make one comment?

The Court: Yes.

Mr. Robertson: You remember the traffic thing in Virginia about reckless driving, which imposes the police penalty. It is customary in all these tort cases in Virginia, in bus and streetcar cases, to cite the statute prohibiting and giving a definition of reckless driving, but you leave out the part that "whoever violates the statute is guilty of a misdemeanor." It seems to me that this is the same thing. Here is a statute that says that these things cannot be done, and then it has another thing following along that says if you do it you go to the penitentiary. Therefore, we leave it out here.

Mr. Mullen: That is contradictory of what page 2337 } goes before which says you can assemble in a crowd.

Mr. Allen: What is that?

Mr. Mullen: It is absolutely contradictory of what goes before. It is contradictory of the statute.

Mr. Robertson: No, it isn't. It says "for the purpose of intimidating." You can't combine or confederate for the purpose of intimidating, alarming, disturbing, or injuring.

Mr. Mullen: It includes the words "engage in peaceful picketing and assemble collectively for peaceful purposes."

Mr. Robertson: Of course you can do that. This statute doesn't say you can't do that.

The Court: I will give you overnight to think that over, Mr. Robertson. As presently advised, the Court will refuse instruction No. 1 offered by the plaintiff, will grant Instruction No. 1-A, and will reserve its decision as to section 437.110 in 1-A.

Mr. Pollard: We got down through No. 7, Your Honor.

The Court: These gentlemen are going to rewrite No. 8, 9, 10, and 11.

Mr. Pollard: Before we adjourn, Your Honor, since this is going to be rewritten, may I offer this case page 2338 } in the consideration of Instruction No. 9, which the Court has tentatively ruled on, and I refer to paragraph (5) in there as to whether or not the plaintiff is entitled to an instruction on business relationship when there has been no evidence on it. I refer to the case of *Norfolk & Southern Railway Company v. Tom Linson*, reported at 116 Va. 153. At page 156 the Court said:

"Instruction (e) related to the measure of damages and the only objection made to it is that it told the jury that in assessing damages they might take into consideration 'such damages as will naturally reasonably and probably result to him (the plaintiff) in the future consequence of his injury, without confining them to the evidence about them as it was done in the instruction with reference to all other items of damage which they might take into consideration. It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them."

Mr. Allen: I have nothing to say on that.

Mr. Pollard: We submit, Your Honor, since there is no evidence before them, then the instruction is improper as to reputation.

Mr. Robertson: That is what you argued before lunch, when you read from the testimony of Salvati.

Mr. Pollard: That is with relation to business relationship. This is with reference to reputation.

Mr. Robertson: It was with relation to the Island Creek Empire.

The Court: 9:30 tomorrow morning, gentlemen. We will have to stay here until we get through tomorrow. If it takes to midnight, we will just have to stay, but I am hoping we will get everything in a few hours.

Mr. Allen: All the questions involved in their instructions have been discussed and argued.

The Court: On No. 1 of course the Court always reserves the right to reserve his instructions, but that is the way I feel about it at the moment. I intend for it to be permanent, but I reserve the right to change my ruling.

(Whereupon, at 4:45 o'clock p. m. the conference was recessed until 9:30 o'clock the next day.)

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\* \* \* \* \*

City Hall,  
Richmond, Virginia,  
Thursday, February 15, 1951.

Met in chambers, pursuant to recess, at 9:30 a. m.

Before: Hon. Harold F. Sneed.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also present: Robert N. Pollard and Williard P. Owens.

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## PROCEEDINGS

Mr. Fred G. Pollard: This should be added to our instruction, Judge.

Mr. Robertson: Judge, I think you indicated that you were not going to give No. 1, the little short one, but that you were going to give this one.

(Plaintiff's Instruction No. 1-A (rewrite) follows:)

"The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

"Section 336.130

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

Mr. Robertson: Then yesterday you were talking about that other statute, and we said we wanted time page 2342 } to look into it. We think we are entitled to it, so we have brought it up, just so we don't raise any new question. We have no new argument on it.

Mr. Fred G. Pollard: Do I understand you are offering this as 1-A without offering Section 437?

Mr. Robertson: I just said we are adding it as a separate instruction.

The Court: I have refused Plaintiff's Instruction No. 1. I am going to grant No. 1-A.

(Plaintiff's Instruction No. 1-B follows:)

"The Court instructs the jury that the Revised Statutes of Kentucky provides:

"437.110 *Conspiracy: banding together for unlawful purpose.*

"(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

The Court: Plaintiff's Instruction No. 1-B is offered this morning.

Mr. Mullen: We object to that.

The Court: I am going to pass that by temporarily. page 2343 }

Mr. Allen: Did I hear an objection to 1-A?

Mr. Mullen: It is merely a statement of the statute.

The Court: They are not objecting to 1-A.

I am going to pass 1-B by temporarily.

Mr. Robertson: You already have No. 2 there, I think.

The Court: I have granted 2 and 3.

Mr. Fred G. Pollard: I don't think you passed on No. 4 since it was rewritten.

The Court: Was 4 or 5 rewritten?

Mr. Lowden: You passed 4 yesterday.

Here it is.

The Court: It is passed, then.

You were going to rewrite 5.

Mr. Robertson: We rewrote 5. We have broken it up into two, to try to meet Mr. Pollard's objection.

Mr. Mullen: This is No. 5 that you have broken up?

The Court: Do you have a 5-A there?

Mr. Robertson: We also have a 5-A.

Mr. Lowden: Yesterday we had two 5's; one Mr. Allen wrote.

Mr. Robertson: No. 6 was withdrawn.

The Court: No. 6 was withdrawn.

Mr. Robertson: No. 8 has been rewritten.

It is on No. 9 that you had the suggestion.

page 2344 } The Court: This is rewritten to comply with the Court's ruling, is it not?

Mr. Mullen: Is No. 8 rewritten as allowed by the Court?

Mr. Robertson: Yes.

Mr. Mullen: What about No. 7?

The Court: That was rewritten yesterday.

Mr. Robertson: Here is No. 9. (Distributing copies.)

Mr. Fred G. Pollard: Your Honor, right much reading has to be done in connection with these rewritten instructions. Inasmuch as we have already spent two days on the Plaintiff's instructions, we submit that it might be proper to take up the Defendants' instructions at this time, and let us check the Plaintiff's instructions during lunch.

The Court: I am accepting their statement that they were rewritten as suggested by the Court yesterday; and if, during lunch, you check and find that they are not, of course, we will go into the matter further.

No. 10 is rewritten.

(Plaintiff's Instructions No. 8, 9, and 10, rewritten in accordance with the Court's instructions, follow:)

## Instruction No. 8:

“The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting within the scope of his authority and employment and was acting page 2345 } for all the defendants for the purpose of ‘organizing the unorganized’, and (2) that in furtherance of that purpose he was going about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force the workers on such jobs to join one of the Defendant unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the defendants, and (4) that in furtherance of this purpose Hart led men to plaintiff’s job site in Breathitt County for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees’ wishes, and (5) that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to ‘sign up’ with one of the defendant unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of forcing plaintiff to recognize one of the defendant unions or failing in that, forcing the plaintiff to get out of the territory, then defendants are liable to plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court.”

page 2346 } Instruction No. 9:

“The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of

“(1) Profits under its contract dated December 15, 1948, with Spring Fork Development Company, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

“(2) Profits the plaintiff might have realized from alleged promised cost plus 5% contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

"(3) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions; and

"(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

page 2347 } "And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrongful acts of the defendants or any of them."

Instruction No. 10:

"The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and, (2) punitive damages.

"(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their subsidiaries or associates, if shown by the evidence; and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjectures and probable estimates does not

page 2348 } necessarily mean that they cannot be recovered at all. If it is certain that substantial damage has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty. The plaintiff has a right to prove the nature of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the

plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

"(2) Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or maliciously and with a design of injuring plaintiff in its business,

or where the wrongful act is accompanied by  
page 2349 } insult, indignity, oppression, or threats, or  
where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed.

"If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way of compensation, but punitive damages must bear some relation to the injury and the cause thereof.

"In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing any acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable,  
page 2350 } although they did not expressly authorize the  
acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

Mr. Robertson: It was very hard to work No. 11, the form of verdict, out. We think we have it in acceptable form.

(Plaintiff's Instruction No. 11 (rewrite) follows:)

"The Court instructs the jury as follows:

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

"(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against U. M. W. A. for compensatory damages unless you also find against U. C. W. and District 50 for compensatory damages.

"(c) Your total award for compensatory damages cannot exceed \$. . . . .

"2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly liable therefor.

"(b) If you make awards of punitive damage 2351 } ages in varying amounts the total of such awards may not exceed \$. . . . .

"(c) If you make one award of punitive damages and designate one or more defendants jointly liable therefor, the award cannot exceed \$. . . . .

"3. The award of compensatory damages if any awarded, plus the award, if any, of punitive damages cannot exceed \$500,000.00.

"4. When you have reached a verdict, the court will upon request aid you in putting your verdict into a proper form."

The Court: Did you gentlemen prepare an instruction on the verdict?

Mr. Mullen: It seems to me that that is strictly an instruction from the Court simply for the convenience of the jury, and it ought to be all in one.

The Court: I think that is right. I thought maybe you had some suggestions and we could combine them; but what we can do, we can go over this instruction. We might delay it until after we have finished with Defendants' instructions, and pass on the instruction later.

Mr. Allen: If you find for the Defendants, say so, and no more. I reckon you want that in there.

Mr. Mullen: That would be accepted.

Mr. Fred G. Pollard: We will let the jury decide that. page 2352 }

The Court: If we could take up No. 5 and get that behind us, then we could proceed with the Defendants' instructions.

(Plaintiff's Instructions Nos. 5 and 5-A follow:)

Instruction No. 5:

"The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized."

Instruction No. 5-A:

"The Court instructs the jury if you believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, Division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job page 2353 } site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, then you will find for the plaintiff against the two defendants, District 50, United Mine Workers of America, and United Construction Workers, division of District 50, United Mine Workers of America, and assess plaintiff's damages in accordance with the instructions on damages.

"And if you further believe from the evidence that William O. Hart, as a representative of District 50, United Mine Work-

ers of America, and of United Construction Workers, division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, and that at that time District 50, United Mine Workers of America, and United Construction Workers,

Division of District 50, United Mine Workers of  
page 2354 } America, or either of them, were agents of United  
Mine Workers of America for the purpose of  
organizing workers in businesses other than the coal mining  
business, then you shall also find for the plaintiff against the  
defendant, United Mine Workers of America, and assess the  
plaintiff's damages in accordance with the instructions on  
damages."

Mr. Robertson: We will have to take 5 and 5-A together.

Mr. Fred G. Pollard: Your Honor, 5-A—

Mr. Lowden: Let's take up 5 first.

Mr. Fred G. Pollard: No. 5 still doesn't meet the objection we made.

Colonel Harris: And there is an additional objection.

Your Honor will notice the last two lines, "while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized." You notice that charge has an agent of an agent. On that account, the agent of the agent must be acting in the line and scope of his employment, and the agent back of him must be acting in the line and scope of his employment. This allows a break in the chain of responsibility by merely having an agent of an agent acting in the line and scope of his employment, but his immediate principal may have departed from the line and scope that he was hired to do. Do I make my—  
page 2355 } self clear to the Court?

The Court: I see what you are talking about.

Mr. Fred G. Pollard: Which also goes to the same idea and objection we made, that they first must find District 50 and United Construction Workers liable. That is still not in here.

Mr. Moore: That is in 5-A.

Mr. Fred G. Pollard: It is not in here.

Mr. Robertson: Are we going to proceed like we did yesterday?

The Court: Yes, we will proceed like we did yesterday.

Mr. Allen: You go ahead and make your objection.

Mr. Fred G. Pollard: That is the objection.

Mr. Mullen: I don't believe 5-A clarifies it at all. I think it just adds a lot of cumbersome language that doesn't meet the point at all.

Mr. Robertson: Are you through?

Mr. Fred G. Pollard: Do you want to finish No. 5, or do you want to take up 5-A, also?

Mr. Robertson: I thought we were going to take 5, and then go on to 5-A. It doesn't make any difference to me.

The Court: Let's take up one at a time.

Mr. Fred G. Pollard: That is all on No. 5.

Mr. Robertson: Just to read the thing once:

page 2356 } "The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business," that is, if it was using those two agents, "then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized."

That is intended to put forth one clean-cut proposition that if the parent organization is using both of its subordinates for its purposes through agents acting within the scope of its authority, then it is responsible for their acts. That is one clean-cut, simple proposition in one instruction, that is intended only to put forth that one thought. Then 5-A comes along to the next thought.

The Court: We will take up 5-A.

Mr. Fred G. Pollard: No, 5-A, the first paragraph in there, as far as I can determine, is the same as the second paragraph in the 7th instruction. It is nothing but duplication.

Of course, the suggestion that we have made on page 2357 } other instructions, that where you have a finding instruction you must find that it is the sole cause of the plaintiff's injury, is left out.

Do you have any other thoughts, Colonel?

Colonel Harris: That also is subject to the defect on agency. He doesn't have the agency go all the way through. As I understand it, all the other objections that we made to this 5 are repeated without dictating them back.

The Court: That is the understanding of the Court.

Have you gentlemen any further observations to make?

Mr. Fred G. Pollard: I think of none.

Mr. Mullen: Except that 5-A and 7 are duplications.

Mr. Allen: No, they aren't duplications.

Mr. Mullen: The last paragraph in 7 covers the same subject as 5-A.

The Court: All right, Mr. Allen?

Mr. Allen: If Your Honor please, 5-A is designed to tell the jury two things: First, if the United Mine Workers was using United Construction Workers and District 50 as agents for the purpose of organizing the unorganized, and Hart went to the Plaintiff's job site within the scope of his agency for District 50 and United Construction Workers and committed these wrongful acts, then United Construction Workers and District 50 are liable. Then the other part of it deals with the liability of the United Mine Workers, if they page 2358 } still believe those things set forth in the first part of the instruction, to meet Mr. Pollard's objection that the jury couldn't find against the United Mine Workers without also finding liability on the part of Hart, that is, that Hart and the men immediately and directly represent the United Construction Workers and District 50. That theory of the law is correct. We are relying, as we are, on this instruction, and this instruction is the only one that puts that situation up to the jury, that if District 50 and the United Construction Workers were being used by the United Mine Workers as agents for accomplishing the purpose of organizing the unorganized, and Hart went there within the scope of his employment and agency of District 50 and United Construction Workers, then the United Construction Workers and District 50 would be liable; and if the jury further believes so-and-so, and so on, then United Mine Workers would be liable.

Under that instruction, they can't find against the United Mine Workers without also finding against District 50 and the United Construction Workers. That is the only instruction which puts that situation up to the jury. We think it is correctly drawn to carry out that object.

Mr. Pollard interposed another objection, and that was that these acts of Hart must be alleged or shown to have been the sole cause of the plaintiff's damages. That principle has no

application whatsoever here. It is applicable in page 2359 } tort cases where the plaintiff is guilty of contributory negligence, and that negligence contributes to the injury, where it is in part a cause of his injury.

Here the principle couldn't possibly apply, because these men came there after Mr. Bryan had done whatever they claim he did. We are going to show in argument on subsequent instructions that everything Mr. Bryan did was perfectly all right under the law. But assuming, for purposes of argument on this instruction, that Mr. Bryan should have bargained with Hart and didn't do it, there is no connection whatsoever on the contributory negligence feature or any other feature which makes anything that Mr. Bryan did in part a cause of the injury or excuse them for the high-handed acts which they did after Mr. Bryan's acts were completed.

The Court: Do you gentlemen have any other observations?

Mr. Mullen: If Your Honor please, the objection that Mr. Pollard made, that they couldn't find against the United Mine Workers unless they found against the United Construction Workers, could be cured by another sentence. Here they come armed with a two-page instruction when one sentence would cure the thing in No. 5.

Mr. Lowden: In Instruction No. 11, which is the one submitted this morning covering the verdict, the jury is instructed that it cannot find against the United Mine Workers unless it first finds against the other two.

Mr. Mullen: I thought you all had finished.

Mr. Lowden: Finished what?

Mr. Mullen: I thought you had finished your argument on it. We want some time to go through ours.

Colonel Harris: There is one objection I want to add to that, if the Court please. This Instruction No. 5, leaving out any question of 5-A, is not predicated upon liability for damages that are proximately caused. This is just the bald statement that they are liable for any wrongful acts.

Mr. Allen contends that our objection that it is not the sole cause is not good, but if that objection is not good, certainly the one that the damages must be proximately caused before there is liability is a correct statement of law, and ought to be there.

Mr. Fred G. Pollard: Not only damages but injuries.

Colonel Harris: Yes, for injuries proximately caused.

The Court: Where do you suggest that that be added?

Mr. Fred G. Pollard: We have suggested that on all of

these instructions. We would have to stop and go through all of them.

The Court: I am talking about Instruction No. 5.

Mr. Lowden: Not on this particular one, but page 2361 } on all of them—I think I am right about this—

my understanding is that these are our instructions, and these gentlemen can protect the point they are talking about by offering an instruction of their own, to which we would have no objection. I don't think they have the right to come here and make up put their instructions in ours. If they want all this about proximate cause and the sole cause, they ought to have an instruction of their own.

Don't you agree with that?

Mr. Allen: Yes.

Mr. Mullen: It is rather a new doctrine. I think we have a right to object so that the instruction may correctly state the law. If you state it partially, we certainly have the right to have it corrected.

Mr. Robertson: You haven't any right to make us tell the whole law of the case in one instruction. It can't be done.

page 2362 } The Court: Gentlemen, I note in Instruction 11, which I have not read in full, which was presented to the Court this morning, under 1(b) "You cannot find against UMW for compensatory damages unless you also find against UCW and District 50 for compensatory damages."

Do you gentlemen have anything further to say?

Mr. Pollard: We have nothing further.

The Court: Colonel, do you have anything further to say?

Colonel Harris: I just wanted to reinforce what Mr. Mullen said. I understood the purpose of our meeting was for us to point out the defects in requested instructions. Then if they want to stand on the defective instructions that is their problem. All we have been doing is doing our best to point out the defects.

The Court: I understand.

Gentlemen, the Court will grant Instruction 5 and Instruction 5-A.

Mr. Mullen: We except to the ruling of the Court in granting Plaintiff's Instructions 5 and 5-A for the reasons stated in the argument on same.

The Court: Now we will proceed to consider the instructions offered on behalf of the defendants. Since we have numbered the plaintiff's instructions, I am wondering if it

wouldn't be a good idea to letter the defendants' page 2363 } instructions.

Mr. Pollard: For purposes of argument it may be easier, Your Honor, just to continue the numbers.

The Court: We may do this, start with 11 instead of 1 on the defendants and number all the instructions.

Mr. Mullen: We can make it A, B, and C.

The Court: All right, Defendants' Instruction A.

Mr. Robertson: If Your Honor please, that instruction reads as follows:

"Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this case, and the law of Kentucky includes the Constitution of the United States, the applicable Federal laws, the statutes of Kentucky and the decisions of the court of last resort of Kentucky."

We think that that instruction is improper here and should not be given for these reasons:

The law of this case, it doesn't make any difference where it came from, is the law as the court gives it to the jury. It doesn't get the jury anywhere or help them in reaching a decision to tell them that it is the substantive law of Kentucky which applies.

Then when you get to the latter part of that instruction, the law of Kentucky includes the Constitution page 2364 } of the United States," it doesn't in this case.

There is no federal question here. They have tried their best to inject a federal question into this case. None arises from the notice of motion for judgment. None arises from the evidence.

"\* \* \* the applicable federal laws." I recognize that is put in there to try to lug in the Norris-LaGuardia Act, which by its terms says it applies only to federal courts, or the Taft-Hartley Act which has no place in this case, or the Sherman Antitrust Act or the Clayton Act. None of them have any part in this case.

"\* \* \* the statutes of Kentucky." Of course that would mean the whole code of Kentucky, which of course can't be true.

"\* \* \* and the decisions of the Court of last resort of Kentucky." There is a whole body of law which can't possibly apply here.

It looks to us that that is trying in that instruction to put

down a springboard from which they can jump to arguments on all sorts of irrelevant things in the case.

Do you have anything to add?

Mr. Allen: If Your Honor please, you can prove the law of another state in the several ways provided by Virginia statutes. If the law of Kentucky is brought here and copied in one of these instructions or any sheet of paper page 2365 } and any of us tell Your Honor that that is the statute of Kentucky, you have a right to accept that as the statute of Kentucky if you are satisfied with it, or the statutes themselves may be introduced in evidence, or lawyers may come here and testify as to what the statutes and the common law are.

When you give the law to the jury, you give it to the jury in an instruction just exactly like you do any other law. You make no reference to Kentucky law or federal law or Virginia law. You tell the jury what the law is that is applicable to the facts in the case.

To give the jury an instruction like this just leaves the matter entirely wide open. I don't think these gentlemen would do it, but under this instruction they could argue anything on earth that is in the judicial decisions of Kentucky, anything that is in the statutes of Kentucky, anything that is in the Federal Constitution or federal statutes on the subject if any of them are applicable. That just isn't the way to instruct the jury on the law in another jurisdiction. We think when you tell the jury what the law is in instructions without any reference to Kentucky law, federal law or any other law, that is all that you should do.

The Court: All right, Mr. Mullen.

Mr. Mullen: Colonel?

Colonel Harris: Mr. Allen argues as to the page 2366 } manner in which we should prove the Kentucky law. I am under the impression—I would be glad to have the Virginia lawyers correct me—that the Virginia code provides that the court shall take judicial knowledge of foreign laws, and it isn't a question of what we prove. In this case it was stated in the beginning—that is, the beginning so far as I am concerned—I wasn't here at the very first—that the law of Kentucky governed. This is not a case where the jury is considering a Virginia wrong. The jury may have some idea from previous experience what Virginia law is, and we think that it is only fair for the jury to know that the law that they are enforcing in a Virginia court is the law of Kentucky.

Mr. Pollard: There is this thought, too, Your Honor: We have a very strict law in Virginia, the Right to Work Law,

and some of these instructions may seem liberal to the jury. They will say to themselves, "I didn't know you could do that under the law." They have to realize or have some instruction to them that it does not apply to Virginia law, but to Kentucky law.

Mr. Robertson: Are you all through?

Mr. Pollard: Yes, sir.

Mr. Robertson: What troubles me about that is that I am not talking about the method of proof or what the Kentucky law is. Of course the substantive law of Kentucky does apply and should be set out in proper instructions as we have tried to do here for both sides. I don't think it is proper, but to meet their objection, I would be willing and I think the instruction could be corrected to say this: "Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this cause," period.

The Court: "In this case." That is what I had in mind, to stop right there.

Mr. Robertson: I don't think they have any right to object to it if it stops there.

Colonel Harris: We would, of course. We stand on it.

The Court: I will give the instruction down through the word "case," period.

Mr. Fred G. Pollard: We except to the Court's ruling.

Mr. Mullen: Do you want to take a copy and mark on it "rejected"?

The Court: Let's see. I wonder if I should mark this refused as tendered. Then would it be your idea that you would offer the instruction down through "case" on the third line, since the Court has refused the instruction which includes "and the law of Kentucky includes the Constitution of the United States, the applicable federal laws, the statutes of Kentucky and the decisions of the court of last resort of Kentucky."

Mr. Mullen: I think it is necessary for us to offer that. The Court has ruled. We don't have to offer anything more.

The Court: Not unless you want to.

Mr. Mullen: It becomes a question of instruction.

Mr. Fred G. Pollard: That will be in the instruction? We don't want to withdraw it.

The Court: What I was thinking was that I would mark this instruction refused, and then you save your point, and then you come back with another instruction in lieu thereof down through the word "case". Wouldn't you be saving your point on this instruction?

Mr. Robertson: Couldn't you do it this way, Judge? Just have the record show that the instruction as offered was refused and the Court upon motion of the plaintiff modified the instruction over the exception and objection of the defendants and gave it as follows.

Mr. Mullen: I think that is the proper way to do it.

Mr. Allen: Not upon motion of the plaintiff, but upon plaintiff's objection, modified the instruction to meet plaintiff's objection.

Mr. Mullen: I think that is the way.

page 2369 } The Court: I should probably mark refused on the original.

Mr. Mullen: Yes.

Mr. Allen: That is right, and your exception then would be to giving the instruction as modified.

Mr. Mullen: Yes. We except to the action of the Court in rejecting Instruction A tendered and save the exception, and also object to the modification of it.

The Court: Then you are going to prepare an instruction in accordance with the Court's ruling.

Mr. Mullen: Yes, we will do that.

The Court: All right.

Mr. Robertson: I think we can get together on Defendants' Instruction B very quickly.

"The jury is instructed that:

"The burden is upon the plaintiff to prove by a preponderance of the evidence all facts necessary to constitute a claim for damages against the defendants. And you may consider a fact established by the greater weight of the evidence as being proven by a preponderance of the evidence, but a preponderance of the number of witnesses for the proof of a fact does not constitute a preponderance of the evidence."

If you put the word "necessarily" in there, "does not necessarily constitute." That is a very stereotyped instruction, but it is not given in the exact words that it is generally given in Virginia, but if you put "does not necessarily constitute a preponderance of the evidence, I think it is all right.

Mr. Allen: May I make an observation on the words "but a preponderance of the number of witnesses." "Preponderance" is not the correct word to use there. It ought to be the greater number.

Mr. Mullen: I agree with you on that.

The Court: In the third from the last line, "but a greater

number of witnesses for the proof of a fact does not necessarily constitute a preponderance of the evidence."

Mr. Mullen: Instead of "necessarily," say "does not in itself."

Mr. Robertson: It may or may not.

The Court: It is a question for the jury.

Mr. Robertson: It leaves it wide open for argument.

The Court: The jury may believe one and disbelieve ten.

Mr. Allen: The testimony of one may preponderate over that of ten.

The Court: I think the word "necessarily" is all right.

Mr. Fred G. Pollard: We have no objection to that. Does the Court grant that?

page 2371 } The Court: The Court grants defendants' Instruction B as modified.

Mr. Mullen: We do not take an exception to that.

Mr. Robertson: Are you ready for C?

The Court: Defendants' Instruction C.

(Defendants' requested Instruction C follows:)

"The jury is instructed that:

"The plaintiff's common laborers and carpenters helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in picketing, and to assemble peaceably.

"In the exercise of these rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

"The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights.

"Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the  
page 2372 } picketing of its peaceful character."

Mr. Robertson: We have been over "C" here and I think that with some minor changes we might agree on that one.

Mr. Lowden and Mr. Allen have worked on that since I have.

The Court: Let the Court read this instruction, please.

All right, Mr. Lowden.

Mr. Lowden: With the following changes, Your Honor, I would not have any objection to this one.

In the first line change the words "common laborers and carpenter helpers" to "employees."

Insert a word in the last line of the first paragraph "to engage in *peaceable* picketing and to assemble peaceably."

Then in the next line say "In the exercise of the rights set forth above such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference, provided they resorted to no violence, intimidation, threats or coercion."

"The above rights are not lost because others who are not employees of the plaintiff join with employees of plaintiff in asserting their rights in a lawful manner."

Otherwise, we think it is all right.

Mr. Mullen: What do you want up in the first of it?

Mr. Lowden: Just "employees" instead of page 2373 } "common laborers and carpenter helpers." I think we are going to come to the point you are trying to make in some of your later instructions.

Mr. Mullen: Are you through for the time being?

Mr. Robertson: "Employees" includes all employees. That is what we are doing. We are not picking out one category. It is all of them.

Mr. Pollard: Your Honor, the evidence is that all of the plaintiff's employed except the common laborers and carpenter helpers were already organized. These employees were not organized. These are the ones to whom these rights particularly apply.

Mr. Mullen: It is the basis of our case, and we have a right to an instruction on it. Common laborers and helpers are what we are dealing with.

Colonel Harris: We didn't have to organize the A. F. of L. members all over again. That charge would incorporate the A. F. of L. members in to the laborers and helpers as a limitation on their right. What one group of men do doesn't deprive the other men of their legal rights. The A. F. of L., under the undisputed evidence, is a craft union. The common laborers and carpenter helpers belonged to a different craft from any of those that were, under the evidence, organized in this case. They have a right to their independent unions. They have a right to organize. They page 2374 } have a right to strike. Nobody can get together and write a contract and leave the carpenter helpers and common laborers out in the cold, not covered by the contract and not having any ability to exercise the rights

given by the law. That is what they are seeking to do here.

Mr. Fred G. Pollard: Frank, what was the second change you wanted?

Mr. Robertson: Wait a minute.

Mr. Lowden: Let's give them the change.

Mr. Robertson: Yes.

Mr. Lowden: In the last line "to engage in *peaceful* picketing and to assemble peaceably."

The Court: Where is that?

Mr. Allen: The last line of the first paragraph.

The Court: "' \* \* \* had the right to strike, to engage in peaceful picketing—"

Mr. Fred G. Pollard: Your Honor, the word "peaceably" at the end seems to apply to everything in that sentence.

Mr. Lowden: No, it only applies to "assemble peaceably."

The Court: "' \* \* \* to engage in peaceful picketing and to assemble peaceably." You had something else you suggested.

Mr. Lowden: That is all in that paragraph. Then in the next paragraph, "in the exercise of the rights set forth above such employees had the right to interfere with page 2375 } the plaintiff's business without being liable in damages for such interference, provided they resorted to no violence, intimidation, threats or coercion."

Mr. Pollard: We particularly object to that, Judge, because the first paragraph sets out the rights, and all the second paragraph says is that in the exercise of these rights if you don't exercise those rights peaceably, without violence, you haven't exercised them.

Mr. Mullen: We already have the word "peaceably" up there, and it refers back.

Mr. Fred G. Pollard: They just want to spot our entire instruction with "peaceably" all the way through when it is in there all that is necessary.

The Court: Anything further?

Mr. Allen: They start an entirely new paragraph, set it off by itself.

Mr. Robertson: We want to have an orderly discussion after they understand the changes that we have suggested.

Mr. Allen: They made their objection first. We understand we make our objection first, they reply, and we conclude.

Mr. Lowden: What we are doing now is pointing out to them what the changes are that we suggest.

The Court: Would there be any objection to a page 2376 } change in the second paragraph to read, "In the exercise of the above rights"?

Mr. Mullen: That is exactly what I was going to suggest.

Mr. Fred G. Pollard: None.

The Court: We will change that to "above rights," then. And at the end of the first paragraph, the last line, insert before picketing "peaceful" picketing. I don't think you have any objection to that, do you?

Mr. Mullen: No.

With those two amendments I think the instruction is all right.

Colonel Harris: You didn't change the words "common laborers and carpenter helpers"?

The Court: No.

Mr. Mullen: "Peaceful" picketing and the "above rights."

Mr. Allen: There is one other that I don't think has been called to your attention. That is the end of the first line of the third paragraph. That line reads: "The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights *in a lawful manner*." The others coming in a lawful manner, too. That is the only time we referred to others, and I think that matter is necessary.

page 2377 } Mr. Fred G. Pollard: It still refers to the above rights, Judge.

Mr. Allen: Yes, but all the above rights are dealing with the employees, and now we are coming to others.

Mr. Mullen: No. "The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights," the employees rights. It is the same thing as above.

Mr. Fred G. Pollard: You could change it to such rights, in asserting such rights.

The Court: How about after "their" putting in brackets "(the employees)"?

Mr. Mullen: All right.

Mr. Fred G. Pollard: Employees or the employees?

The Court: Which do you suggest?

Mr. Fred G. Pollard: Just employees alone?

The Court: Yes, that identifies "their".

Mr. Robertson: I think it would be clearer if you said "in asserting the employees' rights."

Mr. Fred G. Pollard: I think Mr. Robertson is correct, sir.

The Court: "The employees' rights."

Mr. Lowden: Judge, I want to be heard on this in rebuttal when they get through.

The Court: Which one?

page 2378 } Mr. Lowden: This instruction.

The Court: I thought we were through.

Mr. Lowden: No, sir.

Mr. Fred G. Pollard: That is plural possessive.

The Court: All right, Mr. Lowden.

Mr. Lowden: If Your Honor please, if you do not change the words "common laborers and carpenter helpers" in the first line, then Your Honor has made a ruling that those people alone had the right to bargain collectively for that particular group, and I do not think that was their right. They can get the right in one of two ways, either under the National Labor Relations Act or under the statutes of Kentucky. Under the National Labor Relations Act the National Labor Relations Board would have the power to determine whether that group of people was an appropriate unit, and under that act I don't know what the powers of this court are to do that in a case of this kind. They claim they are not under the National Labor Relations Act, but if they were, the appropriate unit might be all of Laburnum's employees, wherever they may work all over the United States, which is in fact the way he bargains and has been bargaining for many years. To come along and say you cut 16 people of that and make that an appropriate unit and give them the right to designate a bargaining agent for that little group, I seriously doubt if that is correct.

page 2379 } The Court: Don't those 16 men—you say they are 16 men—have the right to organize and join the United Construction Workers or A. F. of L.?

Mr. Lowden: Yes, sir. Maybe they didn't intend it this way, but the way it is written it is an instruction by this Court not only that they had that right, which we don't deny, but it is a finding by this Court that they had a right to get a contract for that particular little group. That is not necessarily right. If you go to the statute of Kentucky, which we are going to have a big argument about here today, I think, I doubt that they have the right under that statute because that statute says the employees shall have the right to bargain collectively, but it doesn't say part of them. I think it means all of them. If that is the case, that they have the right to designate collective representatives of their own choosing, it would mean all the employees working on that job, carpenters and laborers together. I don't think the problem is as simple as these gentlemen are making out, by any means.

Mr. Robertson: I think it should be broadened to include

all employees, and then it is open to argument in whatever way it is not limited by other instructions of the Court.

Mr. Allen: Before we conclude our part of it, I want to have something to say on that.  
 page 2380 } The Court: You gentlemen close. We have gotten off the track a little bit, so I will let you gentlemen take the ball at this point and let them close.

Mr. Mullen: If Your Honor please, there isn't any merit whatever in Mr. Lowden's objection there. It is in evidence that neither the A. F. of L. union out there nor here ever applied to the National Labor Relations Board to be designated the representative of all the employees, and that is the only way they could do it. I asked that specific question, and the answers were no. They have the right in classes of labor to organize separately unless there has been an application to the National Labor Relations Board and a designation of a union as representing all the employees. These people were out in the cold, were not represented by anybody. They had a right to organize, to select representatives of their own choosing. Nothing in the Kentucky law or anything says that all of every class of labor employed by any employer have got all to join together, or none can. That is the most—I won't use the word. There is nothing in that whatever.

Mr. Fred G. Pollard: Your Honor, look at the plaintiff's Instruction 1-A, which is the Kentucky statute, and look at the first paragraph of our Instruction C, and you will see that it is a paraphrase of that statute. The only thing that has been done is to punctuate the statute, which  
 page 2381 } has not been punctuated. That Kentucky law in plaintiff's instruction 1-A says that employees may do all of the things listed in our instruction. All that instruction is doing is bringing the Kentucky law down to the facts of this case. The Kentucky law says employees may do this, our instructions say the common laborers and carpenters helpers can do this. They were unorganized, and they had the right to organize and to associate themselves together for the purpose of self-organization and so forth. I don't see a thing in the world wrong with bringing the facts of this case down to what the law itself actually says.

Mr. Mullen: The facts based on our theory of the case.

Colonel Harris: If the Court pleases, there is this additional factor: If what Mr. Lowden argues is taken as true, any majority group could get together, without ever applying to the National Labor Relations Board to represent all employees, and say, "We will form a union, and once we have formed one, the other 49 per cent of the employees are deprived of all lawful rights given them by the statutes of Ken-

tucky. They can't organize because we have pre-empted the field. The only way they can pre-empt the field is to get certified by the National Labor Relations Board.

So it seems to us in this particular case it is really too clear for argument that they can't get together and  
page 2382 } work out a contract and exclude everybody else from equality under the law.

Mr. Allen: Have you finished?

Mr. Fred G. Pollard: Yes.

Mr. Allen: If Your Honor please, the Kentucky statute simply says in part (e) they have a right to organize. That means common laborers, it means skilled laborers, it means all classes of employees. It would give the members of the A. F. of L. just as much right to organize those common laborers as it would give their clients to organize them. This instruction as it is drawn here in fact is a directed instruction on an issue of fact. Mr. Bryan testified that he doubted—in fact, he said emphatically that Hart furnished no proof to him that he represented the common laborers, a minority or majority, either. As I understand the law, what little I know about the labor law, it is held in several cases here in Fed. (2d), and I will give you the citations. In the case of *Texas-arkana Bus Company v. National Labor Relations Board*, 119 Fed. (2d) 460, *National Labor Relations Board v. Empire Furniture Company*, 107 Fed. (2d) 92, and in *International Woodworkers of America, District of Columbia, Council No. 5, 135 Pacific (2d) 759*, all of those cases—and they are late cases—hold that there must be presented to the employer evidence showing that the representative is an authorized bargaining agency for employees.

page 2383 } Wherein did Hart ever present to Mr. Bryan any proof that he represented any of his employees? He just came there and said so. If they had a meeting and decided this, that or the other, he presented Mr. Bryan with no proof. Mr. Bryan said he investigated the matter, and he had no proof, and he didn't believe that he represented them. If that instruction is to be given at all, it certainly should not take away from the jury the question of fact involved.

The Court: Does it take away the question of fact?

Mr. Mullen: Not at all. You all are going to argue just what he said, and I am going to argue just the opposite.

Mr. Allen: Wait a minute. "The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self organization—"

The Court: Didn't they have that right?

Mr. Allen: Wait a minute. Let's get along. "To designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably, "in the exercise of these page 2384 } rights," and so on.

There isn't anything in that instruction which would put upon the defendants any duty whatsoever to furnish any proof that Hart did represent those people. That is what I am getting at. It leave that whole question out.

Mr. Robertson: Who is going to end the argument?

Mr. Fred G. Pollard: I would like to ask the Judge a question, Mr. Robertson, if I may.

Your Honor, Mr. Allen in his rebuttal brought in a new matter that hadn't been brought in before, which I think we should be entitled to answer, the cases that he referred to.

Mr. Robertson: We hadn't finished.

Mr. Lowden: When we get through you have the right.

The Court: Let them finish, and I will give you an opportunity.

Mr. Fred G. Pollard: All right.

Mr. Robertson: If Your Honor please, here is the thing that we object to in the opening sentence there. The statute uses the word "employees," and that includes the A. F. of L. people out there. They have changed it from "employees" to "common laborers and carpenter helpers." If they are paraphrasing the statute let them paraphrase it and say "employees," which is the term of the statute, and page 2385 } then as Mr. Mullen said it is wide open for us to argue about the A. F. of L. and for him to argue about Hart and his crowd.

Supplementing what Mr. Allen has said I think it is very interesting that he said he had no proof that Hart had ever represented anybody. As a matter of fact, from my reading last night of notes made during the progress of this trial, according to his own admission Hart called Bryan up, and he had signed up four, but it is very interesting to note that when Fohl talked about how he went to Bryan's office, he said Bryan said he had a contract with the Richmond Trades Council but he didn't offer him any proof of it. "I never saw the thing. I never saw any proof of it."

In other words, they don't have to offer the proof, but we do.

I say here, if they are going to paraphrase the statute they ought to paraphrase it in the words of the statute and use

"employees" and leave it wide open for everybody to argue except as restricted by other instructions of the Court.

I am going to ask Mr. Lowden to close for us.

Mr. Lowden: Here is the thing in this instruction that is disturbing me, if Your Honor please. I have taken the trouble to read every case in every jurisdiction on the statutes of this type. Suppose he had organize only four page 2386 } laborers, and that is all he had, do you mean to say they had the right or we were compelled to negotiate a contract for just four of the laborers? Suppose he represented only eight of them, would we have had to make a contract with him? Would they have had the right to negotiate just for the eight? Suppose he had half the laborers and half the carpenters, would we have had to make a contract with him for half the laborers and half the carpenters? Did he have to have them all? Did he have to have a majority of them or what did he have to have?

It seems to me in the instruction, if given in the form they desire it, the Court is saying at that stage that the common laborers and helpers are the group they had to have.

The thing these gentlemen are talking about is coming up later, but the first thing that comes up in this case is the telephone conversation of July 14 with Mr. Hart, and Mr. Bryan says, "I deal with the A. F. of L. They represent my people." What he is saying to them in effect is "Almost all my employees now, 99 per cent of them, are covered by A. F. of L. contracts and they belong to the A. F. of L.," denying the right to come in and cut off a small segment and denying that that unit for bargaining purposes is appropriate.

The Court: Do I understand you to contend page 2387 } that the unit includes carpenters, laborers and carpenter helpers?

Mr. Lowden: I don't know the answer to that. We have had a lot of discussion about that. They don't know the answer to that, either.

The Court: In other words, whether you can organize the whole group together and whether the laborers can organize separately. That is what runs through my mind.

Mr. Robertson: The statute doesn't say, and no human being can find out.

Mr. Lowden: I will inject this into it. I would think that if this statute should be construed as establishing a smaller bargaining unit for Mr. Bryan's concern which might be within the jurisdiction of the National Labor Relations Board. I am not sure the statute wouldn't be unconstitutional to that extent, because I do not think the statute of Kentucky can provide for a different type of appropriate unit than is pro-

vided for in the National Labor Relations Act. I am not going to sit here and tell the Court that I know what an appropriate unit is under that statute because I don't know, and neither can any of the other courts tell. I will read what a judge said out in California, and he has changed his mind three or four times. This statute is a little broader than the one under consideration and is a little more indefinite in what it provides.

The Court: Let me ask you this. Are we going into a lot of this in more detail later?

Mr. Robertson: Yes.

The Court: I would suggest, then, that you allow the Court to pass this tentatively.

Mr. Lowden: Maybe they don't think it is a problem, but I think it is going to be a real serious problem.

The Court: It may save time if we are going to have to go into this in detail later.

Mr. Robertson: I think we will save time right now, Your Honor.

Mr. Mullen: We hope to get through ours today.

Mr. Lowden: If I may suggest this, I think you all will agree with me that we will have a real, sure enough argument on this, do you not?

Mr. Mullen: Of course we have an argument on everything we bring up.

Mr. Lowden: The thing runs through several of their instructions, and I would think if we went through and weeded them out and then had the argument all at once.

Mr. Robertson: Let him read this from the California case.

Mr. Mullen: I know there is nothing in it because I have been in too many labor organization matters and bargaining, I know you can divide them up into three or four groups in the same company and I have had it done on me.

page 2389 } Mr. Allen: May I ask you a question which will clear it up, Mr. Mullen. Didn't the A. F. of L. have the right in a proper sort of manner to organize those common laborers?

Mr. Mullen: They had the right but they didn't do it.

Mr. Allen: Didn't they have the right?

Mr. Mullen: Any of them had a right to do it. They were wide open.

Mr. Allen: Whether they tried to do it or did it or got applications, as the testimony shows, is a question of fact. You cut off that feature of it by this instruction. You say that your men had a right.

Mr. Mullen: We don't cut it off. I will save this for my argument.

Mr. Lowden: I would suggest that we keep on going.

The Court: That would be my suggestion. Mr. Pollard, is that agreeable with you?

Mr. Fred G. Pollard: I want to make one short statement. Mr. Allen referred to a lot of cases about proof of representation, and they have no place in this because naturally they were all cases where unions were seeking recognition under the Labor Act, and under the Labor Act you require proof of representation.

The Court: I will put "o. k." with a question mark on this one, tentatively approving Instruction C.

Mr. Allen: The Judge hasn't approved it yet.

The Court: I have tentatively approved C.

Now we go to Defendants' Instruction D.

Mr. Robertson: I will ask Mr. Lowden to discuss that.

The Court: If you don't mind, Mr. Lowden, will you read it?

Mr. Lowden: All right, sir.

"The jury is instructed that:

"In Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce employers to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

"To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair: publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellowmen, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate

labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends."

I see nothing the matter with the first paragraph, and I see nothing the matter with the second paragraph except the sentence, "when engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places."

I am aware of the fact that that sentence was copied out of a Kentucky case, but I would like to suggest to the Court that the crowd in and of itself may be intimidatory, depending upon the circumstances of the case. What might be a lawful crowd in Richmond or in a city may not be out in the woods.

Mr. Robertson: I think that is what I have said. For instance, I don't think I have any right to argue this to the jury, but I think it is a fact that every time we took depositions in any isolated place, this fellow David Hunter and Noble Hobbs and sometimes others would be sitting *would be sitting* there looking you in the eye. I can look Your Honor in the eye right now and make it just about as insulting and just about as threatening as any words I can utter. I think they intimidated these men at those depositions. I think that is why they were there. I say I have no right to use that in argument before the jury. I say it all depends on what sort of crowd gets there. The very presence of a crowd may in itself constitute a threat.

The Court: It would be a question for the jury whether or not this crowd intimidated.

Mr. Robertson: Yes, I think it would be.

Mr. Mullen: This is word for word, as they admit, from a Kentucky case.

Mr. Fred G. Pollard: Your Honor allowed Mr. Robertson to rise to a point of personal privilege, and I would like to do so now, if I may. Mr. Robertson's statement that we had these people there at the taking of depositions for the purpose of intimidation of witnesses is wholly without any foundation in fact.

Mr. Robertson: I didn't say you did it. I said that I thought that was the effect of doing it.

Mr. Fred G. Pollard: You said you thought that was the purpose.

Mr. Robertson: I think the labor union did it. I think David Hunter is one of the most villainous looking men I ever looked at, and Hobbs seems to be a nice enough looking fellow.

The Court: The argument doesn't go before the jury and

it is not going to have any effect on me one way or the other.

Mr. Fred G. Pollard: It is in the record, and it is not proper.

The Court: You have answered him.

Mr. Fred G. Pollard: Those men were there at our request so that we could get any information that they had about their connection with this case. We had a right to have them personally there representing the defendants, and that was the sole reason they were there. Mr. Robertson's statement of anything to the contrary is not true.

Mr. Robertson: If Your Honor please, let us close this down on this. I didn't attribute it to counsel. I say that I can name instances where a man would come in there and see them and go out in the back room, and he would come in and say he was scared to testify and didn't testify. That has nothing to do with this, however.

Colonel Harris: I arise to a point of personal privilege also. Some of those depositions were taken when Mr. Pollard was up here, and he can speak for the ones that he was in, and as to the ones that I was in down there page 2394 } that statement is absolutely incorrect. We only exercised the lawful right that we had. I saw no signs of intimidation or threat or anything of the sort. The only thing that was reported to me was that they had some man out in the hall who refused to testify and then when he refused to testify they put on Bert Preston and took another deposition from him, as I recall it.

The Court: Let's go on with the argument, gentlemen.

Mr. Allen: I wasn't there.

The Court: I wasn't either.

Mr. Robertson: Dixon refused because he said at that time he was in the coal business running a trucking coal mine and if he testified they wouldn't let him sell his coal.

The Court: We are wasting time. Let's get on with the instruction.

Mr. Lowden: In the second paragraph we want to insert the words "intimidation, threats, or coercion" following the word "fraud" in the fourth line.

Mr. Robertson: How about a way down at the bottom.

Mr. Robertson: Judge, also "When engaged in a lawful strike its members may join in a crowd to peacefully persuade other men who propose to work not to take their places." To persuade them peacefully.

Mr. Allen: It ought to be an orderly crowd, too.

Mr. Robertson: "Its members have a lawful page 2395 } right to assemble peaceably to address their fellowmen, and endeavor in peaceful, reasonable,

and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may peaceably assemble—"

The Court: Mr. Moore wants to add something.

Mr. Moore: I want to make sure you understood our point on the fourth line down after the word "fraud," to put in "coercion and intimidation."

Mr. Allen: "Not partaking of fraud." It should not be limited to fraud, but intimidation, threats or coercion.

The Court: Do you have any objections?

Mr. Mullen: We have a labor case, the Lee case in Kentucky, involving the same question. This language is direct language taken from the Court's opinion. There is no change in it in any way, shape, or form. They have used "crowd," and "mob" all through their instructions, and we are entitled to this. Of course they don't want the jury to be told they can join in a crowd. We have that right. They have it under the decision of a Kentucky court. Mr. Pollard will read you the Kentucky case and you will see that it is word for word.

Colonel Harris: If Your Honor will look at your instruction you will see how closely it follows the instruction.

Mr. Fred G. Pollard: Your Honor, this is the page 2396 } *case of Blandford v. Press Publishing Company*,  
151 S. W. (2d) 440, the leading Kentucky case. We have omitted one or two things that have no bearing on the case, but I would like to read the finding of the court here and ask that you follow the second paragraph as I read it.

"To accomplish these legitimate ends, a labor organization may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members, may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellow men, and endeavor in a peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends, that is, use persuasive powers in a peaceful way."

Mr. Robertson: Why did you leave out "persuasive powers in a peaceful way"? We are just trying to get the peaceful way in it.

page 2397 } Mr. Mullen: Because we use it up above there.

Mr. Robertson: You left out the last phrase in the paraphrase because you didn't like it. You put that in there and I will withdraw my objection.

Mr. Mullen: All right, put that in there.

Mr. Pollard: " \* \* \* to gain their ends, use persuasive powers in a peaceful way."

The Court: That is granted.

Mr. Lowden: No objection.

Mr. Moore: That is the only change.

The Court: Yes, that is the only change.

Mr. Fred G. Pollard: We would like to make one change in the fourth line of that one.

Mr. Allen: The fourth line from the beginning.

Mr. Fred G. Pollard: Yes. We have the word employers in there, and we would like to change that to the word plaintiff.

The Court: Is there any objection to that? That would be the plaintiff in this case. There is no objection to that.

(Defendants' requested Instruction E follows:)

"If you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for page 2398 } the defendants."

The Court: That is granted.

Mr. Robertson: We have no objection to "E".

Your Honor, we do object to "F".

The Court: (Reading.)

"The jury is instructed that:

"Under the law the plaintiff had the duty to bargain collectively with the representatives of its common laborers and carpenter helpers. If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully."

Mr. Robertson: If Your Honor please, when you come to "F" you are right square back where you were on the one

that you passed a moment ago. I am going to get Mr. Lowden to discuss this, but it is perfectly obvious from the beginning there when Hart walked up he said "I represent the majority. Come along now or get out." According to our testimony, Fohl had already lied to Bryan at Hopewell. I say, according to our testimony, Fohl had given Bryan a false statement of fact when he said he had them all organized at Hopewell. That was the background of it. According to our testimony, Hart spoke untruthfully when he told Bryan on the 14th that he represented them when he represented but four. Under this instruction, leaving out the law of it, but page 2399 } just on the facts, according to this instruction as I interpret it, we had to accept anything Hart said at face value and go ahead and act as he told us.

I am going to ask Mr. Lowden to take it up there.

The Court: Let me read this once more, please.

(Court reading instruction.)

Mr. Lowden: Judge, we are right back to the same hitching post.

The Court: Do you think this is the time to beat it out?

Mr. Lowden: I don't know how many more times it comes up. I am sure it comes up some more.

Mr. Robertson: Let's pass it.

The Court: Let's pass it by.

Mr. Lowden: So far as I am concerned, directly on that point I want to make a full scale argument. I think we ought to weed out the rest of it.

The Court: Let's take the rest of them and come back.

Mr. Robertson: Now we come to "G".

"The jury is instructed that:

"None of the defendants can be held responsible or liable for any unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof."

We think that has been covered by prior rulings of the Court. The Court has said it is the recognized rule in Kentucky that you don't have to have prior authorization, you don't have to have subsequent ratification, and if you have knowledge and acquiesce and fail to repudiate it and accept the benefits, you are bound by the acts of the agent within the scope of his authority. We say that you can have con-

structive knowledge as well as actual knowledge. When you come to Tom Raney's accountability to John L. Lewis, who hires him and fires him, to the setup there in the offices, to the nature of the territory through which they operate, to the fact that he went out over the territory with Hunter and helped Hunter and gave Hunter his advice and assistance and, we contend, gave him orders under the guise of polite language, that they are bound by it and that instruction is fundamentally wrong any way you look at it.

Mr. Moore: The big battle we had on Instruction 4 of ours is the basic agency argument. This is the Norris-LaGuardia Act argument we had there.

The Court: I recall the discussion.

It seems to the Court that we went into this pretty thoroughly.

Mr. Allen: We covered it thoroughly in Instruction No. 4.

The Court: I don't know whether you gentleman page 2401 } men have anything in addition you want to say in regard to that.

Colonel Harris: There is one statement they make that we want to reply to. They state that this already has been covered in other instructions of the Court, and we don't think that is quite correct. We think this instruction standing alone correctly states the law, and the law as stated there has not been so simply, so clearly, and so accurately stated as it has in that instruction.

Mr. Fred G. Pollard: Your Honor, I would like to say that in as much as they alleged ratification, it certainly would be proper to give an instruction to the jury that they had to believe that there was ratification.

The Court: Hasn't our Court of Appeals held that you don't have to prove everything you allege?

Mr. Moore: Yes.

Mr. Fred G. Pollard: You don't have to prove all of the facts you allege, but this is an allegation of agency, an allegation of ratification. I don't think that any useful purpose can be served by our going through the whole argument.

The Court: You went into it pretty thoroughly yesterday.

Mr. Allen: Yes.

The Court: The Court will refuse this instruction.

Mr. Mullen: Please note our objection and exception.

Colonel Harris: I was going to ask that the page 2402 } exception be not only on the argument made today but on the argument made on their instruction defining agency.

The Court: Very well.

Mr. Allen: That is all right.

Mr. Lowden: I think we had that understanding from the beginning. Can't we just eliminate that?

The Court: Any objections you made to their instructions will, if you desire, apply to exceptions to your instructions.

Colonel Harris: I was under the impression that they were only pertinent objections, and that is why I wanted to bring that in on another charge.

Mr. Robertson: If Your Honor please, Defendants' Instruction II:

"The jury is instructed that:

"The defendants are not liable for any wrongful conduct of individuals unless they authorized, instructed or ratified that conduct. And no defendant is liable for the conduct of either of the other defendants unless it authorized, instructed or ratified that conduct. You cannot consider the declarations or writings of any individual to establish the fact of authorization, instruction or ratification of his conduct."

We think that is exactly the same instruction page 2403 } that we have already argued with this slight modification: "You cannot consider the declarations or writings of any individual to establish the fact of authorization, instruction or ratification of his conduct." We think that is exactly what you can do, that when they have admitted in their grounds of defense that David Hunter and Hart respectively were both agents of UCW and of District 50. We come on back to the close relationship between A. D. Lewis, John L. Lewis, Kathryn Lewis, and John L. Lewis, and the fact that every report that Hart made to Hunter, a copy went to headquarters in Washington, and every report that David Hunter made, a copy went to Washington to A. D. Lewis in his other capacity. If it was made as United Construction Workers report it went in to Washington. If it was made as a District 50 report it went to Washington. They disclose through those reports that Raney was going all through the territory helping David Hunter and advising him, aiding him, either taking orders from him in the form of requests or giving them. That is all circumstantial evidence and direct evidence which is directly admissible for the purpose of proof of our case.

Mr. Moore: The definition of agency in this is exactly like the definition of agency in Instruction G. It is based on the Norris-LaGuardia Act.

The Court: All right, gentlemen?

Mr. Fred G. Pollard: Judge, I asked Mr. page 2404 } Barrett to get a book this morning—

The Court: He got the wrong book?

Mr. Fred G. Pollard: He got 58 S. E. instead of S. W., and I think it was my fault. The case in there is *Newberry v. Faulconer*, 58 S. W. (2d) 217. I have a quotation from that case but I wanted to get the entire case. The case holds:

“We find the rule to be that evidence of statements or declarations of an agent is inadmissible to establish the fact of agency or the extent of the authority.”

The case goes on to say:

“If the extent of an agent’s authority may not be established by proof of his declaration, it is self-evident that the same rule would forbid admission of his declarations to establish ratification, which would relate back to and supply want of authority in the original transaction.”

That case covers the last sentence in that instruction.

The Court: Let me ask you this, Mr. Pollard: Aren’t the interrogatories admissions when they are addressed to the defendants themselves?

Mr. Fred G. Pollard: Yes. This concerns individuals. I don’t think the word “individual” refers to one of the defendants. What we mean is that no statement in the depositions or in the testimony of Raney or Hart can page 2405 } establish the fact of agency or the extent of authority, and that is what this Kentucky case says. I realize that the first two sentences of that instruction have already been ruled on by Your Honor.

Mr. Allen: What was that?

Mr. Fred G. Pollard: The first two sentences of that instruction.

The Court: Have already been ruled on, he says.

Mr. Fred G. Pollard: I don’t think it is necessary to wait for Mr. Barrett to get that case. That is all we have to say on it. Here is a case that says exactly what the last sentence says.

Mr. Moore: The first two sentences you admit have already been ruled on and must come out. Is there any point in putting the last sentence in?

Mr. Fred G. Pollard: Yes.

The Court: Mr. Pollard, I am going to ask you to read that statement of law again to me which you quoted from your memorandum.

Mr. Fred G. Pollard: "We find the rule to be that evidence of statements or declarations of agency is inadmissible to establish the fact of agency or the extent of authority. If the extent of an agent's authority may not be established by proof of his declarations, it is self-evident that the same rule would forbid admission of his declarations page 2406 } to establish ratification, which would relate back to and supply want of authority in the original transaction."

Would it be beneficial, Your Honor, to review the facts in that case?

The Court: You may do so.

Mr. Fred G. Pollard: This was a case where the manager of a chain store, the manager of one of the stores, was being sued along with the store for slander, and the case held that there must be either ratification or authorization or participation to establish agency. The evidence on which plaintiffs were relying to establish ratification was the statement of the manager of the store that he had reported the incident to his principal and that his principal had written him a letter back and approved of his action. The Court said that that was not admissible for the purpose of proving ratification. We take it that if evidence has been admitted over our objection on this, we are entitled under this case to an instruction saying that the jury can not consider the declarations or the writings of any individual to establish the fact of authorization, instruction or ratification of his conduct.

The Court: All right. Is there anything further, gentlemen, you wish to say?

Mr. Fred G. Pollard: No.

page 2407 } Colonel Harris: I can't add anything to a decision, Judge.

Mr. Allen: If Your Honor please, this question has been up time and again in the Court of Appeals. I have had it a half dozen times in cases myself in trial courts and some of them in the Court of Appeals. When a statement like that is made in the opinion, it means that unless you have some other evidence of agency, if the only evidence that you have of agency is the declaration of the agent, you can't prove the whole agency by that, except in some exceptional circumstances which I shall refer to presently.

Just a brief review of the cases on the subject will show you that that is right. In the case of *Blorum v. Rose*, 144 S. E. 642, 151 Va. 590, the Court held that:

"It may be said in general terms, that whatever evidence has a tendency to prove the agency is admissible, even through

it be not full and satisfactory, as it is the province of the jury to pass upon it.

"Alleged agents' declarations are admissible in corroboration, when evidence tending to prove alleged agency has been introduced."

We have introduced all sorts of evidence here tending to prove agency and Your Honor has given some instructions based on that evidence.

Have you not the opinion there? Go ahead page 2408 } and finish with that, if you don't mind.

Mr. Fred G. Pollard: I think I put in all the pertinent part of the opinion.

Mr. Allen: Then you are not going to come back with comments about that case after I get through? If you are going to make any comments on it, I would like you to make them now so I will have the benefit of them.

What is the style of the case?

Mr. Fred G. Pollard: *J. J. Newberry Co. v. Faulconer*, 58 S. D. (d) 217.

Mr. Allen: This is a procedural matter. We are not concerned with the Kentucky law on this.

Mr. Moore: It is the admissibility of the evidence.

Mr. Allen: Certainly.

The Court: Did you have anything further you wanted to add?

Mr. Fred G. Pollard: I have nothing further.

The Court: You may proceed, Mr. Allen.

Mr. Allen: Further in the same case of *Bloxom v. Rose*, the Court held:

"When evidence has been *introduce* tending to prove the alleged agency, or to make out a *prima facie* case thereof, the declarations of the alleged agent then become admissible in corroboration; and the order in which such proof is introduced is within the discretion of the trial court "

page 2409 } In the case of *Ramsay v. Harrison*, which was a libel and slander case, 119 Va. 682, the Court held that:

"In an action against the principal it is not error to receive the admissions of an alleged agent, tending to establish the agency, when a *prima facie* case of connection between the alleged principal and agent has been shown \* \* \*"

You see, it uses the words "*prima facie* case of connection

between the alleged principal and the agent has been shown.”

“\* \* \* Although the evidence of the agency may be slight, the burden is cast upon the principal to rebut it.”

Again in that same case the Court held:

“In connection with other evidence of agency, held declaration of the agent was admissible to prove agency.”

In connection with that, in the *Royal Indemnity Co. v. Hook*, 157 S. E. 414, 155 Va. 956, the Court held:

“Agency may be proven in many ways, among them by the testimony of the agent himself, and when extrinsic sources a *prima facie* case is made out, the agent’s own declarations and admissions become competent. Frequently it is established and has, of necessity, to be established by circumstantial evidence.”

In other cases the courts hold that the declarations of an agent relating to an act within the authorization of the agent in which the agent was engaged at the time of page 2410 } the declarations were made are admissible.

If a man at the time he is doing a thing which is within the scope of his employment in connection with the business, making reports and the like of that, makes statements which lend color to his acts that shows agency, those declarations are admissible. Some of these statements about agency are in these reports, written reports that were filed in connection with the interrogatories. Those reports were made by the man reporting strictly in accordance with the performance of his duty, and statements that he made in those reports in connection with the agency under this principal are clearly admissible.

As Wigmore says on that same subject:

“Statements of an alleged agent which characterize and qualify an act presently done within the scope of the agency are admissible against the principal.”

The Court: I think you have read enough. The Court will refuse the instruction.

Mr. Fred G. Pollard: We note an exception.

Mr. Robertson: If Your Honor please, coming to Instruction “I”:

"The jury is instructed that:

"Neither the defendants nor any one of them can be held liable for any acts that may have been done unless it be clearly shown that what was done was done by page 2411 } their agents in accordance with their fundamental agreement of association, that is to say of their constitution."

Your Honor, I don't believe that needs any argument. That comes down to the proposition that you have a secret constitution, a private agreement, and then you put Raney, Hart, and Hunter out dealing with the public and they commit a tort, and you have some secret limitation on it. I can go back to my old bus and streetcar cases for that. We give instructions from the company saying if he is driving at night he has to pull the curtain around him. He doesn't pull it around him and we have an accident. You might say you can't mention that because under the secret rules you have violated a secret rule. This is just putting it in a different way. I think that is all there is to it.

Mr. Allen: That principle may be applicable as between the principal and the agent—

Mr. Robertson: Oh, yes.

Mr. Allen: —but it has no application whatsoever between the agent and third persons, none whatsoever, so long as the agent is acting within the scope of his authority or employment. That principle is too simple, it seems to me, to require extended argument.

Mr. Moore: It is stated as follows in American Jurisprudence, Your Honor:

"If relations exist which constitute an agency, page 2412 } it will be an agency whether the parties understood the exact nature of the relations or not."

The Court: All right, gentlemen.

Mr. Mullen: By the way, when you refused "H" I failed to note an exception.

The Court: I think Mr. Pollard did.

Wasn't something said about that question in the Coronado case?

Mr. Pollard: Yes, sir; that is what I was trying to find.

(Off the record.)

Mr. Fred G. Pollard: It is in the second Coronado case, which is 268 U. S. at page 304.

Mr. Allen: You don't have the Supreme Court report?

Mr. Fred G. Pollard: No, I have not, sir. The court said there:

"But certainly it must be clearly shown, in order to impose such a liability on an association of 450,000 men, that what was done by their agents in accordance with their fundamental agreement of association "

Then it goes ahead to quote from the earlier *Coronado* case, and in the last sentence of the quote, which is at the top of page 305 of 268 U. S., the Court said:

"It is a mere question of actual agency which the constitutions of the two bodies settle conclusively."

page 2413 } Mr. Allen: Let me see that, will you, please?

Mr. Fred G. Pollard: Have you anything further to say on that question?

Colonel Harris: The only thing, if the Court pleases, as I understand it the decisions of the Supreme Court of the United States are great persuasive authority in the courts of Virginia, and we are not confronted with any question of interstate commerce or the Sherman Act or any federal statute in that pronouncement of the law. That is the question of the fundamental law of agency of a voluntary association.

Mr. Robertson: Are you all through?

Mr. Pollard: I just wanted to point out to the Court that the *Coronado* case was cited with approval and was followed in the case of the *United States v. White*, which is reported at 322 U. S. 694, decided in 1944.

Mr. Robertson: If Your Honor please, Mr. Allen has read the *Coronado* case more recently than I have, but my recollection from a review of it here the other day is that it went off on a question of procedure. My recollection of the case also is that the Court said there was no evidence one way or the other of the existence or the non-existence of any acts of agency. In other words, there was nothing to go back to but the fundamental agreement between the parent union and its subordinate branches, that that was all they had  
page 2414 } to go to, therefore they went back and relied on that.

It is not, cannot be, and never has been the law of Virginia that two corporations can get together, and one of them say, "You go out and act for me, but you won't be my agent." Their words say one thing and their actions say a different thing. They are bound by their actions regardless of what the words are. This is not the law, and I never heard any

proposition put out like that. Mr. Allen has the Coronado case. My recollection is that there was nothing there to go to. They said the hook-up between them was demonstrated beyond peradventure of doubt, but that the exercise of acts of agency was not shown.

Go ahead, Mr. Allen.

Mr. Allen: This instruction, if Your Honor please, would tell the jury that:

"Neither the defendants nor any one of them can be held liable for any acts that may have been done unless it be clearly shown that what was done was done by their agents in accordance with their fundamental agreement of association, that is to say of their constitution."

These gentlemen, for authority for that instruction, rely upon the Coronado case, and I submit most respectfully that there isn't anything in the Coronado case with reference to the issues involved in that case that authorize or even suggest the propriety of any such instructions as that.

The headnotes of the case are short, and the page 2415 } first headnote reads like this:

"Where the constitution of an international trade union provided that its constituents district organizations might order local strikes within their respective districts on their own responsibility, but that such strikes to be financed by the international union must be sanctioned by its executive board, held that liability for damage to property inflicted in a local strike called without such sanction by a district organization could not be imposed on the larger organization and that evidence of participation by its president was insufficient to show participation by the organization itself or to bind it on principles of agency."

The court didn't hold any such thing as is contended for in this instruction, but the court did hold that in as much as all this damage—and there was a powerful lot of damage done there as a result of the calling of an illegal strike, which was not sanctioned, not authorized, or ratified, I understand, by the international union. The constitution provided exactly as it does now, that if a local union called a strike, in order to hold the international union responsible for any of its consequences, they would have to apply to the international union for a sanction of the calling of the strike.

page 2416 } All of the damage that was done there was done in the conduct of an illegal strike called

without authority whatsoever. There is nothing in there applicable to a case here where everything that was done here, as we claim, was done in the commission of the tort of running our people off the job by intimidation, threats, coercion, and offers of violence, making our people leave the job and engendering such fear, putting them in such fear as to cause them not to return.

That sort of thing is not covered in their constitution in any way, shape or form.

Moreover, District 50 wasn't in effect at that time, had never been organized. District 50 was organized in 1936 and according to instructions which you have indicated that you will give under the law as we think it is applicable to this case, if the jury believes that District 50 was the agent of these unions, and indeed we expect to rely on the constitutions and the rules of District 50 and the rules of the United Construction Workers, and particularly the constitution of the United Mine Workers, together with a lot of other evidence to show that District 50 was the agent and the United Construction Workers was the agent.

Following that up further, as you have indicated in the instructions that you will give, if these agents of District 50 were acting within the scope of their employment page 2417 } in representing District 50, and United Mine Workers were using District 50 for carrying out the purposes of organizing the unorganized, that in itself under the Kentucky law, which is applicable in this case, is all the ratification that you need, is all the authority that you need. You don't go back to the United Mine Workers constitution at all, and this case has no application because it involves nothing on earth but the destruction of a lot of property in the course and as a direct result of that local union calling a strike which was never sanctioned or approved under the United Mine Workers Constitution.

The other three paragraphs of this, which are short, simply deal with the application of the antitrust laws to the situation, and whether or not on this case enough evidence was introduced to bring this case within the antitrust laws, that is, enough evidence to show that interstate commerce was involved. That is all there was to the case. I see no application whatsoever of what was said in the Coronado case. It is too long to read any more.

Mr. Mullen: Have you found one that is too long?

Mr. Allen: I mean to read again. This is a suit for damages as a result of conspiracy—

Mr. Robertson: You said you were not going to read it.

Mr. Allen: I am not going to read it.  
page 2418 } On the face of it, as we have repeated, aside  
from what I have said a moment ago, it just  
can't be the law that they can enter into written contracts  
between themselves, and it makes no difference what the  
agent does within the scope of his employment, the principal  
is not liable for the written contracts.

The Court: Gentlemen, the Court will refuse Instruction "I".

Colonel Harris: We take our exception.

The Court: Your exception is noted.

(Brief recess.)

Mr. Robertson: Judge, we come now to the defendants' Instruction "J".

(Defendants' Instruction J follows:)

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

"(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant.

page 2419 } "(b) No damages can be awarded unless you also find that  
the plaintiff was actually damaged; that the damage  
was directly and proximately caused by the  
alleged wrongful acts of one or more of the defendants,  
and that such damage was intended by one or more  
of the defendants or could reasonably have been foreseen as  
a result of its wrongful conduct.

"(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

"(d) The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages. From its gross profits must be deducted all expenses of every kind (including taxes other than income taxes) properly chargeable to the earnings of such gross profit. If you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any

damages based on the net profits the plaintiff claims it should have earned.

"(e) If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you must from the evidence determine with reasonable certainty the part of such work that Virginia Mechanical Corporation would have done and deduct such part from the plaintiff's claim. If you cannot do so, you cannot award any damages based on work the page 2420 } plaintiff claims it would have done.

"(f) There is no evidence that the plaintiff had a reasonably assured gross earning capacity in Kentucky and West Virginia upon which you can award damages for future earnings based upon a gross profit of cost plus 5%.

"(g) If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff."

Mr. Robertson: I will suggest a few words as I go along and then I think we can shorten the criticism of it some.

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this case you shall be governed by the following:

"(a)"—That ought to be "*No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant.*"

I don't know what they mean by "wrong." page 2421 } We will come back to that.

"(b) *No compensatory damages can be awarded unless you also find that the plaintiff was actually damaged; that the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants, and that such damage was intended by one or more of the defendants or could reasonably have been foreseen as a result of its wrongful conduct.*"

Of course that is just dead wrong, and it confuses damages resulting from the tort with damages resulting from a con-

tract. It doesn't have to be intended. It doesn't have to be foreseen. You just have to remember the Squibb case to know that that is not the law.

"(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

"(d) The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages."

You ruled on that yesterday. You don't have to prove net profits; it is profits. And they may argue what is net and we may argue what is net, and there is the whole field for argument open before you. The Court ruled on that yesterday.

"From its gross profits must be deducted all page 2422 } expenses of every kind (including taxes other than income taxes) properly chargeable to the earning of such gross profit."

That is not the law. It is against the ruling of the court when it declined to make them produce their income tax returns and other tax returns. It is a matter that they can argue to the jury under the instruction which you have already given. Of course they are entitled to the converse of the instruction the Court has said he would give the plaintiff on contingent damages. They are entitled to the converse of that but they are not entitled to an instruction that is contradictory to that ruling.

"If you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any damages based on the net profits the plaintiff claims it would have earned."

What I have said applies to that.

"(e) If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you must from the evidence determine with reasonable certainty the part of such work that Virginia Mechanical Corporation would have done and deduct such part from the plaintiff's claim."

That doesn't even leave that question to the jury. Coleman

page 2423 } Andrews said it was good accounting principle and practice to lump them under the circumstances of the existence of those two companies, and they have introduced their exhibit, after all this hue and cry came up I think about the difference between \$58,000 and \$56,000. They can argue all that to the jury, but it has to be left as a jury question.

"If you cannot do so, you cannot award any damages based on work the plaintiff claims it would have done."

That just violates every principle of law which the Court has given in the other instructions on damages.

"(f) There is no evidence that the plaintiff had a reasonably assured gross earning capacity in Kentucky and West Virginia upon which you can award damages for future earnings based upon a gross profit of cost plus 5 per cent."

That is contrary to what the Court has already ruled. We used the expression here yesterday in the nature of good will; it is an expectancy that the same old customers will come back to do business at the same old stand. They had 28 months of work which netted them at the rate of \$28,000 a year.

page 2424 } "(g) If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damages caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff."

If Your Honor please, as I said before—

Mr. Fred G. Pollard: Mr. Robertson, may I suggest to the court that if we take up each paragraph by paragraph and clear them out of the way I think—

Mr. Robertson: I am at the end of this now.

Mr. Fred G. Pollard: —I think it would be easier.

The Court: All right, we will do that.

Mr. Robertson: I will finish what I had to say, Your Honor, and then I will turn it over to Mr. Allen.

They are entitled to an instruction on damages which is the converse of the instruction which you have given to the plaintiff. To put it the other way, the plaintiff is entitled to a damage instruction which is the converse of the damage instructions for the defendants. This instruction here is so

totally in violence of every rule that the Court has announced the Court will follow in our instructions on damages, it seems to me the instruction has to be totally rewritten. I will ask Mr. Allen to continue.

Mr. Pollard: Your Honor, as I understand we will take them up one by one.

The Court: If that is what you prefer to do, if it won't be confusing.

Mr. Allen: As I understand it, this instruction page 2425 } tion is offered as a whole as instruction J. There are so many things that are just palpably wrong on the face of the instruction, and as I take it the Court would have to refuse the instruction as to some of these because some of these paragraphs direct a verdict. There is no obligation on the court to reform the instruction and no obligation on us to reform it. However, I will take up the instruction paragraph by paragraph and discuss it if the Court wants me to do that.

Mr. Fred G. Pollard: What I meant, Mr. Allen is, after you have finished criticizing paragraph (a), we would like to answer, and then you close on it and then we will pass on that paragraph.

Mr. Allen: You say, "No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant." That is what bothers us there. Instead of "wronged," why don't you say "find that the plaintiff is entitled to recover against that plaintiff"? That "wronged" business comes in there and nobody knows exactly. It doesn't say legal wrong, moral wrong, any sort of wrong. I don't know what he is talking about.

You see, this instruction, Your Honor, deals with both classes of damages, because there is no distinction between them. When you are talking about compensa- page 2426 } tory damages you ought to say so. If you will change that to read "No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant." That would include everything that we would have to prove to entitle us to recover against that defendant. I think that would cure that particular paragraph.

The Court: Any objection to that change?

Mr. Fred G. Pollard: No objection to the last change, Your Honor, but I don't see the necessity for inserting the word "compensatory" damages, because unless the jury first believes from the evidence that the defendants—

Mr. Allen: Say, "No compensatory or punitive—"

Mr. Fred G. Pollard: No, just say "No damages—"

Mr. Mullen: It covers them both.

Mr. Allen: Under the Kentucky law they can award punitive damages alone, and no compensatory damages.

Mr. Fred G. Pollard: This doesn't say anything about that, Mr. Allen. This says that no damages can be awarded against any defendant unless you first find as a fact from the evidence, and then use your language.

Mr. Allen: That is right. I think that would do it.

The Court: I don't think it is necessary to put "compensatory" in there.

page 2427 } Mr. Fred G. Pollard: What is your language, Mr. Allen?

Mr. Allen: Reading your language, "unless you first find as a fact from the evidence that the plaintiff—" Cut out the rest of it, "was wronged by the acts." "Unless you first find that the plaintiff was entitled to recover against that defendant."

The Court: In lieu of "was wronged by the act of", insert "is entitled to recover against."

Mr. Fred G. Pollard: We have no objection to that, Your Honor.

The Court: All right.

Mr. Allen: The next one, "(b) No damages can be awarded unless you also find that the plaintiff was actually damaged."

Mr. Moore: That should be compensatory.

Mr. Allen: "That the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants, and that such damage was intended by one or more of the defendants or could reasonably have been foreseen as a result of its wrongful conduct—" That certainly should be inserted.

Mr. Fred G. Pollard: May I make a suggestion, Mr. Allen, which I think will correct that.

page 2428 } The Court: All right, what is your suggestion, Mr. Pollard?

Mr. Fred G. Pollard: Strike out in line 2 the following language: "The plaintiff was actually damaged; that—"

Mr. Allen: "No damages can be awarded unless you also find that the damage was directly and proximately caused—"

The Court: That is in paragraph (b), line 2. He proposes to delete "the plaintiff was actually damaged; that—" Do I understand you correctly, Mr. Pollard?

Mr. Fred G. Pollard: That is right.

The Court: That is the first six words in the second line.

Mr. Allen: Then it would read "No damage can be awarded unless you also find that the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants."

Mr. Moore: You would have to stop there.

Mr. Allen: The rest of that absolutely will have to come out, Your Honor, because it is in direct contradiction with reference to damages.

Mr. Robertson: Mr. Moore has the case on that.

Mr. Allen: The law is not such as is stated in the last clause of that paragraph (b).

Mr. Moore: It is the same case of *Kentucky* page 2429 } *Heating Company v. Hood*, which we cited yesterday, which explains fully the difference between damages in a tort action and the damages following from a contract violation. The Court says: "It is not material," referring to a tort, "whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In action for a breach of contract the rule generally held to is that only such damages can be recovered as are actually sustained or such as is reasonable to conclude from within the contemplation of the party at the time the contract was entered into. There is a wide difference between the rights and remedies allowed under the one case and the other."

Then referring to a tort, they say, "It is the wrongful act and the consequences that naturally result from it that the law looks after and holds the wrong-doer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from and are the result of this wrongful act. Although he may not at the time have given any thought or have anticipated that injurious consequences would follow, it is no excuse or defense for the wrongdoer that he did not commit any wrong or did not know that any injury or loss would ensue."

I think that clearly shows that everything from "and" on is wrong.

Mr. Allen: Your Honor will recall that in page 2430 } discussing our damage Instruction No. 10 you gave this language, part of which was used as the result of a suggestion from Colonel Harris there. You said, "The plaintiff has the right to prove the nature of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto."

The word "proximate" was put in there at the suggestion of Colonel Harris. Of course he does not waive his objection

to that instruction by making the suggestion. I am simply referring to this to show you that very matter was discussed and that Your Honor passed upon the propriety of it in passing on our Instruction No. 10. Your Honor did not follow the suggestion about reasonably could have foreseen as a result of its wrongful conduct or that the damage was intended by the defendants.

As a matter of fact, that is not the law anywhere, in Virginia or Kentucky or anywhere else so far as I know.

The Court: All right, Mr. Pollard.

Mr. Fred G. Pollard: Your Honor, the rule in contract cases is that a man is liable for his intentional conduct or that which was the result as being reasonably within the contemplation of the parties at the time they entered into the contract. In a tort a person is liable for his intentional acts or any result that might reasonably be foreseen page 2431 } as a result of his tortious conduct.

Mr. Moore: Proximate cause is the only test for tort damage. Everything proximately caused by the tort, you are responsible for. That is the law in Kentucky and everywhere else.

Mr. Allen: That suggests a fundamental proposition of tort law.

Mr. Fred G. Pollard: Do you have anything?

Colonel Harris: I don't care to add anything.

The Court: Is there anything you wish to add?

Mr. Fred G. Pollard: No, Judge.

The Court: Gentlemen, I think the last three lines in (b) beginning with "and" should be cut out, putting a period after "defendants."

Mr. Fred G. Pollard: We except to your Honor's ruling on that.

The Court: All right.

Mr. Robertson: We think (c) is all right.

Mr. Lowden: How about the word compensatory being inserted there?

Mr. Mullen: He has passed on that.

Mr. Lowden: I don't know that he has.

Mr. Robertson: "The compensatory damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or con- page 2432 } tingent compensatory damages are not recoverable."

Go ahead on that, Mr. Lowden. I think you have it.

Mr. Lowden: Your Honor was talking about (b) and we skipped to (c). If I may go back a minute, certainly punitive

damages are not directly and proximately caused. I think it is misleading to the jury to let that be all-inclusive. I don't think there has been any such finding in connection with punitive damages.

Mr. Robertson: Punitive damages are intended to punish, not to compensate, but in Kentucky it is to compensate and also to punish.

The Court: We struck it out in (a).

Mr. Allen: You struck it out in (a), but it is obliged to be there in (b), Judge, because punitive damages don't have to be proximately caused or anything of the kind. Punitive damages are awarded on an entirely different theory.

The Court: Do I understand that in Kentucky you can award punitive damages and not compensatory damages?

Mr. Moore: That is what they did in that Ritchel case we cited yesterday.

Colonel Harris: You would have to award at least nominal damages.

The Court: You do in Virginia, don't you?

Mr. Allen: Oh, yes. Not only that, in Virginia there has to be a reasonable relation. We discussed that page 2433 } yesterday.

The Court: As I recall from the arguments we have had here, it is not necessary to award compensatory damages in order to award punitive damages. If that is the law, of course it is different from what the law is in Virginia.

Mr. Robertson: They said the reason was that in Kentucky they considered in a sense it was compensatory and also it was punitive.

Mr. Fred G. Pollard: Are you through?

Mr. Lowden: Not quite.

Mr. Allen: I don't know how we got into this.

Mr. Lowden: If we are correct, (b) is a misleading instruction.

Mr. Allen: I was talking about the irregularity of the argument.

The Court: If you gentlemen are correct in your views, it appears that "compensatory" should be added.

Mr. Moore: Here is the quote, if you would like to hear it.

The Court: Yes, read it.

Mr. Moore: This is *Louisville and Nashville Railway Company v. Ritchel*, 147 Southwest 411. In that case punitive damages only were awarded, no compensatory damages. The Supreme Court of Kentucky stated:

"As the jury, even under the instructions as page 2434 } given, might have awarded compensatory damages, though nominal in amount, and under a proper instruction might have awarded damages for humiliation and mortification of feeling, we conclude that the fact that the jury returned a verdict for punitive damages only furnishes no just reason why the verdict should not be allowed to stand, since under the rule in force in this state, punitive damages when allowed, are given as compensation to the plaintiff, and not solely as punishment of the defendant."

That is cited in the last case of *Brink v. Kennedy*, 151 S. W. (2d) 58.

Colonel Harris: Are you through?

Mr. Allen: Those Kentucky cases do say—what they mean by it is another question—they do say that punitive damages must bear some relation to the injury and the cause thereof, which gets it over again to show that unless the plaintiff is entitled to recover, unless the plaintiff has made out a cause of action, then he can't recover any compensatory or punitive damages, either. But if the plaintiff has been injured as the result of the wrongs of the defendant, the jury doesn't have to award any compensatory damages. They can award it all in punitive damages which is in part compensation. Do you see what I mean?

The Court: Yes, I see your point.

Colonel?

page 2435 } Colonel Harris: Which is not a correct statement of the decision that they have quoted. We have that decision in our brief, and if you will take the first part that Mr. Moore quoted, the language of the opinion is this: "The correct rule, we think, is that if a right of action exists—that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount—he may in a proper case recover punitive damages." And he must be entitled, as I read that sentence, to recover compensatory damages although the amount does not have to be in excess of a nominal amount. If Your Honor will look at the exact wording of that.

Mr. Robertson: You have it there.

Mr. Moore: It is in our brief on page 16.

Mr. Allen: There is no difference between you and me, Colonel, on that, except I don't agree with you that the jury have to allow any compensatory damages, but I do agree with

you that they have to find that the plaintiff has suffered some injury.

Mr. Fred G. Pollard: Which team has the ball right now, Judge?

The Court: I don't know. I believe you had it, didn't you, Colonel Harris (laughter)?

Mr. Fred G. Pollard: Your Honor, I just want to point this out. I think the Colonel is entirely correct, page 2436 } and what he said would apply if we didn't have the first paragraph in there. But by putting the first paragraph in there we state that this entire instruction applies to damages based on loss of future profits, and then we go on to say, "In this connection you shall be governed by the following:" Punitive damages has no place in this instruction.

Mr. Lowden: That is fine. That is all we ask. You can say this is an instruction on compensatory damages, and that is o. k.

Mr. Fred G. Pollard: This is an instruction on the plaintiff's claim for damages based on loss of future profits, and that is all there is to it.

Mr. Robertson: Then there ought to be "compensatory" before damages everywhere.

The Court: If it is damages for future profits, it can be only one type, and that is compensatory.

Mr. Fred G. Pollard: That is correct, and therefore there is no need to mention it.

Mr. Robertson: Therefore, to avoid confusion of the jury it should be inserted.

Mr. Pollard: The plaintiff has no right to write our instruction. If we have made an erroneous statement of the law they can object to it, but as long as we set out at the beginning that this is an instruction on the plaintiff's claim for damages based on the loss of future profits and say, "In this connection you can be governed by the following," we don't have to mention compensatory damages, page 2437 }

Mr. Lowden: I don't think the statement was correct. I don't mean to interrupt, but you said that—

The Court: Have you all finished? I will let you close.

Colonel Harris: I have nothing more to say.

Mr. Mullen: No.

The Court: All right, Mr. Lowden.

Mr. Lowden: I don't think it is right that because this is based on future profits, there couldn't be any punitive damages for that, because if we are correct, punitive damages may be compensatory and they might decide, as I understand

the law, not to give us future profits as a compensatory item but they might give us some punitive damages to take care of it. Therefore, the thing is a little more complicated.

The Court: The plaintiff has an instruction on damages which describes that, haven't you?

Mr. Allen: Yes, but we don't want this instruction to conflict with ours.

The Court: I understand that, but is there any conflict when the first paragraph states that "A part of the plaintiff's claim for damages is based on the loss of future profits," and so forth.

Mr. Robertson: It seems to me, Your Honor, page 2438 } in order to make it clear, "compensatory" should be put in front of every "damages."

Mr. Allen: Or put "No such damages."

The Court: How about adding "No such damages"?

Mr. Fred G. Pollard: All right.

Mr. Lowden: He has it in the first paragraph.

Mr. Allen: The first paragraph (a) doesn't mention profits.

The Court: It does mention profits, future profits.

Mr. Allen: In paragraph (a)?

The Court: No, but the first paragraph.

Mr. Lowden: If he puts it in first paragraph, that, "A part of the plaintiff's claim for compensatory damages," then it would be all right, but don't you see, the first paragraph doesn't refer to compensatory damages, either. In fact, he doesn't use the word "compensatory" and place in the entire thing.

Mr. Moore: It is a matter of law that loss of profits is compensatory damages. It is confusing enough to the jury to have two different types of instruction without giving them a general instruction about what it can award.

Mr. Lowden: I don't think this instruction should do anything which will be confusing.

Mr. Fred G. Pollard: I don't see a thing confusing about it, Your Honor. If they want to put "such" in there—

Mr. Allen: "Such" wouldn't fill the bill because you don't mention compensatory at all.

Mr. Lowden: If you put compensatory up at the top, "A part of the plaintiff's claim for compensatory damages is based on," and then say "No such damages," I think you have gone a long way toward clearing it up.

Mr. Fred G. Pollard: They have an instruction which defines compensatory damages and another one which defines punitive damages. They say that punitive damages can be

awarded as compensation. All we are talking about in this instruction is future profits. I don't think that we ought to be put in the position where we have to take a position whether future profits are compensatory or punitive damages. We just want to talk about future profits, and we don't want to say anything about compensatory or punitive.

Mr. Robertson: May I ask you a question. Do you admit that we can argue to the jury that they can allow future profits either as compensatory or punitive damages?

Mr. Fred G. Pollard: Mr. Robertson, I will give you your own answer. I don't admit anything I don't specifically agree to.

Mr. Robertson: I ask the Court to put in there "A part of the plaintiff's claim for compensatory damages," and then down below put "No such damages."

page 2440 } Mr. Mullen: A part of the plaintiff's claim for damages." It doesn't confine it to the whole thing. It doesn't cut out your claim for punitive damages. "A part of the plaintiff's claim for damages is based on the loss of future profits." It is not exclusive.

The Court: I will leave it like it is. You can argue it. You have an instruction on future profits.

Mr. Mullen: How far have we gotten?

Mr. Lowden: I think we should except to the ruling of the Court on the ground that the instruction as written is confusing and does not accurately set forth the law.

Mr. Robertson: When you come to (a) are you going to say "No such damages"?

The Court: If you want that in there. Do you want "No such damages"? I don't know that it is necessary.

Mr. Robertson: I believe I will leave it out. Just leave it the way it is.

The Court: All right.

We are down to (d), are we not?

Mr. Allen: Yes.

The Court: All right, Mr. Allen.

Mr. Allen: "The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages. From its gross profits must be deducted all expenses of every kind (including taxes other than income taxes) properly chargeable to the earning of such profit. If  
page 2441 } you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any damages paid on the net profits the plaintiff claims it would have earned."

That instruction is altogether in conflict with our instruc-

tion on damages which you have already indicated that you would give. It uses the term "net profits," and I have not been able to find any decision in Virginia or anywhere else which uses the term "net profits." All the decisions say profits, profits, profits. The use of the term "net profits" in this instance would be wholly misleading and incorrect as a legal proposition because the damages here involved are those growing out of lump sum contracts and these cost plus 5 per cent contracts. According to our theory of the case, what is termed their gross profit is practically the net profit. If they will frame a proper instruction on their theory of the case, based on the testimony of Holt and the jury believes that, that would be quite a different proposition, but here they are asking Your Honor to practically direct a verdict on a disputed question of fact. All this business here about "expenses of every kind (including taxes other than income taxes) properly chargeable."

Mr. Robertson: Let's see if this would meet it: Make (d) read this way: "The plaintiff has the burden page 2442 } of proving with reasonable certainty the profits that it claims as damages." Strike out the next sentence completely. "If you cannot determine the profits from the evidence with reasonable certainty, then you cannot award any damages based on profits."

Mr. Allen: That is proper. That is what you have given in our instruction.

The Court: All right, gentlemen. That appears to be in line with the Court's ruling on yesterday. Of course I will be glad to hear from you gentlemen with reference to it.

Mr. Mullen: We didn't get it.

Colonel Harris: I went out to get a coat and didn't hear what was said.

The Court: We were discussing (d).

Mr. Robertson: Let me read the way I worked it out here:

"(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages."

Then I strike out the entire next sentence: "If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on profits the plaintiff claims it would have earned."

The Court: Then you cannot award what? page 2443 } Mr. Robertson: "If you cannot determine profits from the evidence with reasonable certainty—" Scratch out the next line and the first four words of the next line, making it read, "If you cannot determine

profits from the evidence with reasonable certainty, then you cannot award any damages based on profits the plaintiff claims it would have earned.

The Court: That strikes me as good law, but I will hear you in line with our conversation of yesterday.

Mr. Fred G. Pollard:

. . . . .

page 2444 }

. . . . .

In other words, we have a right in this case to have any damages confined to what the net loss to the plaintiff was, not his loss.

He says "I would have made 'X' dollars out there," but after he has paid certain costs for which he is not reimbursable, he would have a net to him of only "Y" dollars. He is only entitled to recover "Y" dollars, not "X" dollars, because if he had done the work he wouldn't have had "X" dollars in his pocket. He would only have had "Y" dollars, because "Y" dollars is what he would have had left after he paid the costs which were attributable to earning the gross profit.

The Court: That is what you will argue to the jury, is it not, that there was no profit, I believe you say?

Mr. Fred G. Pollard: We can argue there was no profit, but the jury has to be instructed that they should take into account the cost of earning the gross profit if they believe that there were costs in earning it.

Mr. Mullen: He had a maximum fee of \$12,000 on the tipple, but he said he only earned \$10,000, from his testimony. That is his profit. That doesn't take into consideration the controversy of overhead. That takes in direct costs which were not reimbursable on the job. He never got any net of \$12,000. He testified himself that he got a net of \$10,400 I think it was.

Mr. Robertson: That contract is clear out of the case now.

Mr. Mullen: I am using it to illustrate the principle. The principle is still in the case. He had another contract in which his five per cent amounted to \$12,000, but similar expenses had to come off and he still wouldn't have got even \$12,000. He would have gotten \$10,000.

Mr. Fred G. Pollard: May I illustrate it by bringing up this exhibit (indicating on exhibit). Here are these four contracts. Four of the last five from the bottom,

were all contracts on cost plus 5 per cent. On this contract his fee was \$12,000. This was the net after direct expenses for which he is reimbursable, and the gross profit was only 3.74. This job was on a cost plus 5 per cent, and the net was 4.76. This was on cost plus 5 per cent and the gross was 4.76. And the same for this. So even where he had a contract on cost plus 5 per cent, his own books show that the profit is something less than 5 per cent. The jury has certainly got to be instructed that they are to deduct from the gross fee, cost plus 5 per cent, whatever they think the net is. Even this isn't the net. This is just the gross. Then the question for argument is whether you apply overhead to the gross. Before you get the gross you have to reduce the 5 per cent to something less than 5 per cent, and then you have another argument as to whether you take the gross and reduce it further for overhead purposes.

Mr. Robert N. Pollard: Referring to Defendants' Exhibit No. 70.

Mr. Robertson: Are you through?

Mr. Fred G. Pollard: Yes.

page 2447 } Mr. Robertson: If Your Honor please, it seems that we are arguing here what we were arguing *ad infinitum*. We have it all defined in the damages instruction. The very case that Mr. Pollard was reading from was a contract case, not a tort case. Even that case supports what we are saying here. Read that part of it.

Mr. Moore: First of all it is interesting to note that Universal Moulded Products had been in business for only five months and was a far cry from being an established business like Laburnum. The court makes quite a bit out of that. Here at page 570 of the opinion they say:

"When, however, it is certain that substantial damage has been caused by the breach of a contract, and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then there can rarely be any good reason for refusing all damages due to the breach merely because of that uncertainty." (*E. I. DuPont de Nemours & Company v. Universal Moulded Products Corp.*, 191 Va. 525, p. 570.)

Mr. Fred G. Pollard: Your instruction says that.

Mr. Robertson: I thought you were through. When are we going to end this thing?

The Court: Are you through, Mr. Pollard?

Mr. Fred G. Pollard: The only thing I wanted to correct Mr. Robertson on was my recollection of what page 2448 } Your Honor said yesterday on the question of whether or not net profits should appear. You

told us that this was their instruction and it was up to us to draw up our instruction on our theory of the damages, and that that would be considered when we offered it. I thought the question was finally settled yesterday.

Mr. Robertson: This is all I have to say. Our term used the word "profits." It didn't say gross or net. The court said within the term "profits" each side can argue its own evidence.

Mr. Allen: What do you claim, Mr. Pollard, under what you call their "non-reimbursable costs"? What are you claiming by the use of that term?

Mr. Fred G. Pollard: Mr. Bryan testified with respect to the contract of October 28 that he collected a fee of \$12,000 but that his books only showed a gross profit of \$10,200 plus, because there were certain direct expenses for which the plaintiff was not reimbursable. We think that if this other work had been undertaken, the jury should be instructed to take into consideration any amounts that they think would have been direct costs for which the plaintiff was not reimbursable.

Mr. Allen: This contract that you referred to is out of the case, and you are using that just as an illustration.

Mr. Fred G. Pollard: That is correct.  
page 2449 } Mr. Allen: Where is that any evidence that there were any non-reimbursable costs on these other five per cent jobs or that there would have been any on the job that they agreed to give?

Mr. Fred G. Pollard: On cross examination your accountant testified that he couldn't say whether there would be or whether there would not be, but in view of the past experience on other jobs he presumed that there probably would be some.

Mr. Allen: And Mr. Andrews testified that—

Mr. Fred G. Pollard: That he knew nothing about the facts.

Mr. Allen: He testified that that was practically all, that the gross profit was the net profit.

Mr. Fred G. Pollard: You can argue that.

Mr. Allen: And Mr. Bryan testified to the same effect. You have no evidence to show under those circumstances that there were any reimbursable items there. So I think the instruction that Mr. Robertson suggested is exactly correct and leaves it for both sides to argue anything they want to under that.

Mr. Mullen: May I get the ruling of the Court on (d) of Defendants' offered Instruction J?

The Court: The ruling of the Court was in page 2450 } line with the suggestion of Mr. Robertson, which appears in the record.

Mr. Lowden: May I ask a question? As I understand it, the court ruled that it is willing to put clause (d) in as amended by Mr. Robertson. Of course if they don't want it to go in at all, they have a right to withdraw that.

The Court: Certainly.

Mr. Lowden: So is it going to be in that shape?

The Court: The ruling is that clause (d) as written will be refused, but the Court will allow clause (d) as suggested by Mr. Robertson. Did you get your exception in, gentlemen?

Mr. Fred G. Pollard: We except to Your Honor's ruling.

Mr. Allen: May I say here for fear I may forget it, when we get through with this instruction and it is decided the form in which you will give it, I would like for them to say whether they will accept it in that form and of course save their exception, or whether they would rather not have it at all, you having deleted some of it. We are not going to ask for it as our instruction.

Mr. Mullen: We don't have to say that, it becomes the Court's instruction.

Mr. Robertson: If Your Honor please, I think we can make (e) very short. I think in view of the conflict in the testimony of the accountants for the parties, the defendants are entitled to have a jury issue as to whether or not the earnings of the Virginia Mechanical Corporation should be drawn out, if there are any. You remember Holt said it was bad accounting practice to dump them all in together, and Baird and Coleman Andrews said it was good accounting. It seems to me that that could be corrected in this way. I am just suggesting this, and I haven't even submitted it to my associates here. They may not think I am right.

"If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you may deduct such part from the plaintiff's claim."

In other words, I think they have a right to have that issue put to the jury. My associates say they don't agree with me. Go ahead, Mr. Allen.

Mr. Allen: I think the proposition here is this: I think Your Honor has passed on this in another connection. There isn't any question on earth about the fact that one corpora-

tion can use another one as an instrumentality for the furtherance of its business. If Mr. Bryan's testimony is correct and we would be entitled to an instruction on that, they would be entitled to one to the contrary if there is evidence to support it. If Mr. Bryan's testimony is correct and if it is believed by the jury, he was simply using the Virginia Mechanical Corporation as a matter of convenience in page 2452 } carrying on the business of the Laburnum Construction Corporation. That question came up here, Your Honor, since my memory is refreshed, the other day in some way. These gentlemen made a motion to strike out the evidence as to Virginia Mechanical Corporation. It came up here in some connection, and Your Honor decided that you thought that one corporation had a right to use another one like that. My mind is—

Mr. Fred G. Pollard: Foggy.

Mr. Allen: I know that came up in some connection.

Mr. Robertson: Mr. Moore read the rule that anybody, even though insane, can be the agent for a corporation. He used the word "insane" in the same tense.

Mr. Allen: That is right. If the jury believes from the evidence that the plaintiff was using the Virginia Mechanical Corporation as an instrumentality in conducting the plaintiff's business, then anything that the Virginia Mechanical Corporation might have earned belongs to the plaintiff. If they want an instruction along that line and the jury disagrees with Mr. Bryan's evidence, then they should deduct any profits that they claim might have been earned by the Virginia Mechanical Corporation. That is the only thing that I see for that instruction.

Mr. Moore: Couldn't you fix it along this line?

The Court: Suppose we recess for lunch and page 2453 } you gentlemen write out something you have in mind and I will consider it when we come back.

Mr. Mullen: Yes, I want to answer that.

(Whereupon, at 1:00 o'clock p. m. the conference was recessed until 2:15 o'clock p. m. the same day.)

page 2454 } AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: If Your Honor please, I think Mr. Moore has a suggestion on paragraph (3) which he has been working on.

Mr. Fred G. Pollard: Your Honor, shouldn't we state our

position on this instruction before we start considering any substitutes?

The Court: As I understood, they were opening and were suggesting that in their opening statement. Then, of course, you can reply to it.

What is it, Mr. Moore?

Mr. Moore: This is just a rough draft. We would suggest that section (e) read as follows:

"If you believe from the evidence that the profits, if any, of the Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

That, we believe, squarely puts before the jury the conflicting evidence whether or not to include the profits of the Virginia Mechanical Corporation in the claim of Laburnum. There has been testimony by their accountant, Mr. Holt, that it should be a separate item; and our two accountants testified that it should be included. We think the jury should be permitted to decide that conflict of fact.

Mr. Fred G. Pollard: Would you read that again?

Mr. Moore: "If you believe from the evidence page 2455 } that the profits, if any, of the Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

The Court: Do you gentlemen have any further observations to make?

Mr. Robertson: I don't think I have.

Mr. Allen: No.

The Court: All right, Mr. Mullen:

Mr. Mullen: If Your Honor please, the inclusion of the earnings of a subsidiary in those of the parent corporation may be an accounting principle. It is not a legal principle in a law case on the question of ownership. They are separate entities. The courts do not overlook that or say that they are not different things.

We have the same thing in Federal tax law. They can make either a separate or a consolidated tax return. They are recognized as separate identities. You can't go behind the identity of the corporation and say it is something else or a part of something else. The cases are perfectly clear on that point. While their profits may be included in the profits of the parent corporation, they are included as a dividend, but they are not included in the profits from the

work of the parent corporation. They must be excluded from that.

page 2456 } That revised wording would leave it as a legal question to be decided by the jury, when this is a positive question of ownership based on separate identity, recognized in the law everywhere.

The second thing is that they made no claim in the Notice of Motion for any profit, loss, or damage done to the Virginia Mechanical Corporation. They now come in and claim that is part of their damages. They have taken us by surprise, and not having given us notice of that, they have no right to claim it in this action.

Mr. Fred G. Pollard: Your Honor, one of the cases we have on agency is a Kentucky case, *Southeastern Greyhound Lines v. Hardins Administrators*, 136 S. W. (2d) 42. In that case the Court said:

"We have often held that where one corporation was but the *alter ego* of another or but a conduit through which one operated as by way of pretense or deceit in the perpetration of a fraud, the courts would look through the fiction and place the responsibility where it belongs."

But we have had no notice in this case in the Notice of Motion that they were going to come in here and try to claim the profits of Virginia Mechanical Corporation.

All this instruction says is that if it believes any part of the work would have been done by Virginia Mechanical Corporation, you must from the evidence determine page 2457 } with reasonable certainty what part Virginia Mechanical would have done, and deduct that from the Plaintiff's claim.

You have already approved, in an earlier instruction, Your Honor, in Defendants' Instruction C, that the damages claimed by the Plaintiff must be capable of being ascertained with reasonable certainty. All this instruction adds to that is that if you cannot do so, determine with reasonable certainty, you can't award damages based on the Plaintiff's claim for work it would have done. If you can't determine one with reasonable certainty, you certainly can't determine the other portion.

Mr. Mullen: As Mr. Pollard indicated, the only case in which they do go behind the corporate identity is in case of fraud, where one corporation is sued for fraudulent purposes by another.

Mr. Fred G. Pollard: Pretense or deceit.

Mr. Mullen: Is there anything you want to say, Colonel?

Colonel Harris: There is nothing I wanted to add. Mr. Mullen made the argument that I had in mind.

Mr. Allen: If Your Honor please, the question here involved is just as simple as it can be. We believe upon the evidence we are entitled to an instruction, if we ask for it, that if the jury shall believe from the evidence that the Virginia

Mechanical Corporation, a wholly-owned subsidiary of Laburnum, was used by Laburnum as an agency or instrumentality to carry on a certain part of Laburnum's business, then any loss to the Virginia Mechanical Corporation would be a loss to Laburnum. There can't be any doubt about that proposition. One corporation may use another as an agent. It can use an individual as an agent.

Mr. Mullen said that no mention was made of Virginia Mechanical Corporation in the Notice of Motion. Of course not. No mention was made of Mechanical Corporation for the very reason that the damages to Mechanical Corporation or losses to Mechanical Corporation were a part of the losses to Laburnum.

Moreover, we are suing here for a tort, and whatever damage, direct or proximate, sustained by Laburnum through this tort is recoverable. It may have come indirectly through another corporation. It is nevertheless a loss to Laburnum.

Mr. Bryan testified positively that this company was organized solely for the purpose of carrying on a part—and he described the part—of the business of Laburnum, and he has testified positively that this corporation did not do work on any jobs except Laburnum jobs. It did no outside work.

Mr. Mullen: Let me interrupt you there. He said it did most of its work, most of the work of the Mechanical Corporation.

page 2459 } The Court: Have you checked the record on that?

Mr. Allen: We checked the record on that, and it was read here.

Mr. Fred G. Pollard: It has not been read here.

Mr. Mullen: It hasn't been read here.

Mr. Allen: I checked the record on it when it was brought up.

Mr. Mullen: I asked the question, and he said most of the work, the main work, was for Laburnum.

Mr. Allen: He used another term there, Mr. Mullen, which meant practically all.

Mr. Mullen: You are now saying exactly what I said. He said some of it was done outside.

Mr. Allen: I think I made a note of it here the other day.

The Court: I may be mistaken, but my recollection is that he didn't say all the work was done for Laburnum.

Mr. Allen: He didn't use the term "all," but he didn't use the term "most." He said practically all.

Mr. Bryan was on the stand.

Mr. Mullen: He was on the stand four or five days, so it is pretty hard to find it.

Mr. Robertson: I think what it boils down to, according to my recollection, that was *de minimis*, didn't amount to anything, the part he didn't do for Laburnum.  
page 2460 } It was toward the end of his testimony.

The Court: Was it in answer to a question on cross examination? Do you recall?

Mr. Mullen: I think so, yes.

Mr. Lowden: I think it was on rebuttal. That is my recollection.

Mr. Mullen: His rebuttal was very short.

Mr. Lowden: See if it wasn't the last day.

Mr. Robertson: I think it was the last day.

(Discussion off the record.)

Mr. Allen: This is not the place I was talking about, but here is where he did say something about it. This isn't what I was talking about, but this does deal with it, and I want to look the other place up, too.

Mr. Fred G. Pollard: What page are you on?

Mr. Allen: Page 1990:

"By Mr. Robertson:

"Q. What kind of work, if any, does Virginia Mechanical Corporation do for Laburnum Construction Corporation?

"A. Virginia Mechanical Corporation has agreements with the plumbers and steamfitters local union, the sheetmetal workers local union, the electricians local union, and they handle mechanical work in which Laburnum Construction Corporation is interested. That is the purpose of it.

"Q. Do the profits and losses from Virginia  
page 2461 } Mechanical Corporation go back eventually to  
Laburnum?

"A. Certainly."

Then it goes off on something else here.

"A. All the jobs that the Virginia Mechanical Corporation has had of any size or consequence have been Laburnum jobs.

"Q. Is that why they are included in there?

"A. That is right. They are treated as a part of the Laburnum jobs."

Mr. Mullen: It doesn't say "all."

Mr. Allen: Well, it comes so near saying "all." "All the jobs that the Virginia Mechanical Corporation has had of any size or consequence have been Laburnum jobs."

Just as Mr. Robertson said, you can certainly construe that to mean that what Virginia Mechanical Corporation did, if anything, that was not Laburnum work, was *de minimis*.

Mr. Robertson: You have no evidence of any kind that they did work for anybody else. He said everything of any consequence, and they elected not to pursue it any further. So you have no evidence there of anything that is worth a nickel that wasn't for Laburnum.

Mr. Allen: He says that eventually all the profits go back to Laburnum, profits or losses.

Mr. Mullen: The stockholders or—

Mr. Allen: He says it goes to Laburnum.

page 2462 } Mr. Mullen: The stockholders or Plaintiff?

Mr. Robertson: You didn't bring that out. You have the accountants one way, and we have another. We propose now to leave it to the jury.

Mr. Fred G. Pollard: It is not an accounting, Your Honor. It is a matter of the law.

Mr. Allen: It is a matter, Your Honor, of whether the loss or profit of Virginia Mechanical Corporation is reflected in the loss or profit of Laburnum, and Mr. Bryan says positively it is, and that is that. So if Mechanical sustains a loss, Laburnum sustains a loss, and that is sufficiently direct.

Mr. Robertson: According to the accountants' testimony, the jury has a right to take it one way or the other.

Mr. Fred G. Pollard: May I make a statement, Your Honor?

Laburnum is the sole owner of the stock of Virginia Mechanical Corporation, and to allow it to recover any profits or losses of Virginia Mechanical Corporation in this proceeding would in effect be to allow Laburnum Construction Corporation to bring a stockholders' suit on behalf of Virginia Mechanical Corporation; and as Your Honor well knows, there are many conditions precedent to allowing a person to bring a stockholders' suit. The argument that they  
page 2463 } make would be the same situation as if U. S. Steel furnished steel for the job and Laburnum owned one share of stock in U. S. Steel. That is just how silly their argument is. They would say, "U. S. Steel lost profits be-

cause they didn't get to sell us the steel for the job, and we are a stockholder of U. S. Steel and we would have made some profits out of that." That is just how much sense their argument makes.

Mr. Allen: I believe we have the opening and closing.

All I have to say is that that instruction directs a verdict in their favor, regardless of the circumstances of the case, regardless of the facts testified to by Mr. Bryan, regardless of whether the jury believes that evidence and believes that Laburnum sustained a loss, as Mr. Bryan testified to there.

Mr. Robertson: And regardless of conflicting theories of accounting.

The Court: Gentlemen, I will not allow (e) as written.

Mr. Fred G. Pollard: We except.

The Court: But I will allow, in lieu thereof, the following:

"If you believe from the evidence that the profits, if any—"

Mr. Fred G. Pollard: Would you go a little page 2464 } slower, please, Judge?

The Court: "If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

I don't believe you stated your exception to that.

Mr. Mullen: We except to the rejection of clause (e) of Defendants' Instruction J as offered, for the reasons stated in our argument; and we further object to the revised form in which this instruction will be given by the Court.

The Court: And it is understood that you will prepare this?

Mr. Mullen: We will write it up.

Mr. Robertson: If Your Honor please, we think that (f) has to come out altogether, because that is directly opposed to the former rulings of the Court. That is all I have to say on that.

Mr. Allen: I don't believe any argument is necessary. This would be a directed verdict on that instruction.

The Court: Do you gentlemen want to be heard on that? I think it has been discussed.

Mr. Fred G. Pollard: Just very briefly, Your Honor.

On the record over there, the only jobs that they have ever had in Kentucky were the contracts of October 28 and December 15. If they are going to claim that they were doing work out there on the basis of gross profit of \$28,000 a year, that is one thing; but

the work that they had done in the past was not done on cost plus 5% contracts. They can't come along and say, "We would have done this future work on cost plus 5%," and say that their past record establishes an assured earning capacity which they can apply to the future, when the future is on the basis of cost plus 5%.

That is all I have to say about it.

Mr. Allen: It is in conflict, of course, with our instructions on damages which Your Honor has given. If you give that, it would be directly in conflict with the ones you have already given.

The Court: This instruction is refused.

Mr. Fred G. Pollard: We except, Your Honor.

Mr. Mullen: The Defendants except to the ruling of the Court refusing paragraph (f) of Defendants' Instruction J as offered.

Mr. Robertson: If Your Honor please, we think (g) is wrong as written, but that it can be corrected. It says:

"If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff."

page 2466 } There is no charge here of any conspiracy.

This case is based on agency. That proposed instruction is contrary to the former rulings of the Court that the United Construction Workers could be the agent, District 50 could be the agent, Hart could be the agent.

Mr. Fred G. Pollard: We are willing to withdraw the clause beginning with "unless."

Mr. Robertson: I don't think that is true. I don't think that cures it. "If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant." I think if you would add "or its agents," it would be all right, as far as I can see. I don't know what Mr. Allen thinks.

Mr. Fred G. Pollard: Your Honor, we would except to the instruction not being given as offered, but we would take that language rather than any other emasculation of it.

Mr. Allen: What is that? I didn't hear you.

Mr. Fred G. Pollard: I said we would except to paragraph (g) not being given as offered, but we will take the other, just putting "or agents" after the word "defendant."

Mr. Allen: Let's see how that will read after you put it in. Right after defendant add "or its agent," and you will stop right there?

page 2467 } Mr. Fred G. Pollard: Yes.

Mr. Allen: I don't think that instruction is complete as to either Plaintiff or Defendants, and if they are going to except to its being given that way, it might be error against them, because then it would simply read, "If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damages caused by the wrongful conduct of that defendant or its agents." That would be confusing, and would be error both ways. It doesn't correctly state the doctrine of *respondet superior*. If they find against one defendant, then they can find the damages resulting from the wrong committed by that defendant or the agents of that defendant. That would be wrong. That is the way it would be construed, as written.

If there is going to be any instruction along the line of Instruction (g), it should follow completely and be well rounded on the doctrine of *respondet superior*. That is clearly stated in this late Virginia tort case of *Jefferson Standard v. Hedrick*. We, of course, now are dealing with the law of Kentucky. Nevertheless, the law of Kentucky is the same as this. I refer to *Jefferson Standard Insurance Co. v. Hedrick*, 181 Va. 824. There the Court said:

"It is a general doctrine of law that he, the principal, is held liable to third persons in a civil suit for  
page 2468 } fraud, deceit, concealments, misrepresentations, torts, negligences, and other malfeasances or

misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or ratify or participate in or, indeed, know of such misconduct, or even if he forbade the act or disapproved it. In all such cases the rule applies *respondet superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal or indirectly with him through the instrumentality of agents."

That was a tort case in which that doctrine was laid down by the Virginia cases, and identically the same doctrine is laid down in the Kentucky cases, many of which have been read here, all of which Mr. Moore has over there in his brief.

If you are going into the question of the liability of the defendants separately, then you have to state properly in

that connection the doctrine of *respondeat superior*. It doesn't do it with that little addition there.

Mr. Robertson: Do you want to be heard on that?

Mr. Moore: No. I think the whole thing ought to come out. I think all of (g) ought to come out.

Mr. Allen: I do, too.

Before I conclude, let me say this, if Your page 2469 } Honor please. We have been dealing with Instruction J here, which contains 7 paragraphs. We have objected to a number of paragraphs, and Your Honor's ruling has been, tentatively at least, that a number of the paragraphs are wrong.

There is no duty upon the Court or upon us to reframe those instructions; and furthermore, we might get into error if we do. If they offer an instruction that is wrong, then I think the proper course to pursue is for Your Honor to refuse it and say, "Gentlemen, you can except to my refusal to give that instruction, you can offer another instruction in accordance with my ruling, and I will give that if I think proper, without requiring you to give up your exception in connection with the other instruction."

We are getting on right dangerous ground when we take an instruction this long and go through it and try to modify their own instruction to conform to Your Honor's views, and then when we get through, they still except to that instruction. We would certainly, I think, out of an abundance of caution, have to ask Your Honor, if they except to it, not to give it, unless it is given under the circumstances that I have mentioned: Let them except to Your Honor's ruling in not giving what they ask for. Then let them offer an instruction which comes within Your Honor's ruling, let them offer it under protest if you wish; but under our procedure they have the right to do that and still rely upon their exception to your refusal to give their instruction as originally offered.

The Court: If the Court refuses this instruction, as I see it, it is up to these gentlemen to offer another instruction.

Mr. Allen: That is right.

The Court: That is the practice in this State.

Mr. Robertson: Unless we proceed that way, we are not going to finish today.

The Court: You don't have to offer any further instruction, but by offering a further instruction you do not waive your objection and exception to the instruction refused. If you do except to an instruction that you offer, you have the privilege of offering a substitute.

Mr. Fred G. Pollard: Yes, sir. We can't very well offer a

substitute unless Your Honor indicates what his ruling will be, what he would permit.

The Court: I have indicated in several instructions what I would permit, but I doubt, then, if you brought an instruction in covering those points, whether or not you could except to it. You have saved your exception by excepting to your original instruction.

Mr. Allen: That is exactly correct.

Mr. Lowden: We have that situation two or three times. That is the thing I asked this morning when Mr. page 2471 } Mullen excepted to not giving one and excepted to the one we put in. You said it was going to be the Court's instruction.

The Court: All of the instructions, finally, are the Court's instructions. When the Court reads the instructions to the jury, they are the Court's instructions.

Mr. Allen: That question has not been so very important until we came to this long instruction with so many objections, several of which were sustained. We object to the whole thing.

The Court: I am inclined, gentlemen, to sustain the objection to (g).

Mr. Moore: In its entirety?

The Court: Yes, as written.

Mr. Mullen: The Defendants except to the ruling of the Court refusing to give paragraph (g) of Defendants' Instruction J as offered.

(Discussion off the record.)

Colonel Harris: Did Your Honor mean, when you said the whole instruction was refused, that is all of the one lettered J, and not merely the paragraph?

The Court: Yes.

(Discussion off the record.)

Colonel Harris: Aren't we departing, if the Court pleases, from the procedure we followed for two days on their instructions?

page 2472 } The Court: Are we?

Colonel Harris: It seems to me that we are; that the procedure we have used for two days on theirs, they now say let's don't use on ours.

Mr. Robertson: I think the way it was modified, we accepted it. That is my recollection.

The Court: I don't think they took any exception.

Mr. Allen: We didn't take any exception to the modification.

Colonel Harris: The point I was making was about putting them in good shape according to the theory of the Court right here and now, the way we did on theirs.

The Court: Haven't we been doing that up to now?

Mr. Fred G. Pollard: Suppose we re-offer this Instruction J as reformed by the suggestion of the Court.

The Court: Then the Court will grant the instruction.

Mr. Mullen: We will do it without waiving our exception.

The Court: Without waiving your exception to the original instruction.

Mr. Fred G. Pollard: All that remains to be done is for us to have it retyped.

The Court: Yes.

Mr. Allen: When we accepted the modification page 2473 } tions that he made, then we arranged it right

there and rewrote it according to that modification, but you are not accepting the modifications here to this instruction, but you want what he does agree to give and save your point as to this. In that event, he has to refuse the entire instruction and you write it over.

Mr. Mullen: Let's get this on the record. Your Honor, you rule that you refuse Instruction J as offered.

The Court: As offered.

Mr. Mullen: And we except to the ruling of the Court for the reasons heretofore stated.

(Defendants' requested Instruction K follows:)

"The jury is instructed that:

"The mere expectancy of a contract is not sufficient to justify recovery of alleged loss of profits therefrom. The plaintiff claims damages in the amount of \$27,125.00 representing the loss of gross profits in connection with approximately \$542,500.00 worth of work on a basis of cost plus a fee of 5% which the plaintiff claims Pond Creek Pocahontas Company had agreed to have the plaintiff perform. If you find that the defendants committed the acts complained of, and you further find that the plaintiff did not have an enforceable contract for this work, you cannot consider it as an item of damages.

"If you believe that the work which the plaintiff claims would have been awarded to it has not been done page 2474 } or any part thereof has not been done, then you may not award damages with respect to any of such work which has not been done.

"If you believe that any part of this work was let on bids, and if you further believe the plaintiff would have been awarded this work if it had bid on it and been the low bidder, then the plaintiff is not entitled to recover any damages for this item."

Mr. Robertson: Now we go to K:

"The jury is instructed that:

"The mere expectancy of a contract is not sufficient to justify recovery of alleged loss of profits therefrom. The plaintiff claims damages in the amount of \$27,125.00 representing the loss of gross profits in connection—" it isn't confined to just the profits—"in connection with approximately \$542,500.00 worth of work on a basis of cost plus a fee of 5% which the plaintiff claims Pond Creek Pocahontas Company had agreed to have the plaintiff perform. If you find that the defendants committed the acts complained of, and you further find that the plaintiff did not have an enforceable contract for this work, you cannot consider it as an item of damages."

I will discuss that for a moment. Our Court has held repeatedly that you ought not to pick out these items of dollars and talk about them. The Court has ruled here in this case repeatedly that the evidence is within the scope page 2475 } of Virginia decisions which will permit future profits if the jury chooses to award them. There is enough evidence here for that, and that whole statement would be contrary to that ruling of the Court. It is not the law that you have to have an enforceable contract. It is the likelihood that the same old customers will come to the same old stand.

"If you believe that the work which the plaintiff claims would have been awarded to it has not been done or any part thereof has not been done, then you may not award damages with respect to any of such work which has not been done."

That is not the law at all. The Island Creek empire, when it found it could not do work with Laburnum, elected for the time being not to do any work at all, for a time, with anybody. That is no proof he wouldn't have done it with us. Salvati said he would like to go ahead, that it had been authorized, that they had a master plan that would have continued indefinitely over a period of years.

In the final paragraph:

"If you believe that any part of this work was let on bids, and if you further believe the plaintiff would have been awarded this work if it had bid on it and been the low bidder, then the plaintiff is not entitled to recover any damages for this item."

That man Cundiff that they brought in here page 2476 } from Indiana, when they couldn't get Laburnum they might well have taken him for part of it, for a little, meager portion of it, or anybody else they wanted. The fact that they let it to somebody else on bid when they would have let it to Laburnum in conformity with Salvati's original contract, has nothing to do with the situation here.

I think the whole instruction is so wrong that it cannot be recast.

Mr. Allen: I may say this: They are talking about contracts. The principle is exactly the same principle that was involved in the case of *Fenson v. Rabb*. Fenson was engaged in what we call a manufacturer's business. He had contracts with about nine manufacturers. Those contracts were cancelable every year. They ran out automatically every year, and they had to be renewed every year. Rabb bought that business from Fenson on Fenson's statements that he was in good standing with those companies. We claimed in that case damages because we did not get the contracts from two of those manufacturers. When Rabb got hold of the business he discovered that Fenson's standing with those two was such that they didn't see fit to renew the contracts after Rabb got hold of the business.

The question arose in the case as to whether, in view of the fact that the contracts were annual and the company was under no obligation whatsoever to renew the con- page 2477 } tracts at the end of any year, regardless of whether the man was in good standing or whether he was in good standing, we were entitled to damages.

The Court said if it had been the custom or the practice to renew those contracts from year to year as long as the man was in good standing, that that was an item of our damages; that our damages could be figured by the loss of those two contracts.

That case was decided here last June in Virginia. It is *Fenson v. Rabb*. Mr. Sands was on the other side, and he thought that was crazy law. I thought he would go crazy about it. He said it was the most farfetched thing he ever

heard of, but that is what the Court of Appeals said. And when the case came back for trial, all we had to do was to show what our damages were from the loss of those two contracts which they were under no obligation whatsoever to give us, but according to the evidence, if Fenson had been in good standing the probability was that we would have gotten them. They said we could go to the jury on that.

Mr. Fred G. Pollard: Are you all through?

Mr. Allen: Yes.

Mr. Mullen: That case you just cited was a case of fraud and failure of consideration, and the basis of your damage was against a man who fraudulently represented what he had and who got compensation for something that he  
page 2478 } didn't turn over. I don't think that applies at all.

Mr. Allen: You all finish, and then I will reply.

Mr. Fred G. Pollard: Judge, the plaintiff in this case claims he had this work that Mr. Salvati agreed to have him perform. The jury has a right to determine from the evidence whether or not he actually had that contract.

Mr. Mullen asked Mr. Bryan, "Was that a 5 per cent binding contract?" And the witness, Mr. Bryan, said, "Well, Mr. Mullen, if what you mean is whether I could have sued on it, the answer is no."

Any time anybody has a contract he can't sue on, he ain't got a whisper. That is a question for the jury to determine.

We are certainly entitled to an instruction that if they believe he didn't have that contract, they can't award damages for it.

The second paragraph: I just don't see how in the world anybody can allow damages that he would have earned if something had been built which has never been built, and the jury is certainly entitled to make a decision that if they believe something has never been built, of course he is not entitled to any fee he would have earned on something that hasn't been done. If I undertake to get you a divorce and you never get a divorce, I certainly am not entitled to the fee I would have gotten if you had gotten the divorce.

page 2479 } The last paragraph: Salvati testified—and there is no contradiction of it anywhere in the evidence—that if Laburnum had bid and bid low, it would have been awarded the work. Mr. Robertson has referred to the contract that Cundiff got. Mr. Bryan bid on that. Mr. Cundiff's bid was \$111,000. Mr. Bryan's bid was \$205,000. You just can't blame Mr. Salvati for not giving him the contract on that when Cundiff was \$95,000 low. The jury has the

right to decide from the facts whether or not Bryan would have been given the contract if he had been low. Salvati said he would have. The jury has the right to pass on whether they believe Mr. Salvati.

There is nothing in there that isn't a proper jury question. It puts it squarely up to the jury.

There is one thing I would like to change, and that is in about the sixth line. It says the Pond Creek Pocahontas Company. Plaintiff's Exhibit on Damages says Mr. Salvati. So I would like to substitute "Mr. Salvati" for "Pond Creek Pocahontas Company." They made an exhibit of this item as an item of damages, Exhibit 33.

The Court: Do you want to change that in your own handwriting, Mr. Pollard?

(Instruction handed to Mr. Pollard.)

The Court: You are offering it as changed?

Mr. Fred G. Pollard: Yes, sir

page 2480 } Mr. Lowden: "Mr. Salvati"?

Mr. Fred G. Pollard: "Mr. Salvati." That is what your Exhibit 33 says.

Mr. Allen: Are you all through?

Mr. Pollard: Yes, sir.

Mr. Allen: If Your Honor please, Mr. Bryan testified, and Mr. Salvati corroborated, Mr. Bryan stated unequivocally that Mr. Salvati agreed to give him this work following the other. Even though it wasn't in writing, an oral agreement to build a house or to put up buildings is perfectly valid. The Court of Appeals held that in the case of this old man out here in Chesterfield, *Horner v. somebody*. In that case Horner agreed to build a house. There wasn't a scrap of ink about it. He agreed to built it, and he didn't build it, and they sued him for damages for breach of the oral contract to build that house. I was in the case, and I defended the case on the ground that the building of the house involved also a contract to sell the lot. Consequently, the building of the house would enter into the lot, and therefore it was real estate, and the contract wasn't valid because it was not in writing.

The Court of Appeals differed with me, and I lost the case. They held—

Mr. Robertson: That is the first one I ever heard of, George.

page 2481 } Mr. Allen: The Court of Appeals held that that was a perfectly valid oral contract to build

that house, and that this boy was entitled to the difference between the price at which Horner agreed to build the house, and the price which he later would have had to pay to get the house built.

Mr. Bryan testified that Salvati agreed to give him this work. I say it was an enforceable oral agreement. He has "contract" in here, and that would be misleading.

In addition to that, the instruction is wrong down here in the second paragraph.

The Court: Let me ask you this: How do you get around Mr. Bryan's statement that he said he couldn't enforce the contract?

Mr. Robertson: Here is the way I answer that, Judge. This is against every ruling the Court has made here on prospective profits.

Mr. Allen: Mr. Bryan's answer to that question was nothing on earth but a matter of opinion on the law. That is all that is, opinion on the law, and it has nothing to do with the case. We are dealing with questions of fact. Do you accept Mr. Bryan's statement which he made in our testimony that you are liable and that so-and-so is agent? He positively testified that different persons were agents of so-and-so.

Mr. Mullen: We were asking him for a fact page 2482 } here, if he had an enforceable contract, not if he had a contract he could sue on.

Mr. Allen: When you asked him that, you were certainly asking him a question of law.

Mr. Fred G. Pollard: It was an admission against his interest.

Mr. Allen: That is contrary to the theory and the principle of all the instructions on damages that Your Honor has given. Your Honor has given, so far, complete, well rounded instructions on damages, limiting us to profits that can be proven with reasonable certainty. That element is involved in this instruction. All of the elements essential for us to prove in order to recover are dealt with in our instructions, and this instruction is in conflict with those principles.

Answering Mr. Mullen with reference to the *Fenson v. Rabb* case, Mr. Mullen said that was a case of fraud. Not only was it not a case of fraud, it was in fact a case of contract. The action was on an implied contract, and there was a distinct avowal that no fraud was charged and no fraud claimed.

Mr. Mullen: Did you claim failure of consideration?

Mr. Allen: No, the claim was based upon the fact that Fenson had innocently represented that he was in good standing, and as an incident of that good standing we would get

the benefit of those contracts. It turned out he  
page 2483 } was not in good standing, and we claimed the fact  
that he was not in good standing was the cause  
of our not getting those two contracts. The Court said that  
we could prove it.

We settled the case afterwards. We got together on what  
profits we would have made under those two contracts and  
settled the case when it came back.

That is about all I have to say on that. The instruction is  
right in the teeth of the other damage instruction.

The Court: Gentlemen, I will refuse this instruction. All  
this may be argued to the jury.

Mr. Fred G. Pollard: We except to Your Honor's ruling.

Mr. Mullen: We except to the Court's ruling refusing to  
grant Defendants' Instruction K, for the reasons heretofore  
stated.

Mr. Robertson: If Your Honor please, we are coming to  
three or four in a row that are just different phases of the  
same thing. Now we come to L:

"The jury is instructed that:

"The plaintiff claims damage in the amount of \$120,000.00  
by reason of the alleged destruction of the business relation-  
ship which it had formed with Pond Creek Pocahontas Coal  
Company, Island Creek Coal Company, and their associate  
and subsidiary companies, but the plaintiff has  
page 2484 } introduced no evidence of the alleged destruction  
of this business relationship and you cannot al-  
low any recovery of damage for such destruction."

That was completely argued yesterday, and this is in com-  
plete conflict with what the Court has already ruled.

The Court: It is my recollection that we went over this  
very carefully yesterday, and unless you gentlemen have  
something further to say, I am prepared to rule.

Mr. Mullen: Have you anything to say, Colonel?

Colonel Harris: I think possibly, in view of the fact that  
there may be some confusion, it was in objections to some  
of their interrogatories yesterday rather than this, that we  
ought to state the grounds of our exception. Otherwise, I  
am afraid we haven't got one under the agreements that have  
been made heretofore.

Mr. Mullen: All right, go ahead and state them.

Colonel Harris: We object to the refusal of this instruc-  
tion.

The Court: I suspect I had better say, first, that the Court refuses Instruction L.

(Discussion off the record.)

The Court: Go ahead, Colonel.

Colonel Harris: If it is permitted, we except for all the grounds that were stated in our objections to a similar charge, or a charge dealing with the same thing, that page 2485 } they requested yesterday or the day before, so that I don't run the risk of losing it if I try to state it.

Mr. Allen: That is all right.

The Court: Very well.

Mr. Robertson: Now we come to M:

"The jury is instructed that:

"The plaintiff claims damage in the amount of \$120,000.00 by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies. You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949, or was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

I think we argued all that out yesterday. I remember very distinctly stating that we claim that this business relationship was destroyed when we were run off the job on July 26, and that everything subsequent to that is mere proof of the prior termination of the business relationship. We had that up and down yesterday.

Mr. Fred G. Pollard: Is that all you have to say on that?

Mr. Allen: That is all we have at the present time.

Mr. Fred G. Pollard: Your Honor, we have page 2486 } an entirely different situation here. This instruction covers the position just taken by Mr. Robertson, that is, in the last clause where it says, referring to such destruction, "was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

The purpose of this instruction is that we believe, from the evidence before the jury, the alleged destruction of the business relationship, if it was caused by us, was not caused by us until after the suit was brought. We think the jury has a

right to pass on them it occurred. All that this instruction says is that you cannot allow this item of damages unless you believe that the destruction occurred prior to November 16, or occurred or was caused by the wrongful conduct of one of the parties and the conduct took place prior to that date. I don't see anything in the world wrong with that. If it was caused by acts which took place after the suit was brought, it is not properly a part of this cause of action.

We objected at the time that evidence was allowed on it, and I believe Your Honor said, "Can't that be taken care of by an instruction?"

The Court: Do you gentlemen want to say anything further?

Mr. Allen: If Your Honor please, this Instruction M, as well as L, is objectionable because it singles out the evidence, which the Court repeatedly said should not be done.

Your Honor will remember, too, that this matter was discussed yesterday or the day before. I forget which it was. The matter was all gone over.

We claim that what they did on the 26th of July, 1949, destroyed our business relationship, if it was destroyed at all, and that is no evidence to show or upon which to base an instruction that it was destroyed after that time. What took place afterward was nothing on earth but an aftermath or natural consequence of what happened on the 26th. There is no evidence that these defendants did anything to destroy the business relationship after that time. What was done was done on July 26.

Mr. Fred G. Pollard: Your Honor, I don't want to interrupt Mr. Allen, but he has made a palpable misstatement of the evidence.

The Court: If he has, I will let you reply to it.

Go ahead.

Mr. Robertson: I was going to say, Your Honor, that they claim that they never did anything to us that was wrong. They claim they didn't run us off the job. They claim that everything that Hart did was peaceful, lawful, and proper. We say on that particular date, the 26th, you ran us off the job. They said, "You can't buck the union and get away with it. Out you go," and out we went.

We have never been back there to do any work since, and it destroyed our relationship when they did that.

I speak subject to correction, but my recollection is that when we offered this evidence on the period subsequent to July 26, and it ran on down to the time the suit was instituted, I stated to Your Honor then that that was merely in proof

of the fact that our business relationship had been destroyed, and that no matter how we tried to get business after July 26, we never got a dollar's worth.

As I have understood from Your Honor, taking care of it under the instructions and the argument, they have a perfect right, under the instructions given here, to go in there and, in addition to all their argument that everything else was lawful on July 26, they can say, "Yes, and they are trying to flimflam us now, because do you believe it was destroyed on that date as they claim, when they were here bidding and writing and trying to get it ever since, after that?" It is jury argument, just pure and simple.

Mr. Fred G. Pollard: May I answer Mr. Allen's statement?

The Court: Yes.

Mr. Fred G. Pollard: First, I might say that this instruction doesn't conflict with what Mr. Robertson has just argued.

The jury can find on that very easily.

page 2489 } Mr. Allen said there was no evidence that the relationship was destroyed after the suit was commenced. We went fully into what happened from May 15 to May 18, 1950. That is when it was destroyed. There is a whole lot of evidence on it.

The Court: They claim it was destroyed before then.

Mr. Fred G. Pollard: Yes.

The Court: This instruction says, "You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949," which was, incidentally, the date the suit was instituted, "or was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

Mr. Fred G. Pollard: That is correct, sir.

The Court: In other words, the wrongful act must have taken place prior to the date of institution of suit.

Mr. Fred G. Pollard: That is correct, sir.

The Court: Gentlemen, it strikes me—

Mr. Robertson: Before you rule there, let me ask you this. I am going to ask that you delete the \$120,000.00. Just say, "The plaintiff claims damage by reason—"

Mr. Fred G. Pollard: Your Honor, Mr. Bryan has testified that that was one of his items of damage.

Mr. Robertson: And it is in the cardboard page 2490 } exhibit that you put in, but that doesn't make it proper in an instruction, any more than to say not to exceed the amount of \$500,000.

The Court: It may be best to leave that figure out. You can recite it to the jury.

Mr. Mullen: They itemize that as a particular item of loss.

Mr. Fred G. Pollard: He has itemized that.

The Court: What was that citation you gave a few minutes ago, Mr. Allen, on emphasizing figures in the instructions? I think it might be well for you gentlemen to consider that before the Court passes on it.

Mr. Fred G. Pollard: We don't object to cutting out "in the amount of \$120,000.00."

Mr. Moore: May I ask one more question? Don't you think the word "compensatory" ought to come in before "damages," five lines down?

Mr. Fred G. Pollard: No.

The Court: That has been explained in another instruction. We had that question up a little while ago.

"The plaintiff claims damage by reason—" strike out "in the amount of \$120,000.00."

I will grant the instruction.

Mr. Moore: Will you note the Plaintiff's objection and exception to the allowance of Instruction M.  
page 2491 }

Mr. Robertson: Now we come to Instruction N:

"The jury is instructed that:

"The plaintiff claims that its reputation has been damaged in the amount of \$100,000.00, but plaintiff has introduced no evidence of any damage to its reputation, and you cannot allow any recovery for damage to reputation."

We argued that yesterday

The Court: I think we argued that pretty thoroughly yesterday, unless you have something further to say.

Mr. Fred G. Pollard: I want to say this: I want to see some authority cited by the Plaintiff that you can allow recovery for damage to reputation when there is no evidence of any damage.

Mr. Robertson: We went into that yesterday and talked about Salvati's evidence.

Mr. Fred G. Pollard: I don't want to get the brush-off that Mr. Robertson is trying to give me. I just want some authority.

The Court: I can hear but one at a time. The Court Reporter cannot take it down, anyway.

Mr. Allen: We started, didn't we?

The Court: Yes.

Mr. Allen: Have we finished? (Laughter.)

Mr. Robertson: I say this, Your Honor—

The Court: One at a time.

page 2492 } Mr. Robertson: I say that we argued that  
thing at length yesterday.

The Court: I think you have already said that, Mr. Robertson.

Mr. Robertson: Both on the facts and on the authorities, which we have here and cited to the Court.

Mr. Allen: I say this, that I know that I have one authority here, and Mr. Pollard read it there after I had read from it, and I know Mr. Moore read from another authority supporting us on that instruction, and that argument was in connection with our instruction on the same subject.

The Court: I recall the argument.

Mr. Allen: So I should think that would have to go out.

Mr. Moore: We would like to add, it would be novel if we had to cite authority for the Defendants' instructions.

Mr. Fred G. Pollard: Now it is our turn, Your Honor?

The Court: It is your turn.

Mr. Lowden: Your second turn.

Mr. Fred G. Pollard: The case we cited was in 116 Va., and it said that the instruction was bad because it didn't say that the damages had to be based on evidence. That is our authority. We submit that they haven't submitted any authority, and I just want to be shown it, be-  
page 2493 } cause what they showed yesterday did not cover  
this instruction.

Mr. Allen: We have authorities here directly in point, saying that action of that kind does affect the man's reputation because it naturally is inherent in it. We argued all that here yesterday at length.

Mr. Mullen: It was pointed out that that sentence you read here didn't say that. The sentence you read from that case yesterday did not say that you didn't have to give evidence of it. It said you didn't need argument then on the question of instructions as to whether reputation or credit could be damaged by what happened there, but you had to show evidence of it.

Mr. Robertson: Yesterday you made exactly the same argument, or Mr. Pollard did, exactly the same argument in almost the identical words, that you are making now.

Mr. Allen: I read from another case, I think *Wilkinson v.*

*Allen*, which went on to say that there are damages of certain types that are inherent in the nature of the case, and require no proof and need not even be alleged in detail. Mr. Moore read a case on the subject, and His Honor ruled on it.

Mr. Mullen: Haven't you a case on that subject, Colonel? You had one at one time.

Colonel Harris: I looked through. I remember you said it was at the bottom of a yellow page. I went page 2494 } through and didn't find it on the yellow sheets. It is one of my sheets that probably has been lost.

Mr. Fred G. Pollard: May I read this one paragraph from *Norfolk & Southern Railway Co. v. Tandierson*, 116 Va. 153. The Court said:

"It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them, but when the instruction as a whole is considered we do not think that the jury could have thought they had a right to fix future damages by mere conjecture instead of by the evidence before them."

This case says they have to do it by the evidence before them. In this case the plaintiff admits that there is no evidence.

Mr. Robertson: Wait a minute.

The Court: Let him finish.

Mr. Fred G. Pollard: It is the law that there has to be evidence. " \* \* \* we do not think that the jury could have thought they had a right to fix future damages by mere conjecture instead of by the evidence before them."

The plaintiff admits there is no evidence on this point, and this is the law, and this instruction must be given unless they can produce some authority which says you don't have to produce evidence to prove damage to reputation.

Mr. Moore: Judge, it seems obvious from the page 2495 } quote that they were talking about future profits.

They said so four times in the quote. Future profits can't be allowed on the basis of conjecture. Of course they can't. We are talking about damage to reputation.

Mr. Fred G. Pollard: Damage to reputation on conjecture.

Mr. Robertson: They are talking about no damage to reputation? What about the testimony of Salvati? We went into that yesterday, that it was ruined throughout the coal fields of West Virginia and Kentucky.

The Court: I refuse the instruction, gentlemen.

Mr. Mullen: The Defendants except to the refusal of the Court to grant Defendants' Instruction N tendered to the Court.

The Court: Are you through, Mr. Mullen?

All right, Mr. Robertson.

Mr. Robertson: We think Defendants' Instruction O is fatally wrong and cannot be recast

"The jury is instructed that:

"There is no evidence in this case that any of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, and therefore you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall page 2496 } be limited to compensatory damages only."

I don't think I care to argue that, that is so palpably in conflict with all former rulings.

The Court: I will hear from the defendants on that.

Colonel Harris: The language in that is taken from a case, if the Court pleases, a Kentucky case. The case is *Louisville & Nashville Railroad Co. v. Wilkins' Guardian*, 136 S. W. 1023. The Court said:

"From these repeated adjudications the rule would seem to be firmly established in this jurisdiction that punitive damages are recoverable only where the defendant has acted wantonly, or recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations.

"The facts of this case do not bring it within the rule, and for that reason alone the judgment is reversed, and a new trial ordered."

Those first four lines were taken from that, and that was dealing with punitive damages. That is the express language of the Kentucky Court. The case was reversed because they allowed punitive damages without meeting that test.

Mr. Lowden: This one says there isn't any evidence in this case.

Mr. Robertson: Are you through?

The Court: This instruction tells the jury page 2497 } there is no evidence in the case that they have acted wantonly, recklessly, or oppressively, or

with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations. Isn't this a question for the jury to determine?

Mr. Allen: That is what you have decided in giving our instruction.

Colonel Harris: Mr. Pollard says that is covered in a later charge, and we will defer changing that, if the Court pleases.

The Court: Pass by it?

Colonel Harris: If it is agreeable to Your Honor.

Mr. Owens: It isn't covered there.

Mr. Lowden: I don't recall it anywhere else.

Colonel Harris: Which one did you think covered it, Fred?

Mr. Fred G. Pollard: I don't think that it is covered.

Mr. Lowden: Judge, our ideas might be different if this was merely an instruction as to what malice is, or something like that, but that is not what this does.

The Court: This tells them they can't find punitive damages in the case.

Mr. Moore: Unless the facts of this case are like the facts of that Kentucky case Colonel Harris read.

The Court: Have you gentlemen any objection to the definition?

Mr. Allen: It should be compared with ours here. Of course, if that is the correct definition, you would say the jury cannot find punitive damages unless they believe from the evidence that they acted, and so forth and so on, provided that is a correct definition. I will compare it with ours.

Mr. Lowden: Let's compare it with this case they are talking about.

The Court: Mr. Robertson, we get the point.

All counsel ought to cooperate with the Court and see if we can get the instruction as near right as possible. If we keep going back, we will never get to the jury. We can thresh out a lot of these matters around the table here.

Colonel Harris: Here is a suggested change in Defendants' Instruction O: Instead of saying "There is no," strike that out, and in place of it write "If you believe from the". For the first three words substitute, "If you believe from the evidence in this case that" and strike out "any" and put "none", and then on the third line from the bottom strike out "and therefore." As modified, we do not tell them there is no evidence at all. We leave that still a question for the jury.

The Court: Then it will read.

"If you believe from the evidence in this case page 2499 } that none of the defendants have acted—"

Mr. Robertson: May I interrupt you? "or any of their agents acting within the scope of their authority."

The Court: "—or any of their agents acting within the scope of their authority." I understand, Colonel Harris, you don't agree to that. I am just making a pencil memorandum of it.

Colonel Harris: No, sir, we don't agree to that.

The Court: "—have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only."

Colonel Harris: What was that addition he made?

The Court: After "defendants" in the first line, "or any of their agents acting within the scope of their authority."

Mr. Allen: You ought to add to that, also, if you are going to put that in there, "in the performance of a duty to their principals to organize."

Mr. Robertson: I think I ought to say this, in fairness to the Court, Your Honor. I still think it is wrong from the viewpoint of the defendants, because the way it is done there,

it is still all wrong, because they set me right page 2500 } on one earlier today. If any one defendant did

anything wrong through its agent, within the scope of his authority, we hook them all, on that instruction, as I understand it. That is certainly opposed to their theory of the case. I think in fairness to the Court, unless I am wool-gathering, that is what the instruction would now mean. So it is still wrong. It is wrong in our favor. I don't want it wrong in our favor.

Mr. Allen: We have protected ourselves against that in our instruction, the last paragraph of it, on that subject.

Mr. Robertson: I want to cooperate, too, but I don't want to get myself out here and invite a reversible error in trying to cooperate.

Mr. Allen: It is a difficult instruction to write, if Your Honor please, changed around like this. We were very careful to try to protect ourselves against any possible error in the instruction as we offered it along that line, and we coupled it with language like this: "If you believe from the evidence that the actions complained of were committed by Hart—"

Mr. Fred G. Pollard: What number is that?

Mr. Allen: That is No. 10.

“—by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized, and if in doing any acts which he was authorized to do he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done and did not expressly ratify the manner in which the acts were done.”

If you give this as they have suggested here, unless you give it as an instruction requested by them to which they do not except—and they are not willing, I understand, to assume that burden—I would be afraid of it, because when you hold principals liable for wanton and reckless acts of an agent you have to have the instruction coupled with a lot of elements that they haven't indicated they are going to put in that one.

Mr. Robertson: If the agent of any one did wrong, acting within the scope of his authority, you would hook all three, unless you had other facts added to it.

Mr. Allen: And that would be wrong.

Mr. Lowden: The thing that has been troubling me all day is that we should rewrite their instruction and offer it. That leaves us away out in the field, and we may get in trouble.

Mr. Robertson: It is inviting error. I don't think we have any so far, so far as I know.

Mr. Lowden: We could indicate what would be all right with us on a redraft, but we certainly couldn't leave ourselves in the position of rewriting their instruction and offering it in our behalf, if there is something wrong in it.

The Court: You are not offering it in your behalf. It is just a suggestion. I think counsel on both sides have made suggestions.

Mr. Allen: Yes.

The Court: And they have not been bound by them.

Mr. Lowden: When we were going through ours yesterday, we always accepted the thing and rewrote it and brought it back the next day.

Mr. Allen: And took no exception to it.

Mr. Lowden: But these gentlemen are doing different from us.

Mr. Fred G. Pollard: Your Honor, I understand that you have refused the Defendants' Instruction O.

The Court: I haven't passed on it yet.

Mr. Fred G. Pollard: As offered, I mean.

The Court: I haven't ruled, at the moment.

Mr. Fred G. Pollard: We want to offer it as written, without any attempt to conform it.

Mr. Allen: You mean as a direct instruction, "There is no evidence \* \* \*?"

Mr. Mullen: We want to offer it exactly as written.

The Court: All right. The Court will refuse that instruction.

page 2503 } Mr. Fred G. Pollard: We except.

Mr. Mullen: Defendants except to the ruling of the Court refusing Defendants' Instruction O as tendered.

Mr. Robertson: Judge, I think Defendants' Instruction P can be modified to be correct, very easily, by adding a phrase in it.

The Court: Let me read it.

(Defendants' requested Instruction P follows:)

"The jury is instructed that:

"If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants."

Mr. Robertson: "The jury is instructed that:

"If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff"—I have added in there, "or compelling the employees of the plaintiff to join one of the defendant unions"—"then no exemplary or punitive damages can be awarded plaintiff against any of the defendants."

Colonel Harris: No. This plaintiff is not suing on account of any injury to any employee.

page 2504 } Mr. Robertson: I withdraw it, and let it go as is.

Mr. Mullen: Is it granted?

The Court: Granted.

Mr. Robertson: Q, I think, is wrong:

"The jury is instructed that:

"Any wanton, reckless or oppressive conduct of Hart or

any person with him on the occasions complained of cannot be imputed to any of the defendants so as to authorize the award of any punitive damages against any of the defendants in the event you find for the plaintiff."

Your Honor has ruled on that over and over again.

Mr. Allen: That comes right back to the question that the Court has the right to direct a verdict on the question of punitive damages, regardless of the circumstances shown by the evidence.

Mr. Moore: We believe that is the same thing we were talking about yesterday, that ratification and authorization are not necessary in Kentucky to make the principal liable in punitive damages for acts of the agent within the scope of his employment.

Colonel Harris: We argued that point yesterday, and the difference that was stressed, as I recall, in Mr. Pollard's argument, was that these defendants are voluntary associations, and they are not corporations, and that the law of agency as to voluntary associations is correctly page 2505 } stated there. There is no liability on them for punitive damages on account of any act of an agent unless the other requirements that were argued yesterday were included.

Mr. Allen: Do you all have anything further?

Mr. Moore: Would you like me to give one quote from the Nagel case in Kentucky, which we talked about yesterday? This is quoting the language of the Court:

"Appellant contends, further, that exemplary damages should not be awarded against a corporation for the acts of its servants, unless it expressly authorized the act as it was performed, or afterwards ratified it, or was negligent in employing its servant, or in retaining him in its employ; and for this he quotes Mr. Sedgwick on Damages. True, the learned author says such rule obtains in many jurisdictions. Fortunately, it has never obtained in Kentucky, and we are not now so impressed with its soundness or authority as to undertake to ingraft it on our jurisprudence. Of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated. The later and better rule seems to be that corporations are liable for the acts of their servants committed within the scope of their employment \* \* \*."

The Jackson case says they are treated as corporations.

Mr. Allen: The Kentucky case says under the page 2506 } Kentucky Constitution and the Kentucky statutes, these associations are dealt with and treated as corporations. They said that in the Ashley case 291 S. W. 21. "The word 'corporation' as used in this Constitution shall embrace joint stock companies and associations."

The Court: The Court will refuse Instruction Q.

Mr. Mullen: The Defendants except to the ruling of the Court in refusing Defendants' Instruction Q as tendered, for the reasons stated in the argument here today and for the reasons stated in argument of the like question on an instruction offered by the Plaintiff.

(Defendants' requested Instruction R follows:)

"The jury is instructed that:

"None of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, Kentucky."

Mr. Robertson: Defendants' Instruction R. If Your Honor pleases, I think if they changed one word in that, R would be all right.

"The jury is instructed that:

"None of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, alone."

page 2507 } Mr. Allen: " \* \* \* generated solely by the alleged reputation for violence \* \* \* "

The Court: You suggest "solely" after "generated." Is there any objection to that change, gentlemen?

Mr. Fred G. Pollard: Yes.

The Court: Do you gentlemen want to say anything further at this time?

All right, Mr. Pollard.

Mr. Fred G. Pollard: We just object to it. There is nothing wrong with it the way it is. All it says is that the defendants are not responsible for any fears that plaintiff's employees may have had which were generated by the alleged reputation of Breathitt County. I don't think there is any necessity to put "solely" in there, and we object to it.

The Court: Do you want to say anything further?

Mr. Allen: I think to make the instruction fair, it certainly ought to be in there.

Mr. Robertson: I can give you an illustration of it. When I went out there and got to Salyersville, I was very anxious to take a picture of the Court House, because I was thinking it would be a very interesting thing to have, but I didn't tarry long enough. I thought I had better be moving. Then when I went down there to the tippie site, I didn't tarry around there very long. If that is the only thing, then they couldn't recover from that. But if, in addition  
page 2508 } to that, somebody shows up and tells me to get the hell out of there, then I could recover. I am just using a garden variety illustration.

Mr. Allen: When you inquire back, "What does 'Get the hell out of here' mean?" in view of the reputation of Breathitt County, it means "Get the hell out of here, or we'll kick your butt out."

Mr. Robertson: Who was it said there would be some butt-kicking?

Mr. Allen: Hart himself said there might be some butt-kicking.

Mr. Robertson: Yes. He said he was going to bring 500 men from Breathitt County, and I don't think he ever committed himself—

The Court: Don't leave out Beaver Creek.

Mr. Robertson: But he didn't say how many butts the 500 men from Beaver Creek would kick.

Mr. Moore: That was just south of Whippoorwill Hollow.

The Court: I think I will give you this as it is written.

Mr. Allen: Without the word "solely" in there?

Mr. Moore: Plaintiff will except to the granting of Instruction R.

Mr. Allen: This instruction reads, if Your page 2509 } Honor please, talking about Instruction S:

"The jury is instructed that:

"Any evidence introduced on behalf of plaintiff to the effect that any of the defendants has a bad reputation for failing to abide by the law in Eastern Kentucky is not to be considered as evidence that the defendants committed the specific wrongful acts alleged by the plaintiff."

In the first place, the instruction is entirely misleading. It may be confused by the jury to apply to evidence about the defendants committing criminal acts of violence that have

nothing to do with this case. We are talking about in this case the reputation of the defendants for running people off the job; in other words, the reputation that Dixon said the defendants had. It was their policy to run the workmen of contractors off the jobs unless those contractors agreed to recognize one of these defendant unions. We are talking about that reputation.

Questions were asked with reference to reputation. They were asked with reference to policy. They were asked with reference to the plan or pattern of these defendants in connection with their conduct in Eastern Kentucky. It all goes back to the evidence of specific instances which tend to show the mind or motive or intention or purpose with which these people went there to Breathitt County on the 26th day of July.

page 2510 } We argued all that out here, and cited the authorities to show that all that evidence was admissible.

This instruction is designed to rule out of the case every bit of that. It will afford the basis for argument on that.

The Court: Is there anything further you gentlemen wish to say?

Mr. Robert N. Pollard: If Your Honor please, this instruction is not directed at any evidence which the plaintiffs put in on specific acts that relate to a course of conduct. It is related only to reputation evidence that they have put in. Where a man says on the stand that he knows the reputation of the defendants for failing to abide by the law in Eastern Kentucky, and he makes no specific reference to any particular job, and says that he knows of his knowledge that the defendant ran somebody off the job at Wheelwright, and names the specific job, that is reputation evidence. He knows the reputation of the defendants. That is what he testifies. He knows their reputation in Eastern Kentucky for failing to abide by the law. They have introduced evidence on that score.

We submit that the rule in Virginia is that in a civil case, reputation or character evidence is not a proper consideration in determining whether the specific acts complained of were committed. I think that rule is stated in page 2511 } 116 Va. 942, the case of *National Union Fire Insurance Co. v. Burkholder*. At page 945, the Court states this to be the general rule:

"The general rule is that in a civil action the character of neither party thereto, nor of any other person, is involved and cannot be made the subject of inquiry."

Character is reputation, what people in the vicinity think of the party or the person as to whom the evidence was introduced. The Court said:

"The record furnishes no suggestion why this case should be taken from under the operation of the general rule mentioned."

It is the general rule in Virginia that reputation evidence is not a proper subject of inquiry in a civil case. That is just what you have here. The rule in other jurisdictions is that if you do have a wilful tort, where you have to prove a malicious act, it may be proper to show bad reputation in the first instance. That is not the rule in Virginia as announced in this case. This was a suit to recover on a fire insurance policy, and there was an allegation by the insurance company that the building was wilfully burned. The wife was the owner of the building. They sought to introduce evidence of the dishonesty of her husband, although he wasn't a party to the action, and the Court held, as I stated, that:

"We are further of opinion that there was no  
page 2512 } error in the court's refusal to permit Dr. Miller  
to testify as to the honesty of J. C. Burkholder,  
the husband of the plaintiff. His honesty was not an issue,  
and was in no way involved in this case."

Then the Court stated the general rule.

That is what we have here. We are not referring, Your Honor, to evidence of prior course of dealings on the part of the defendants, but independent evidence of persons who had no specific knowledge or did not know of their own knowledge that the defendants had allegedly run people off the job, but just the reputation that the defendants had for running people off the job. That is what reputation is: what other people think about you. And they have introduced evidence that that reputation of the defendants was bad. Under the rule in this case, we claim it is not proper.

Mr. Allen: If Your Honor please, if they agree that the instruction should not have the broad scope that I indicated I thought it might cover and permit them to argue, we might withdraw our objection. As I understand it, the instruction is not intended to apply to the course of conduct or to the particular instances which might be used to show the state of mind and the motive for which these people went there, and it is only applicable to a situation whereby the reputation

of being a law violator cannot be used as evidence to show that the defendants committed a particular wrong.

The Court: On July 26, 1949.

page 2513 } Mr. Allen: If that is the limitation to be put upon the instruction, I don't think it is objectionable.

Mr. Robertson: Put that date in there.

The Court: That is what you intend this instruction for, isn't it, Mr. Pollard, that is cannot be used in connection with the particular instance on July 26, 1949? Do I understand you correctly?

Mr. Robert N. Pollard: That is correct, Your Honor, that the reputation that they have sought to establish, of the defendants—

The Court: —is not evidence that they committed these acts on July 26. I think you are right about that.

Mr. Robertson: All you have to do is add those two words, "on July 26, 1949."

Mr. Fred G. Pollard: Where do you want to add that, Mr. Robertson?

Mr. Allen: Just "committed the specific wrongful acts complained of."

The Court: " \* \* \* wrongful acts alleged by the plaintiff." I will give this instruction.

(Brief recess.)

Colonel Harris: Are we ready to proceed?

Mr. Mullen: We haven't taken up the last one yet.

Mr. Fred G. Pollard: That involves the same page 2514 } argument that our Instruction F involves.

The Court: That is Instruction T?

Mr. Fred G. Pollard: Before we take those up, Your Honor, Colonel Harris would like to submit a revision of our Instruction O; which you are going to present as O-1, are you not, Colonel?

Colonel Harris: Yes. It will have the changes that I first suggested:

Strike out, in the Instruction O that you have, the words "There is no," and substitute in place of them "If you believe from the," and then strike out "any" and put in "none" in its place; and in the fourth line down, strike out the two words, "and therefore."

I think I told you that a while ago. Is that clear to you gentlemen?

We tender it in that form, if the Court please.

Mr. Allen: Will you read it as it will read, amended?

Colonel Harris: All right.

"The jury is instructed that:

"If you believe from the evidence in this case that none of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you  
page 2525 } cannot award plaintiff any punitive damages in  
this case, and if you should find for the plaintiff,  
its recovery shall be limited to compensatory damages only."

Mr. Robertson: If Your Honor please, we object to that, but if they add this, we will not object to it:

"The jury is instructed that:

"If you believe from the evidence in this case that none of the defendants"—then add, "or any of their agents acting within the scope of their authority—"

Mr. Fred G. Pollard: "—or any of their agents acting?"

Colonel Harris: "Nor," didn't you say, n-o-r?

Mr. Robertson: I said "or."

The Court: "—or any of their agents acting within the scope of their authority."

Mr. Lowden: Wouldn't "their respective agents" take care of the trouble?

Mr. Robertson: All right.

The Court: "—of their respective agents."

Repeat that once more.

Mr. Robertson: Do you have it there, Frank?

Mr. Lowden: "If you believe from the evidence in this case that none of the defendants or any of their respective agents acting within the scope of their authority \* \* \*"

Colonel Harris: We can't accept the modification that they suggest, if the Court please, and would like it ruled on without that modification.

The Court: Are you through, Colonel?

Colonel Harris: Yes, sir.

The Court: Go ahead, Mr. Robertson.

Mr. Robertson: If Your Honor please, I am compelled to say just what I said before, that I believe even as modified, either with or without the limiting phrase that we suggested

it is reversible error, for the reasons I stated when we argued here before; and because I want to keep reversible error out of the case, I think we are compelled to object to it.

The Court: As I understand, you don't object to it with this addition?

Mr. Robertson: No, sir.

The Court: The Court will refuse Defendants' Instruction O-1 as offered by counsel for the defendants, but will give O-1 with a further modification to read, after "defendants" on the first line, "or any of their respective agents acting within the scope of their authority."

That means that if you gentlemen desire to present such instruction, the Court will grant it. At the same time, you would be saving your exception on O-1 as originally offered.

Mr. Fred G. Pollard: We except to the page 2517 } Court's ruling in not granting Instruction O-1 as tendered. However, we will now offer it as amended in accordance with the suggestion of the Court and the understanding that it will be granted.

The Court: It will be granted, and you gentlemen may re-write that overnight.

Mr. Moore: What will it be called now?

The Court: That will be numbered O-2, will it not? You have an O and an O-1. This now becomes O-2.

Now we return to Instruction T.

(Defendants' requested Instruction T follows:)

"The jury is instructed that:

"Under the law the defendants had the right to organize or attempt to organize the plaintiff's common laborers and carpenter helpers. If you believe that the plaintiff acted in concert with the American Federation of Labor to interfere with such rights of any of the defendants, then the plaintiff acted unlawfully."

Mr. Robertson: That brings us right back where we were this morning, and I will ask Mr. Lowden to discuss that.

The Court: Let me read this again, please.

Mr. Lowden: You might read F, also.

The Court: That is one that we passed by, did we?

Mr. Lowden: Yes.

The Court: Very well.

page 2518 } Mr. Lowden: As I understand the contentions of the defendant, we are not here concerned with the rights given under the National Labor Relations Act, but we are confining ourselves to the substantive law of the State

of Kentucky. In order to make clear what I am going to say, I think I ought to say something about the National Labor Relations Act by way of illustration.

The National Labor Relations Act is a quite lengthy statute, and it provides for the representation of employees by labor organizations, and it provides that in a case where there is a question as to whether or not particular employees are represented by someone, the National Labor Relations Board may resolve that question. It says that the Board can go in and define the unit, hold an election, certify the representative, and then that representative will be the exclusive representative of the employees in the unit. It sets out certain tests to guide the Board in describing the unit in which they are going to certify the representative.

That Act goes on, and after a representative is certified, and perhaps even in cases where there is no certification, where there is no doubt about the union representing the employees, it provides in Section 8 that the employer commits an unfair labor practice if he refuses to bargain with that representative. The Act provides that the Board, after making such findings, can direct the employer to page 2519 } bargain in good faith. Under the Act as presently written, it prescribes what "bargaining in good faith" is.

The National Labor Relations Act in the form when it was known as the Wagner Act and in the form since it has been part of the Taft-Hartley Act, has been in existence since about 1936, and the number of decisions that have been handed down by the Board would fill pretty nearly a library of books. They are up to Volume 90-something in 16 years.

Many of those decisions involve what is an appropriate unit. A man comes into my plant and says, "I represent all your laborers." If you don't think that is the appropriate unit, you can go to the Board and they will decide whether, in order for him to get exclusive bargaining rights, he must represent all of your employees or a particular craft or a division, or whatever it may be, in the particular case. The cases have always held, if there was a *bona fide* doubt as to whether or not the unit was appropriate, even under that Act where the requirement to bargain is express, if there was a *bona fide* doubt as to what the appropriate unit was, you didn't commit an unfair labor practice in refusing to bargain.

Under that Act, also, if there was a *bona fide* doubt whether or not they represented your employees, you didn't commit an unfair labor practice by refusing to recognize them, be-

cause you had a right to have the thing deter-  
 page 2520 { mined in an orderly way where there was a *bona*  
*fide* doubt, even under the Wagner Act.

These people come over to the law of Kentucky, and they are claiming under that law substantially the same rights, or even more than they would get under the Wagner Act. The Kentucky Act doesn't go anywhere near as far as that. It doesn't set up methods for determining the question. It doesn't set up any methods for determining what a unit shall be. It has no express provision that anybody will bargain with anybody. It merely says, in one very short paragraph, that:

"Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing and assemble collectively for peaceful purposes." Then it goes on in the next section:

"Neither employers or their agents nor employees, associations, organizations, or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats, or coercion."

page 2521 { I take it that it is from that section that these gentlemen have written Instructions C. F. and T.

I have run down the cases as to this statute, and I thought it was a really fascinating question as to what that might mean, and I found that there has been no litigation, that I could find, in Kentucky that sheds any light on the subject.

Then I went to all the other States that have laws similar to that, to see if I could find out if a similar statute had been construed in any such way as would bind us here. I found that there was quite a famous case in Wisconsin that construed a statute which I considered to be similar but much more full. I think Mr. Joe Padway brought the case.

In that case the employer had told his employees that if they joined in the union he was going to shut down the plant and move away, and all that sort of thing. They brought an injunction proceeding, and they asked that the defendant be enjoined and restrained from using any threats, intimidating language, and so forth, suggesting the loss of employment,

and requiring its employees, as a condition of employment, to refrain from joining or organizing a labor union.

The Court in that case did grant the injunction in the terms asked for, and they did it on the basis of this statute, which is quite long, but I feel as if I ought to read it.

The Wisconsin statute provided:

page 2522 } "Working people may organize. Injunction  
not to restrain certain acts.

"(1) Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, the families of deceased members, or for such other object or objects for which working people may lawfully combine having in view their mutual protection or benefit."

Then in another section of the statute:

"Public policy as to collective bargaining.

"In the interpretation and application of Sections 268.18-268.30, the public policy of this State is declared as follows:

"Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to engage in corporate and other forms of capital control dealing with such employer. The individual unorganized worker is helpless to exercise actual liberty of

page 2523 } contract and to protect his freedom of labor and  
thereby to obtain acceptable terms and conditions  
of employment. Therefore, it is necessary that  
the individual workman have full freedom of association and self-organization, designating representatives of his own choosing, to regulate terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of the employers of labor or their agents in the designation of such representatives or in the self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

The case I am reading from, I think I forgot to cite. It is *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co.*, 256 N. W. 56 (1934).

The actual injunction went to the acts of the employer in threatening loss of employment, threatening discharge, and other coercive activities which the bill of complaint stated, and the court held that stated a cause of action and said an injunction might be granted against such activities.

The case does not indicate at all that the court required the employer to bargain with anybody. It merely said "don't interfere." It did contain this language, and I will put this thing out, good or bad, in front of you so you will get the whole picture. The court went on to say:

page 2524 } "Refusing to negotiate with designated representatives or large numbers of employees, the defendant violated the declared public policy of this State, and in that regard there was nothing to mediate or arbitrate. On unlawful act can hardly be the subject of mediation or arbitration."

It goes on to say:

"Had the defendant refused to negotiate with McMurray because he questioned the assertion that he was the designated representative of its employees or large numbers of them, a different question would have arisen. In that case it probably would have been necessary to make every reasonable effort to settle such dispute either by negotiation or via the available machinery of governmental mediation or voluntary arbitration before resorting to court action."

So in the leading case, they come down to say they wouldn't give them any relief, injunctively, if there was any doubt about the matter.

It is to be noted that this case, decided in 1934, didn't order anyone to bargain with anybody, but since that decision, Wisconsin has adopted a statute like the National Labor Relations Act in which it says: "You shall bargain with the designated representative." It has adopted that law.

Now we come along to the Supreme Court of Florida in 1949, in the case of *Miami Laundry Co. v. Local Union 935 International Brotherhood Teamsters, Chauffeurs*, page 2525 } *Helpers and Warehousemen of America, A. F. of L.*, cited in 16 Labor Cases, Paragraph 65.214. Under a similar statute an injunction was sought by the union, and the Florida court dismissed the bill of complaint on the

ground that such statutes did not afford the union any right, that it gave right only to individual employees, and therefore they dismissed the bill because a cause of action wasn't stated.

Then California has a statute that I think is almost word for word the same as the one in Wisconsin that I read to you and they have had some litigation out there about it. There was a case decided, I think in the California Superior Court, I think they call it, Los Angeles County, reported in 2 Labor Cases, Paragraph 18,748, where an A. F. of L. union brought a suit to compel an employer to recognize the union. That court held, reading from it:

"The Legislature has not established any Board in this State with power to conduct hearings, to hold elections, or to make findings of fact such as are provided for in the National Labor Relations Act, the Railway Labor Act, and the Labor Relations Acts of the States in which such statutes have been adopted, nor has it vested such power in the courts. The courts at times have legislated to cure defects or supply manifest omissions in the statutes in order to give effect to the plain intent of the legislative body where, in the absence of such judicial legislation, the statute would be  
page 2526 } without efficacy in the accomplishment of its contemplated purpose. In so doing the courts should act with caution and deliberation.

"To hold that the court is vested with the power asserted by plaintiff would not be interstitial legislation by the courts supplying accidental omissions, but it would be necessary for the court to constitute itself in essence a labor board and to formalize its own procedure for bringing the parties before the court, for conducting a hearing in order to ascertain and declare their rights, and for the enforcement of the order of judgment.

"In order to give effect to the section of the California Code which plaintiffs contend should be given, it would be necessary to legislate judicially into the section provisions which the Legislature did not place there or in any other statute, and which it must be assumed, in view of the refusal to adopt the so-called Little Wagner Act, that body did not intend to be a part of the laws of the State."

He dismissed the bill for an injunction.

Then that same judge seesawed back and forth, and he followed it up on other occasions, beating all around the bush. Finally he had a case involving a transportation company in the City of Santa Monica, in which the union this time, the

same plaintiff, represented 62 out of 63 of the  
page 2527 } employees, and there wasn't any doubt about it.

He held that they had an obligation to bargain with them. That case was appealed, and the California Appeals Court, 168 Pacific (2d) 741, reversed the judge. They reversed him because it happened that this particular transportation system was publicly owned, and they said the labor laws do not apply to that; and they also went on that as to what the law required anybody else to do, we are not going to say at this time. So the matter in California remained in doubt.

It is my opinion that the Kentucky statute was probably intended to authorize a strike, a peaceful strike, peaceful picketing, peaceful assembly, for the purpose of recognition, because at one time a strike for that purpose was unlawful. I don't know whether it was in Kentucky, but in many States it was. But I do not think that the section prescribed any duty upon the employer to recognize it. I do not think it makes it unlawful for him to decline to do it, and I am especially of the opinion that it does not require him to recognize anybody where there is doubt about it, as there is in this particular case, because the evidence is that the A. F. of L. signed the people up, and by their own testimony that was of their own free will. Then they came along and said they had signed up with the UCW on the 26th, but had not signed up when Mr. Hart made his demand on Mr. Bryan on the 14th. As near

as I can tell from the testimony of the laborers,  
page 2528 } there is no telling how they might have voted had they been given the opportunity to do so secretly. They were just joining to make sure they kept their jobs.

In addition to that, there is a lot of doubt, it seems to me, under the labor laws, and I think there is no doubt when Mr. Bryan was talking about his contracts with the A. F. of L. and when he was testifying to the fact that it wouldn't work to have A. F. of L. and UCW on the same property, and when he testified that "Almost all my people scattered all over the Southeast already belong to the A. F. of L.," what he was saying, translated into words of art, is that he doubts the appropriateness of the unit. There isn't any doubt about that. It is just a lay way of saying, "I doubt that the unit which you want to represent the people is appropriate for the purpose." He is merely stating the reasons, not the legal conclusion.

There was a recent case in Kentucky involving this section of the law and another section of the law, Section 336.040, which section, for your convenience, I will read. Section

336.040 provides, in effect, that the Department of Industrial Relations shall encourage, promote, and develop fair practices both by employer and employees, and shall discourage and eliminate as far as practicable all unfair practices by either, and shall enforce the laws relating to the same.

There was a recent case in Kentucky, decided page 2529 } this year, *Blue Boar Cafeteria v. Hackett*, decided on the 17th of February, 1950, 7 Labor Cases, Paragraph 55,618, which involved an attempt by the Commissioner of Industrial Relations in Kentucky to come to the Blue Boar Restaurant and conduct an election among the employees on company time and on company premises.

The actual cause of action was brought by the owner of the restaurant to enjoin the Commissioner of Industrial Relations from doing that, and the court enjoined him, stating that the two sections of the Code we have been talking about did not authorize him to take any such action as that.

I don't think that particular decision has any real significance here, because they left open the question whether or not he might take an election at some other time and at some other place, but they did say in the case:

"Though it does not seem material to the decision, it may be observed that there is no assertion of any hazard to the safety or health of the plaintiff's employees or any unfair labor practices \* \* \*."

I say that is significant because if the law obligates me to recognize people just out of hand upon Mr. Hart's say-so, that is what must have been the fact in the Blue Boar Restaurant case. Otherwise there would have been no need for an election.

page 2530 } It seems to me that Kentucky case is saying that the refusal to recognize somebody is not an unfair labor practice under Kentucky law. Of course, it is only dicta, because they say in the opinion that it does not seem to be material to the decision.

They do say that they cannot imply from Section 336.130 any right on the part of the Commissioner to hold such an election against the wishes of the employer.

On the basis of my investigation of the law, I do not believe the Kentucky statute requires us to bargain with anybody. It doesn't say so. I don't believe that was the purpose of it. I don't believe that was what it was intended to do, and I don't think it does it.

Furthermore, even if it did require that, I do not think it requires it in every instance. I think it is bound to be so

in a case where there is a doubt as to the appropriateness of the group or in a case where there is doubt as to whether the union really represents them or not. When the employer in good faith has that doubt, he cannot be guilty of any unlawful act in refusing to recognize them under such circumstances.

I might add that I am in doubt if these people were in compliance. They could have gotten a determination of their rights under the National Labor Relations Act. I am quite certain. They didn't elect to do that. In fact, page 2531 } as I understand the testimony of the witness Fohl, they do it some other way. They don't fool with this Board which has been established as the method for determining such questions.

On the basis of what I have said, I object to Instruction C, because in Instruction C the way it is written, by inserting the words "common laborers and carpenter helpers" and connecting that up with the phrase "to designate collectively representatives of their own choosing," the implication, it seems to me, is unavoidable that the Court is determining that this was an appropriate unit. I don't believe the Court is in a position to do that.

Coming to Instruction F, which reads:

"Under the law the plaintiff had the duty to bargain collectively with the representatives of its common laborers and carpenter helpers. If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully."

I do not believe that the law of Kentucky obligates anyone to bargain collectively with anybody.

To be honest about it, I don't understand what they mean in Instruction T, because if there was unlawful interference by the plaintiff, it wouldn't make any difference whether it was in concert with the American Federation of Labor or not. I am not sure I understand what they are driving at. I don't object to that one as much as I do Instruction F, page 2532 } which I think is clearly wrong on law as written.

Mr. Moore: Do you believe Instruction C could be straightened up by putting the words "employees" in?

Mr. Lowden: I would have no objection to Instruction C if they wrote Instruction C the same way they did Instruction D. "The employees of the plaintiff, including common laborers and carpenter helpers, had the right \* \* \*." I wouldn't

object to C so amended. That was objected to, and that is the way Your Honor fixed it before.

The Court: Do any of you gentlemen have any comments to make?

Mr. Allen: We have the close on it, haven't we?

The Court: Yes.

Mr. Mullen: If Your Honor please, in the first place we have had no opportunity to read those cases, and it is now late in the afternoon.

Mr. Lowden: I might say I tried to quote them as fairly as I know how to do it.

Mr. Mullen: In the second place, in so far as they refer to the statutes, they are statutes of different States, and we are concerned with the statute of Kentucky. The statute of Kentucky negatives the argument that he has made. It negatives the argument that they do not have to bargain with employees. It negatives the argument as to the question of whether this was a proper union to bargain. The page 2533 } statute says:

"Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare."

If that means anything, where it says they may "designate collectively representatives of their own choosing and negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare," the person with whom they would negotiate is the employer.

The statute would have no meaning unless that right must be exercised and must be recognized by the employer.

It also says, "employees collectively and individually." There goes out your question of whether there is the proper unit.

"Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes."

I think that that language in the statute itself can have no other meaning than that the employer must negotiate with them.

Also, in these cases, the employer in a labor dispute or

labor matter comes under the National Labor  
 page 2534 } Relations Act, which requires an employer to ne-  
 gotiate.

They have come down here to Richmond, and they require it. If there is a dispute and if an employer is refusing to negotiate, the National Labor Relations Board can call for an election and require them to do it. They have done it right here. This company certainly comes under that much of the Federal Act.

I asked if they had ever been certified by the National Labor Relations Board, and the reply was, neither the union here nor in Kentucky had been certified as the bargaining agent for the employees of Laburnum.

That being the case, these common laborers and carpenter helpers were free, under the Kentucky statute, to organize as a union and to require bargaining with their chosen representatives.

Instruction C follows the language of the statute, and applies it in this case. It follows the specific wording of the Blandford case. We are entitled to that. We are dealing solely with the laborers.

We submit that we have a right to apply the statute to the case in question, that is, to those laborers whom we are claiming we represented and who we claim had the right to organize, regardless of what the A. F. of L. members in the skilled workers did. The A. F. of L. union had no control over these people in any way, shape, or form. They could not,  
 page 2535 } by making any agreement with Laburnum, give themselves the right in any way to control the common laborers, who were not members of their union, whom they didn't recognize in any way, and say, "Regardless of what you say, without giving you any choice in the matter, we represent you." That is something that they couldn't possibly do.

The laborers and the carpenter helpers had the right, free from restraint and coercion, to associate themselves for self-organization.

Instructions F and T. "Under the law, the plaintiff had the duty to bargain collectively with the common laborers and carpenter helpers." We submit that under the law of Kentucky and the wording of the statute, after they had organized, after they had appointed men of their own choosing to negotiate, and the testimony is that in that meeting on the 24th they elected a committee of stewards from their number to negotiate, in connection with Hart, with the Laburnum Corporation, and the Laburnum Corporation refused to negotiate, said there was nothing to negotiate, and from beginning

to end refused to recognize their rights under the Kentucky statute.

"If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully." That is F.

page 2536 } T says:

"Under the law the defendants had the right to organize or attempt to organize the plaintiff's common laborers and carpenter helpers. If you believe that the plaintiff acted in concert with the American Federation of Labor to interfere with such rights of any of the defendants, then the plaintiff acted unlawfully."

The plaintiff acted unlawfully if it did cooperate or work with the American Federation of Labor, whether it interfered with the rights of the defendants or not. It is not permitted under the law to cooperate with the union in any matter involving labor.

Mr. Robertson: Under what law?

Mr. Mullen: Under the Taft-Hartley Act, for one.

Mr. Robertson: They are not under the Taft-Hartley Act.

Mr. Mullen: You certainly are under the Taft-Hartley Act. All labor in this country is under the Taft-Hartley Act.

Mr. Allen: Have you finished?

Mr. Mullen: No.

It is a corporation of this State, doing business in another State.

Mr. Fred G. Pollard: Your Honor, this situation, addressing myself to Instruction F, is not so mysterious page 2537 } as the plaintiffs would have the Court believe.

Mr. Lowden made a very learned dissertation on what he had looked into, but those cases he looked into were all cases where a labor union or members of a labor union were seeking to enforce rights under statutes of this kind, the Kentucky statute. It is well known that there are certain statutes which grant rights, but nevertheless they don't create any substantive rights upon which you can bring a suit, or they do not create a cause of action. Those were the cases to which he referred.

Our only position under that statute is that the statute gives us the right to organize collectively and to designate representatives to negotiate contracts.

The second section says that employers shall not engage in unfair or illegal acts.

If the first section gives us the right to organize, to negotiate contracts, and an employer won't negotiate with us, then the statute means nothing; but the second section says they shall not engage in unfair acts as employers.

If you look at our instruction, all it says is that if you believe that any of the defendants were the representatives—there is your jury question—and if you further believe the plaintiff failed to bargain with them. First they have to believe that they were the representatives; and second, they have to believe he failed to bargain, then he acted unlawfully.

If we can't have that instruction, the Kentucky page 2538 } statute means nothing.

To go back to Mr. Lowden's objection to our Instruction C, he feels that we should not be allowed to have the phrase, "plaintiff's common laborers and carpenter helpers." The undisputed evidence is that all other employees were organized. They are the employees with whom we are concerned in this case. We certainly should have the right to bring the statutes down to the facts of this case, and that is all that that instruction does.

In Instruction T, all the first sentence does it tell the jury that it was lawful for us to attempt to organize the plaintiff's common laborers and carpenter helpers. I don't think they will dispute that we had a right to attempt to organize them, and organize them if we could.

The second sentence, all it says is that the plaintiff did not have a right to interfere with our right to organize. That is our business. It is the reverse of the plaintiff's case. The plaintiff says that "We were in business out there and you unlawfully interfered with our business." This instruction says that the defendants were in the business of organizing labor, which is lawful, and all we ask the Court to say is, if the plaintiff interfered with the defendants' business in the same way that the plaintiff claims that we interfered with its business, then the plaintiff's acts were not lawful.

Colonel Harris: I want to say a word.  
page 2539 } As I have marked it, Your Honor, this morning Your Honor tentatively approved Instruction C.

The Court: Yes.

Colonel Harris: What they are contending on C goes contrary to the practical realities of American life that Your Honor is no doubt familiar with. Your Honor knows that there are hundreds and hundreds of thousands of laboring men in America organized in different craft unions under the

A. F. of L., and to my mind, it is departing from what we have seen happening all over America to say now that a bunch of men who do not qualify for the crafts that are organized in the industry cannot themselves organize. In other words, they don't have the qualifications to join the A. F. of L., so they can't get in the A. F. of L. The A. F. of L. makes no effort to take them in, and they are left completely without any rights whatsoever. Everybody else in America has it.

I haven't found any case anywhere that held that laboring men didn't have the right to organize into a union. All laws that have been passed to take greater control of labor that I have run across, somewhere have the statement that a laboring man may join a union of his own choosing.

What they say is that all the practices of America and all the laws of America that give a laboring man a right to say what union he will go into, are completely thrown  
 page 2540 } aside by a bunch of A. F. of L. carpenters having a union, and excluding these carpenter helpers and common laborers.

It seems to me that they are asking this Court to shut its eyes to what has been going on in America in State after State, and a right that, as an American citizen, each one of these laborers had. Nobody could say, "We won't take you in. We will keep you out, and you people who are outcasts and pariahs under our craft organization, you can't have anything. We won't take you in, and we won't let you form one of your own."

So it seems to me that C, as tentatively approved by Your Honor, is a plain, common sense instruction based on the realities of American life, and not on any fanciful idea which has not been adopted by the courts.

Mr. Fred G. Pollard: May I end this by saying that the Instructions F and T are just as simple as this, Your Honor: If you have a right of any kind, and I interfere with it, I have acted unlawfully. All those two instructions do is to state the defendants' rights, and say that if the plaintiff interfered, the plaintiff acted unlawfully. Those two instructions are just that simple, Your Honor.

The Court: You contend, then, that it was unlawful for the plaintiff to refuse to bargain with the representatives of the common laborers?

Mr. Fred G. Pollard: If the jury believes,  
 page 2541 } first, that the defendants were the representatives, and if they believe that the plaintiff refused to bargain.

The Court: Isn't the gist of the question whether or not he had a right to refuse to bargain? Isn't that the meat in

the coconut? And, if he did refuse, whether or not it was unlawful?

Mr. Fred G. Pollard: That is correct. I believe that is the meat of that instruction.

The Court: I might want to hear from you further, but I will still give you gentlemen a chance to close.

Mr. Lowden: Of course, we are in this position now, Judge. Mr. Mullen says they have the right under the National Labor Relations Act. Mr. Pollard says that get it under the law of Kentucky. Neither gentleman has cited a single case in support of their contention, not a one. They haven't cited anything, and I don't think they can find any to cite.

Let's stick to F for a moment. Take the National Labor Relations Act. I am going to demonstrate why it hasn't any application, in just a minute.

Section 7 of that Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining and other mutual aid or protection. They shall also have the right to refrain from any and all such activities except to the extent that the right may be affected by an agreement requiring membership in a labor organization as a condition to employment as authorized in Section 8(a)(3)."

So in Section 7 of the National Labor Relations Act, they give them the same right as they are given in Section 1 of the Kentucky statute.

But they come over in the next section, Section 8(a)(5), and say:

"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."

They go on and expressly say that there is a duty to bargain, because when you come over to Section 10, they authorize an administrative tribunal to prevent unfair labor practices and to compel them to bargain if they don't, when all the conditions are met. There isn't any such provision as that in the law of Kentucky.

The State Court that came closest to that was the Wisconsin Court, but in Wisconsin they found it necessary to enact

a law patterned after this, since that case, to require people to bargain collectively.  
page 2543 } This is kind of A, B, C, stuff, but it looks like we have to go into it.

Under the National Labor Relations Act, where you have all these rights spelled out and all these obligations spelled out, this is the general rule, and there is no doubt about this:

"The employer's statutory obligation to bargain collectively does not exist where the union fails to provide satisfactory proof of its majority claim when requested by the employer. Thus, where an employer is in genuine doubt as to a union's majority status, his refusal to bargain for that reason does not constitute an unfair labor practice."

That is under the statute where it expressly says refusal to bargain is an unfair labor practice. There never has been any doubt about this point at all, and if there is any doubt about it, the refusal is not an unfair labor practice.

Mr. Mullen: May I ask you a question? Doesn't that say where the employer requested evidence that he had a majority?

Mr. Lowden: That is two points. I read the whole paragraph.

I think the law under the National Labor Relations Act is that if a union representative comes to the employer and says, "I represent a majority of your people,"  
page 2544 } the employer, if he wants to see his credentials, should ask for them. In this case we have people signed up in two unions known to the employer. If you don't think there was doubt about who actually represented those laborers, that is for you to argue, but I can't see how you can avoid that.

Mr. Mullen: I was just asking you if, under that statute, he must request it; if you haven't denied that your man ever asked for it or that it was refused him?

Mr. Lowden: Let's get this straight. I am not kidding anybody. I am putting it out exactly right, whether it hurts or doesn't hurt. I am not trying to kid any person. I want these instructions to be right, and we are going to get them so you get more than what is coming to you just to make sure—

The Court: Answer Mr. Mullen's question. I don't believe you answered his question, what the section stated.

Mr. Lowden: "The employer's statutory obligation to bargain collectively does not exist where the union fails to provide satisfactory proof of its majority claim when requested

by the employer. Thus, where an employer is in genuine doubt as to the union's majority status, his refusal to bargain for that reason does not constitute an unfair labor practice."

That is just A, B. C.

Then there is another section, and if Your page 2545 } Honor wants it, I will get you some cases on this.

The Court: I am going to decide one way or the other tonight.

Mr. Lowden: This is also the law:

"The Board must also determine whether the unit in which the union represents a majority of the employees is appropriate for purposes of collective bargaining before it may hold an employer refusing to bargain with the union has refused to bargain in violation of the Act."

So if he refuses to bargain in good faith doubt, the Board can't go to court and get an injunction against the man to compel him to bargain.

The Court: Therefore, you contend it would not be unlawful to refuse to do it?

Mr. Lowden: That is right. I also think, I contend further, that the law of Kentucky does not impose a duty to bargain. I can't find any case on any statute that would indicate that it does.

Mr. Robertson: We haven't finished yet.

Mr. Fred G. Pollard: I wanted to make a suggestion, with the leave of the Court, if I may. I think perhaps we should reword this instruction to meet the plaintiff's objection to it.

The Court: All right.

Mr. Robertson: Which one are you talking about?

Mr. Fred G. Pollard: Instruction F. We of page 2546 } fer this as Defendants' Instruction F-1:

"Under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe the plaintiff interfered with this right, then the plaintiff acted unlawfully."

Mr. Robertson: There is no evidence to support the last part. The only evidence at all—and I think it is from the defendants' witnesses—is that they went in there to Delinger and told him they had signed up, and Delinger said, "All right, you have a right to sign up." That was never disputed by anybody, and as I recall, that was the only evidence on that phase of the case.

Mr. Lowden: Except your witnesses said that nobody made them sign in the A. F. of L.

Mr. Fred G. Pollard: Mr. Bryan's testimony was that he told Delinger to get them signed up in the A. F. of L.

Mr. Allen: He had a right to do that.

Mr. Fred G. Pollard: No. That is interference.

Mr. Allen: No, it isn't, either. That is not interfering.

Mr. Mullen: It is making a company union.

Mr. Robertson: On what statute do you base that statement that it is interference?

page 2547 } Colonel Harris: Statute?

Mr. Lowden: What statute?

The Court: "Neither employers or their agents nor employees nor associations, organizations, or groups of employees, shall engage or be permitted to engage in unfair or illegal labor acts or practices \* \* \*"

Mr. Fred G. Pollard: Let's go to the first sentence of paragraph (1). Instead of using the words "interfered with," go to paragraph (1) where it says, "Employees may, free from restraint or coercion by the employers or their agents \* \* \*"; instead of the word "interference," we will use "restraint." "If you believe that plaintiff restrained \* \* \*"

Mr. Allen: Let us finish our discussion, and let the Judge decide. Have you finished?

Mr. Fred G. Pollard: I think the instruction as redrafted should remove your objection.

Mr. Robertson: How does it read?

The Court: Let's write it down slowly. Dictate it and let me write it down.

Mr. Fred G. Pollard: "Under the law the plaintiff's common labors and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe the plaintiff restrained or coerced such employees in the exercise of these rights, then the plaintiff acted unlawfully."

page 2548 } The Court: You are offering that in lieu of F?

Mr. Fred G. Pollard: Yes, sir.

The only question there, it seems to me, would be whether there was any evidence to go to the jury on the question of restraint and coercion. We say that there is a jury question on that, because Mr. Bryan testified that he told Delinger to get them signed up in the A. F. of L., and I recollect Mr. Mullen's question, "What chance does a laborer have to refuse when word came down that the big boss said 'Sign up in the A. F. of L.'?"

We think we have a right to argue to the jury that that amounts to restraint or coercion, and I can produce a dozen

Labor Board cases that say that is restraint or coercion. I don't think that Mr. Lowden will take issue with me on that, that the cases do hold that that does amount to restraint or coercion.

Mr. Lowden: Let me understand. Are you going to offer this in place of the one you have as F?

The Court: Yes, a substitute.

Mr. Fred G. Pollard: Call it F-1.

The Court: I don't know whether you want to talk any more on F. I will grant F as offered.

Mr. Robertson: As now offered?

The Court: As now offered.

Mr. Lowden: May we have an exception for the record?

The Court: Yes.

page 2549 } Now we go to T.

Mr. Robertson: Isn't that another duplication?

Mr. Fred G. Pollard: The only difference between this one and F is that F says the employees had a right to organize. T says that the defendants had the right to organize or attempt to organize those same employees. That is the only difference between the two.

Mr. Lowden: I didn't hear that, Freddie, I am sorry. I went to sleep.

Mr. Fred G. Pollard: F says that the employees had the right to organize for purposes of collective bargaining. T says that the defendants had the right to organize the employees or to attempt to organize them.

Mr. Lowden: I agree with that.

The Court: Down to the period, there is no objection?

Mr. Lowden: That is right, sir.

Mr. Fred G. Pollard: We think there is evidence to go to the jury that there was concerted action on the part of the plaintiff acting with the A. F. of L. to interfere with our rights to attempt to organize these common laborers. In other words, the evidence is that Bryan told Delinger to get them signed up, and Delinger got hold of Robert Poe and put Poe to work signing them up.

page 2550 } Mr. Mullen: Gave him time off with pay.

Mr. Fred G. Pollard: Poe was trying to make arrangements to get them in to sign.

The Court: Is that unlawful? Is that coercion?

Mr. Lowden: It is not.

Mr. Allen: It is not, under the cases I have here.

Mr. Robertson: We have no objection to the first sentence.

Mr. Lowden: It would have been unlawful if one of your

laborers had come to Delinger and said, "Will you give me time off to organize them for some other union," and he refused. Then I think he would have committed an unfair labor practice.

Mr. Fred G. Pollard: There is no question of an unfair labor practice. The question is, we had a right to do something, and the plaintiff and the A. F. of L. banded together to interfere with that right.

The Court: Shouldn't that then be "coercion"?

Mr. Fred G. Pollard: Restrain or coerce.

The Court: Doesn't it have to be restrain or coerce?

Mr. Allen: In answer to that, may I cite a few cases?

The Court: Just in concert with the American Federation of Labor may not be restraint or coercion. That is what is in my mind.

page 2551 } Mr. Fred G. Pollard: To substitute for the word "interfere," to "restrain or coerce."

Mr. Allen: There isn't any evidence on that whatsoever.

Mr. Robertson: There is no evidence on that.

The Court: I will write this down just for discussion: "Plaintiff acted in concert with the American Federation of Labor to restrain or coerce \* \* \*."

Mr. Fred G. Pollard: " \* \* \* restrain or coerce the exercise of such rights," and strike out "with."

We say there is evidence before the jury on the question of restraint, in this way, sir: Hart got out there on the 14th, and he signed up four people; and then on the night of the 24th, he had nine people at the meeting. Then on the 26th, he had them all signed up. Bryan's only testimony is that he told Delinger to get them signed up in the A. F. of L., and he said to change their classification to carpenters, to take them in the Salyersville local if possible. That was restraining us in the exercise of the right that we had to organize them without interference.

Mr. Lowden: Assuming that you are right, you still could argue it on the instruction you already have, as a matter of argument. The fact of the matter is that there were several laborers called as witnesses for the defendants who signed up on the 12th, and they all testified that they

page 2552 } signed up with the A. F. of L. of their own free will and without any restraint or coercion. That is their testimony. They all belong to the United Mine Workers of America now.

page 2553 } Mr. Allen: The Court in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, 142 Fed. 922, passed on this identical question and said this:

"The National Labor Relations Act does not forbid an employer from expressing opinions as to labor unions or as to anything else so long as the expressions do not constitute or contribute to acts or threats of discrimination, coercion or intimidation, or the denial of employees free exercise of their own rights under the Act."

In the case of *Continental Box Company v. National Labor Relations Board*, 113 Fed. (2d) 93, the Court said:

"An employer may express a preference for one union over another so long as the expression is not coercive."

And in the case of the *National Labor Relations Board v. American Shoe Vending Company*, 320 U. S. Supreme Court 668, the employer expressions regarding selection of a union and an attempt to persuade employees to accept them comes within the constitutional rights of free speech."

You talked about free speech of employees to picket and put up signs and persuade. That same right of free speech belongs to the employer.

I have a case right here in the Fourth Circuit decided in 120 Fed. (2d), *National Labor Relations Board v. Clarksburg Publishing Company*. The Court said:

page 2554 } "An employer may express an opinion if it carries no threat of discrimination and does not interfere with attempts to organize."

In the case of *Jacisonville Paper Company v. National Labor Relations Board*, 137 Fed. (2d) 148, *certiorari* denied, 320 U. S. 772, the court said:

"An employer has the right to express his hostility to the union and his opinion of the \* \* \* union."

There isn't a particle of evidence in the case that is not perfectly in harmony with these holdings.

Mr. Moore: Mr. Allen, you might add one more case and cite *Virginia Electric Power Company v. National Labor Relations Board*—

Mr. Allen: That is right.

Mr. Moore: —as long as you are getting personal about it.

Mr. Allen: That is right. I have that somewhere too. That went to the United States Supreme Court and that is what they said.

Mr. Lowden: Judge, how have you got C?

The Court: What about it?

Mr. Lowden: We have a proposition coming up.

The Court: Good. I always like to hear propositions.

Mr. Fred G. Pollard: The proposition is if they will withdraw their objection to C we will withdraw Instruction T.

page 2555 }  
The Court: Do you agree to that? I left it that plaintiff's common laborers and carpenters helpers had a right free from restraint or coercion by the plaintiff or his agents.

Mr. Allen: Read it as you tentatively propose to give it.

The Court: I will read the whole Instruction C:

"The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

"In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

"The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

page 2556 } "Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character."

Mr. Robertson: We agree to that.

The Court: Very well.

Mr. Moore: "T" is withdrawn.

The Court: "T" is withdrawn and C is given.

Mr. Mullen: That concludes everything in ours.

The Court: I think we have to go back to one or two.

Mr. Robertson: We go to 1-B now.

The Court: That completes the defendants instructions, does it not?

Mr. Mullen: Yes. I want to say but one word about 1-B. Mr. Robertson himself said here today there is no conspiracy charge in this case, and therefore the conspiracy statute has no bearing on it.

Mr. Robertson: I also said yesterday that I wanted overnight to decide whether or not I thought we were entitled to

it because I didn't want to ask for it unless I thought we were entitled to it. I have been over it. I have reviewed the bus and streetcar cases that I have tried time and time again and the way they apply the traffic laws. I have conferred with everybody else here on our side, and we think we are entitled to it on the strength of those decisions because the felony statute includes within it civil page 2557 } rights.

Mr. Mullen: They went to the fact that there was carelessness, and so forth, in those same things. It was civil there; that wasn't criminal.

Mr. Allen: "band themselves together. That means getting together and going somewhere for the purpose of intimidating.

Mr. Mullen: It is conspiracy.

Mr. Robertson: Do you think bargain collectively through representatives of your own choosing is a conspiracy?

Mr. Mullen: No. That is a contradiction of that.

The Court: Let me hear the objection and then you close.

Mr. Mullen: That is all I am going to say because I don't want to prolong this thing.

The Court: Fred, do you want to say anything?

Mr. Fred G. Pollard: Yes, sir, in just a moment.

Mr. Allen: You didn't pass over 9 and 10 of ours, did you?

The Court: No. They have been given. You brought re-drafted copies of them this morning.

Mr. Allen: That is right.

Mr. Fred G. Pollard: Judge, the only thing I have to say on this is that there is evidence of intimidation, although we don't think it true, but there is no evidence that page 2558 } they confederated or banded together for that purpose and that they had a view of inflicting punishment before they went down there.

The Court: What was the last statement, Fred?

Mr. Fred G. Pollard: The last part of the statute says "Or of taking any person charged with a public offense from lawful custody with a view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

None of that applies.

Mr. Lowden: When I first wrote it up I didn't have it in there. Then I thought it fairer to quote the whole statute. If you want to strike the last part of it, I will accept that amendment.

Mr. Mullen: We don't agree to that. The whole statute should go out. As I said, it is the Ku-Klux-Klan statute. That is what it is. That is what it was passed for.

Mr. Lowden: But it has been applied to Mine Workers.

Mr. Moore: They include the mine workers under it.

Mr. Fred G. Pollard: There is no charge in the notice of motion of any conspiracy.

The Court: That is what concerns me.

Mr. Allen: A gang of men got together.

Mr. Fred G. Pollard: Your Honor, I think  
page 2559 } under Instruction 1-A, the second paragraph is  
certainly sufficient to cover anything the plain-  
tiff's asked for. That says "Neither employees or their  
agents nor employees or associates, organizations, or groups  
of employees shall engage or be permitted to engage in un-  
fair or illegal acts or practices or resort to violence, intima-  
dation, threats or coercion."

It is perfectly clear that that is the statute which is to  
define and deal with unlawful acts in the case of labor dis-  
putes because it ties right in to the labor statute. It certainly  
is sufficient for their purpose, and the other one obviously  
applies to cases other than labor or is intended so to apply.

Mr. Lowden: Do you want to say a word, Mr. Harris?

Colonel Harris: No. I think his last sentence hit what  
I would have argued.

Mr. Lowden: If Your Honor please, there are cases as long  
as your arm in Kentucky against the mine workers, at least  
two or three, individual mine workers, and some against the  
A. F. of L. pipefitters under that statute for going on a job  
and doing just exactly what these people did here. When you  
say there isn't any evidence that they came there for the pur-  
pose of intimidating somebody, it is just wrong because Mr.  
Hart said that that is exactly why he got the crowd. He said  
the reason we got together we wanted to show them how  
strong we were, to come down there and let them look us  
over.

page 2560 } Mr. Robertson: And do some butt kicking.

Mr. Lowden: He didn't testify to that, but he  
did admit that was the idea. If it was just to go down there  
and peaceably sign people up, you don't go down with 30  
men to sign up 8 men unless you have some idea in mind that  
you will just scare them a little bit.

Why do we want the statute in there? My reason for want-  
ing it in is this: If this jury believes they violated that stat-  
ute, it has a bearing on our right to recover punitive damages.  
It is true we haven't alleged a big conspiracy. I think we  
have proved one, but we didn't allege it. But that design and  
its unlawfulness is a large element, it seems to me, in affect-  
ing the jury's discretion on punitive damages, and that is the  
purpose I had in mind in putting it in there.

The Court: Do I understand you to say that this section has been used in labor cases?

Mr. Lowden: Yes, sir.

Mr. Mullen: Criminal cases?

Mr. Lowden: Oh, yes, it is a criminal statute.

Mr. Allen: But concerning laborers.

Mr. Lowden: I read you one last night where the man did exactly what they did in our case. I will be glad to let your Honor look at it.

Mr. Moore: Here it is, Your Honor.

page 2561 } Mr. Lowden: It uses almost the same words.

Colonel Harris: There is one statement that Mr. Lowden made that I want to reply to, if the court pleases. He said Mr. Hart wanted to show them how strong they were, and then he implies that Mr. Hart meant by that to show them how strong they were in physical strength, and we submit that the proper and reasonable interpretation of that is how strong the organization was proceeding in getting the men that it had. You see, the undisputed evidence is that these men were men who lived in that general neighborhood and some of them worked for Codell, and they were all men whom Hart was organizing.

Mr. Robertson: That is jury argument. You have a right to argue that.

Colonel Harris: I know, but he is arguing—

Mr. Robertson: He has a right to argue.

Mr. Lowden: We have a right to argue what I said to the jury.

Mr. Robertson: He has a right to argue.

Mr. Robert N. Pollard: Could I add this: They might as well present also the criminal statute on mayhem, the criminal statute on assault, the criminal statute on malicious wounding, as to present this statute in the form of an instruction.

Mr. Lowden: No. We haven't any evidence  
page 2562 } of any malicious wounding and if we did, maybe  
we would ask for that statute too.

Mr. Mullen: You have no evidence of conspiracy. You say there is no conspiracy charge in this case.

Mr. Fred G. Pollard: I want to point out one other thing, Your Honor. The statute 336.130 is not a criminal statute. There is a serious matter in my mind that a criminal statute has any place in the instructions in this case. In the third place, if they have been convicted under that statute, it wouldn't be admissible that they had been convicted under it. In an automobile case you can't show a conviction for careless and reckless driving in a civil suit for damages.

The Court: You do cite a statute that it is unlawful to operate a vehicle over the highways in a reckless manner.

Mr. Fred G. Pollard: It is true. You do that to show what the speed limit is, and there is a Virginia statute I believe dealing with civil liability on that. In this case the mere fact that the defendant or some of the people out there would have violated 427.110 would not give the plaintiff a cause of action. He is suing for interference with his business. There is nothing that would connect this with business interference.

The Court: Are you through now?

page 2563 } Mr. Fred G. Pollard: Yes.

The Court: All right, wind it up.

Mr. Lowden: I was just going to say I don't think that statute is the basis of a cause of action, but I think it has a lot to do with punitive damages and I think we have a right to show that what they did was unlawful right from the beginning. I think we have shown that they started at Carver on Sunday themselves.

The Court: Are you in accord with the views of these gentlemen?

Mr. Allen: Yes.

Mr. Moore: Yes.

The Court: Gentlemen, I think I will give this instruction, 1-B.

Mr. Fred G. Pollard: That is referred to as 1-B, Your Honor.

The Court: 1-B.

Mr. Fred G. Pollard: The defendants except to the granting of Instruction 1-B for the reasons stated.

The Court: Gentlemen, it might save you a lot of time and waiting around here if we can agree on an instruction on the verdict. While the jury is out I find sometimes they delay coming in because of not knowing how to write the verdict.

Mr. Lowden: This one doesn't quite do that.

page 2564 } Mr. Robertson: I tell you, Judge, here is one thing I had seriously in my mind last night. I went home and tried to write up a form of it, and I had so much difficulty that I asked Mr. Lowden and Mr. Moore to work separately, and they came up with that. I wondered whether if the Court would tell the jury when they agree, they tell the Court that they have agreed and on what, and the Court would help them getting the verdict in proper form would simplify it. While I think this thing is very skillfully done, I don't think it is simple.

Mr. Mullen: I think the one as first offered was much simpler than that.

Mr. Lowden: But the way it was first offered it was not right from anybody's point of view. What you get down to is that you have a multiplicity of things they might do.

Mr. Allen: I believe it would be confusing to give them a long instruction on that. Let the jury render the verdict in accordance with the general instructions that you give and then tell them if they have any trouble about the form of the verdict, come back and tell you what they have found.

The Court: "When you have reached a verdict the Court will aid you upon request in putting your verdict in proper form." Are you gentlemen in accord on that?

page 2565 } Mr. Mullen: I am in accord with Mr. Robertson's suggestion. Let the Judge tell them afterwards that he will help them with the form of verdict.

The Court: In other words, I will tell the jury at the conclusion of the reading of the instructions this: "When you have reached a verdict the Court will, upon request, aid you in putting your verdict into a proper form."

Mr. Mullen: That is right.

Mr. Lowden: Then, Judge, there is one thing they have brought up which I agree with them on, and it is not covered in anybody's instructions up to now, and I think it should be covered. That is, I do not think that they can find compensatory damages against the United Mine Workers unless they also find them against either UCW or District 50. I think they should be told that. I do not believe you can hold the principal without also holding the agent.

Mr. Allen: That is in one of our instructions.

Mr. Robertson: Compensatory damages cannot be in varying amounts.

The Court: What is that?

Mr. Robertson: That is covered in that long thing, too.

Mr. Moore: You can't find different amounts of compensatory damages as to the various defendants. It has to be one amount.

page 2566 } Colonel Harris: Judge, I have a criticism of your other statement that you would tell the jury that when you have reached a verdict the Court will aid you in putting it in proper form. That indicates that their verdict is going to be complicated, and it would be very simple for a verdict to come in and say, "We the jury find for the defendants." So instead of aiding them to put it in proper form, I think the Court should tell them, "When you arrive at a verdict let me know and the Court will put it in proper form for you."

Mr. Lowden: I agree with that.

Mr. Robertson: Rather than have all these complications, I feel it should be the way you wrote it up.

The Court: I still feel if we could get an instruction on the form of verdict it would be helpful.

Mr. Allen: I am inclined to agree with Colonel Harris on that.

Mr. Lowden: I think you are absolutely right.

The Court: I will leave it to your discretion, but I find it very helpful if we can get a form of verdict.

"The Court instructs the jury as follows:

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

page 2567 } "(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against U. M. W. A. for compensatory damages unless you also find against U. C. W. and District 50 for compensatory damages.

"(c) Your total award for compensatory damages cannot exceed \$....."

That should be the amount sued for. I don't know whether that should go in.

Mr. Allen: I don't know whether that should be put in there at all or not. The compensatory damages couldn't be \$500,000 because that is not claimed. I would leave out (c).

The Court: "2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly liable therefor.

"(b) If you make awards of punitive damages in varying amounts the total of such awards may not exceed \$....."

page 2568 } Mr. Robertson: That ought to come out, too.  
The Court: "(c) If you make one award of punitive damages and designate one or more de-

defendants jointly liable therefor, the award cannot exceed \$....."

Mr. Robertson: Yes. I think three ought to come out too. It is just what we have been saying you don't do in Virginia.

The Court: In this first form we told them how to write the verdict, didn't we, the form of the verdict?

Mr. Robertson: We didn't have it right.

Mr. Moore: There was still a possibility that wasn't covered by that form.

Why couldn't this be improved on to make it right?

"We the jury on the issues joined find for the plaintiff—"

Mr. Robertson: Here is why you can't make it right. Suppose they bring in a verdict of punitive damages against all three defendants in varying amounts, you would have to have three forms for that. Then you would have to fix it—I don't know enough mathematics to know how many different combinations are possible.

Mr. Lowden: There is a lot of them.

Mr. Moore: I can say the possibilities are almost endless.

Mr. Robertson: Let me say this, Judge. Suppose you give it the way we are in agreement on now. I page 2569 } think "3" ought to cut out.

Mr. Moore: You have to tell them the total can't be more than the amount claimed in the notice of motion for judgment.

Mr. Robertson: Then leave "4" the way Colonel Harris suggested.

Mr. Lowden: Let's take 3 out altogether.

Mr. Mullen: I believe it would be better for the Judge to tell them he will help them on the verdict.

Mr. Allen: What was the language you used, Colonel Harris?

Colonel Harris: "When you let know that you have reached a verdict, the Court will put it in proper form for you."

The Court: "When you have reached a verdict—"

Colonel Harris: "—if you will let me know, the Court will put it in proper form for you." "If you will advise me," is better.

The Court: "When you have reached a verdict, if you will advise me, the Court will put your verdict in proper form."

Mr. Robertson: That is all right.

Colonel Harris: Do you see any objection to that?

The Court: All right.

Mr. Robertson: There is nothing for us to write up.

Mr. Fred G. Pollard: Your Honor, we think page 2570 } we ought to have a chance to go over their instructions as redrafted in accordance with the order of the Court and I am sure they would like to look at ours.

The Court: Will it be satisfactory to meet here at 9:30 in the morning?

Colonel Harris: Yes.

The Court: Let's try to be here at 9:30 promptly and we will go into that matter.

(Whereupon, at 6:15 o'clock p. m. the conference recessed until 9:30 o'clock a. m. the next day.)

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City Hall,  
Richmond, Virginia  
Friday, February 16, 1951

Met in chambers, pursuant to recess, at 9:30 a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Willard P. Owens.

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# PROCEEDINGS.

(The following proceedings were had in Chambers:)

(Defendants' Instruction J (redraft) follows:)

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

“(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant.

“(b) No damages can be awarded unless you also find that the damages were directly and proximately caused by the alleged wrongful acts of one or more of the defendants.

“(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

“(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages. If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on the profits the plaintiff claims it would have earned.

“(e) If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should page 2573 } not be included in the profits, if any, of the plaintiff then you must deduct such profits, if any, from the plaintiff's claim.”

Mr. Fred G. Pollard: I think I should call the Court's attention to Instruction J, paragraph (e). You remember paragraph (e) was redrafted and we used Mr. Robertson's language. I took the liberty of making a change in that one. The only change is in the last line on the page. I stuck in “if any.”

The Court: I refused the whole instruction, and you were going to rewrite it under the Court's ruling.

Mr. Fred G. Pollard: I did, except that I added in the last line “if any.”

The Court: Is there any objection to that?

Robertson: No.

Mr. Allen: I think you might tell the jury, as I think you always do, that all the instructions are the instructions of the Court and must be read and considered together.

Mr. Robertson: Here is the verdict 1 that we talked about last night.

Mr. Mullen: I thought we settled that the Judge would tell him that the judge would help them put it in proper form when they arrived at the verdict.

Mr. Robertson: I thought it was to be this way.

The Court: There was discussion both ways. page 2574 } but I was under the impression that the Court was to tell them the verdict would be put in proper form.

Mr. Robertson: I have it at the end there.

The Court: Let's read this.

(Plaintiff's Instruction No. 11 follows:)

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

"(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against United Mine Workers of America for compensatory damages unless you also find against United Construction Workers, Division of District 50, United Mine Workers of America and District 50 United Mine Workers of America for Compensatory Damages.

"2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly page 2575 } liable for such damages.

"3. When you have reached a verdict, if you will advise me the Court will put your verdict into proper form."

The Court: Is there any objection?

Mr. Mullen: Yes, we certainly object to that because it is entirely one-sided. It contemplates but one judgment, and that is in the favor of the plaintiff. There is nothing said about the other possibility.

The Court: We will proceed as indicated last evening.

Mr. Lowden: We withdraw that then.

Mr. Fred G. Pollard: You withdraw it?

The Court: Very well, it is withdrawn.

Mr. Allen: We are already clear on the instructions, but we are certainly going to argue and tell the jury that they cannot find against the United Mine Workers without finding against District 50 and United Construction Workers, because I think that is the law.

Mr. Pollard: Your Honor, I don't think there is any instruction on that.

Mr. Allen: If there is no instruction on that, why not let him give (b) of this instruction.

Mr. Mullen: What objection do we have to their arguing that?

Mr. Moore: It is all in your favor.

page 2576 } Mr. Lowden: The idea came from Mr. Harris when he said you can't hold the principal unless you hold the agent, and I think he is right. We are just trying to meet what you were hollering about a couple of days ago.

Mr. Allen: We offer (b) and if they object to it, it is all right.

Mr. Moore: It is also in Instruction 5.

Mr. Allen: It is supposed to be in five, but I don't know whether it is really clear in there or not. In that long five it is.

Mr. Fred G. Pollard: I would like to have that statement for the record.

Mr. Mullen: I think we should just leave it open and argue as they please.

Mr. Robertson: I expect to argue anything I have a right to argue under the instructions and the law, and if it is wrong you can stop me.

Mr. Mullen: I am sure you know the bounds of argument.

Mr. Allen: We are going to confine ourselves to the law and the issues.

The Court: Do I understand you are offering (b) or not, Mr. Allen?

Mr. Robertson: We are not offering it.

The Court: There is one thing I would like page 2577 } to take up with counsel for the plaintiffs. On

Wednesday morning a motion was made for a mistrial due to an editorial published in the News Leader. Do you gentlemen wish me to poll the jury to see whether or not they have read that editorial and whether or not it will have any influence?

Mr. Allen: My view of that is, so far as the record shows, you instructed the jury not to read any newspaper. They are presumed to follow that instruction unless there is evidence they did read newspapers. If these gentlemen on the other side want to ask the jurors that, we have no objection, but we don't see any occasion for us asking you to ask the jurors—

Mr. Robertson: We don't want it.

Mr. Allen: And we don't ask for it.

Mr. Fred G. Pollard: Our position, Your Honor, is that the editorial was so prejudicial that no instruction that you can make to the jury will cure it.

The Court: Do you gentlemen desire the Court to poll the jury on that question?

Mr. Fred G. Pollard: You indicated at the time the motion

was made that if the verdict went against the defendants they could renew their motion to set aside the verdict, and we would like to poll the jurors at that time, should that occasion arise.

The Court: Is that satisfactory to you gentlemen?  
page 2578 } Mr. Robertson: No, sir. We will meet that issue when it comes up.

The Court: You are not asking me to poll the jury at this time.

Mr. Fred G. Pollard: In view of the fact that you indicated you would let us renew the motion after the verdict should the verdict go against the defendants, we are asking the Court whether or not we may poll the jury after the verdict.

The Court: But you are not asking the Court to poll the jury at this time?

Mr. Fred G. Pollard: Your Honor, the answer to that depends on whether or not you would permit us to poll it afterwards.

Mr. Robertson: If the Court please, I object to your passing on a moot question at this time.

The Court: I would prefer to defer ruling on that question until the time arises. What I am concerned about at the moment is whether or not you want the jury polled now.

Mr. Fred G. Pollard: Our decision on that of course depends on what our future rights are.

Mr. Robertson: Isn't the answer that he doesn't want them polled at this time?

Mr. Fred G. Pollard: May we confer on this,  
page 2579 } Your Honor?

The Court: Certainly.

(Counsel conferring.)

Mr. Mullen: We are not going to ask at this time to have the jury polled.

The Court: All right.

(Whereupon, at 10:00 o'clock a. m., the above-entitled matter came on for oral argument in open court before The Honorable Harold F. Snead, Judge, and a Special Jury.)

(Roll call of the jury.)

Mr. Mullen: If Your Honor please, after the jury was allowed to go on Monday, this stipulation which counsel had been examining was filed with the agreement of counsel. We think it should be read now and introduced as evidence.

I won't read the heading. It is a stipulation.

"It is stipulated between the Plaintiff and the Defendants by their respective counsel that Pond Creek Pocahontas Company began to mine coal at No. 1 mine, Evanston, Kentucky, during June, 1949, and that a substantial part of such coal was shipped by the Chesapeake & Ohio Railway Company from the place it was mined at Evanston, Kentucky, to points outside of the State of Kentucky during June and July, 1949." Signed by Archibald G. Robertson, Counsel for Plaintiff, George E. Allen; and by James Mullen, counsel page 2580 } for the Defendants. We ask that that be filed with the Court.

The Court: Gentlemen of the Jury: You have listened attentively to the evidence in this rather long trial. It now becomes the duty of the Court to instruct you as to the law applicable to the evidence in this case. I call your attention to the fact that the instructions which will be read are to be read together and to be considered as a whole.

The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

"Section 336.130:

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

The Court instructs the jury that the Revised page 2581 } Statutes of Kentucky provides:

"437.110 *Conspiracy: banding together for unlawful purpose.*

"(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of United Construction Workers Division of District 50, United Mine Workers of America, or District 50, United Mine Workers of America, or United Mine Workers of America without threats of violence or acts of violence against such men, or intimidation of such men by anyone to induce such men to join United Construction Workers.

The Court instructs the jury that United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America.

The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done the scope page 2582 } of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were then also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them.

The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America.

while those agents were acting in the line and  
page 2583 } scope of their employment for the purpose of or-  
ganizing the unorganized.

The Court instructs the jury if you believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, Division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, then you will find for the plaintiff against the two defendants, District 50, United Mine Workers of America, and United Construction Workers, division of District 50, United Mine Workers of America, and assess plaintiff's damages in accordance with the instructions on damages.

And if you further believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, and that at that time District 50, United Mine Workers of America, and United Construction Workers, Division of District 50, United Mine Workers of America, or either of them, were agents of United Mine Workers of America for the purpose of organizing workers in businesses other than the coal mining business, then you shall also find for the plaintiff against the defendant, United Mine Workers of America, and assess the plaintiff's damages in accordance with the instruction on damages.

The Court instructs the jury that while employees may, free from restraint or coercion by employers or their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, col-

lectively and individually, strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

page 2585 } If you believe from the evidence that William

O. Hart, was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe from the evidence that while he was so acting he went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and if you believe from the evidence that he was then acting in furtherance of the business of all three defendants, and if you believe from the evidence that while so acting he, by intimidation, threats, acts of violence, or coercion, caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instructions on damages.

The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting within the scope of his authority and employment and was acting for all the defendants for the purpose of "organizing the unorganized," and (2) that in furtherance of that purpose he was going about Eastern Kentucky leading men to various job sites

for the purpose of compelling by intimidation, page 2586 } coercion, or force the workers on such jobs to join one of the Defendants unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the defendants, and (4) that in furtherance of this purpose Hart led men to plaintiff's job site in Breathitt County for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees' wishes, and (5) that Hart or other at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to "sign up" with one of the defendants unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of forcing plaintiff to recognize one of the defendant unions or failing in that, forcing the plaintiff to get out of the territory.

then defendants are liable to plaintiff *no* only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court.

The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of

(1) Profits under its contract dated December 15, 1948, with Spring Fork Development Company, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(2) Profits the plaintiff might have realized from alleged promised cost plus 5% contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(3) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions; and

(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrongful acts of the defendants or any of them.

page 2588 } The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and, (2) punitive damages.

(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their subsidiaries or associates, if shown by the evidence; and the profits which the plaintiff would have gained by a con-

tinuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjectures and probable estimates does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damage has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty. The plaintiff has a right to prove the nature

page 2589 } of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

(2) Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or maliciously and with a design of injuring plaintiff in its business, or where the wrongful act is accompanied with insult, indignity, oppression, or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the

page 2590 } amount claimed.

If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way

of compensation, but punitive damages must bear some relation to the injury and the cause thereof.

In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing any acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done.

The jury is instructed that since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive page 2591 } rights of the parties in this case.

The jury is *instruction* that the burden is upon the plaintiff to prove by a preponderance of the evidence all facts necessary to constitute a claim for damages against the defendants. And you may consider a fact established by the greater weight of the evidence as being proven by a preponderance of the evidence, but a greater number of witnesses for the proof of a fact does not necessarily constitute a preponderance of evidence.

The jury is instructed that the plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interferences.

The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

page 2592 } Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character.

The jury is instructed that in Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce plaintiff to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellowmen, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends, that is, use persuasive powers in a peaceful way.

The jury is instructed that if you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for the defendants.

The jury is instructed that under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe that the plaintiff restrained or coerced such employees in the exercise of those rights, then the plaintiff acted unlawfully.

The jury is instructed that a part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant.

(b) No damages can be awarded unless you page 2594 } also find that the damages were directly and proximately caused by the alleged wrongful acts of one or more of the defendants.

(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages. If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on the profits the plaintiff claims it would have earned.

(e) If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should not be included in the profits, if any, of the plaintiff's then you must deduct such profits, if any, from the plaintiff's claim.

The jury is instructed that the plaintiff claims damages by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies. You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949, or was caused by the wrongful conduct of one of the defendants which conduct took place prior to page 2595 } that date.

The jury is instructed that if you believe from the evidence in this case that none of the defendants, or any of their respective agents acting within the scope of their authority, have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

The jury is instructed that if W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants.

The jury is instructed that none of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, Kentucky.

The jury is instructed that any evidence introduced on behalf of plaintiff to the effect that any of the defendants has a

bad reputation for failing to abide by the law in Eastern Kentucky is not to be considered as evidence that the defendants committed the specific wrongful acts alleged by the plaintiff.

### ARGUMENT OF GEO. E. ALLEN IN BEHALF OF THE PLAINTIFF.

Mr. Allen: Will Your Honor notify me when my time has expired.

May it please Your Honor and gentlemen of the jury: We are approaching the end of a long struggle which do doubt has taxed the capacities and the patience of all of us. The historians tell us that at the end of a struggle is peace. It may be so in this case. They tell us also that a struggle is a means to that end.

Indeed, gentlemen of the jury, the very life of the law itself is a struggle. Every legal right that we enjoy today, every fundamental principle upon which our American way of life is based, was wrung from those who denied it by a struggle, and sometimes a long struggle. A legal right, a fundamental principle, once gained, men have had to stand ready continually to defend it, else it would be lost to the benefit of society.

When an important right is challenged, somebody must of necessity rise up and assert the defense.

When Mr. Bryan went to Kentucky with contracts in his hands with those coal companies, with employees of his own choosing, he had a constitutional right to go there and to do business in that way, and when that important right was challenged, it was not only his duty to himself but his duty to society, to American civilization, to assert his right and defend it, and how magnificently he has done that in this case. How he has defended that right down to this good minute is worthy of the admiration of every patriotic citizen.

Gentlemen of the jury, the rights of the parties in this case are determined and may be determined by the decision of a few very simple question.

In the first place, did Hart and his men go to the job site in this case, as His Honor says in the instructions, with peaceful intentions? As my friend, Watkins, the Commonwealth's Attorney from Breathitt County says, did he get these men from homes which had Bibles and did he bring them there with Sunday school words on their lips to persuade, peacefully and in a Christian-like manner, these employees of Mr. Bryan to join his union for the betterment of their working conditions

and the increase of wages, or did he go there with these ruffians, this disorderly crowd of men and by threats, intimidation, force or threats of force, violence or coercion cause these men to leave their jobs and put them in such fear that they did not return? You are to decide what he went there for.

It is my purpose to point out to you a few things which I hope will help you to decide that question in our page 2598 } favor.

In the first place, His Honor says it is the duty of both employers and employees to negotiate. Collective bargaining is the rule, is the law. Did you hear of any negotiations on the part of this man Hart before he went there with that crowd of men? The only negotiations you hear of is that he called up Mr. Bryan on the 14th of July, 1949, and told him, "I don't care so much about the work you are about to complete, but you are not going to do any more work in Kentucky unless you work our men. This is United Mine Workers' territory."

Mr. Bryan asked him, "Don't do anything until I get out there." Mr. Bryan had a breakdown with his automobile and didn't get there until a few hours after Hart had made the raid. Who was it that failed to negotiate? Who was it that took the law in his own hands to begin with? Who was it that gave Mr. Bryan the ultimatum to start with: "This is United Mine Workers' territory. You have got to employ our men if you work out here." Mr. Bryan had a right to employ A. F. of L. men. He had a right to make a contract with them. He had a right to make contracts with the coal companies, and he had a constitutional right to go out there and get the benefit of those contracts, the profits that he might earn from the performance of those contracts.

Why, indeed, gentlemen of the jury, a contract page 2599 } is regarded with such sanctity in this country that it is in the Constitution of the United States that even a state can't impair the obligation of a contract, and yet these men, these defendants look upon a contract as a mere scrap of paper. "We don't care—" They didn't use that exact language, but the sum and substance of the testimony is, "That doesn't make any difference if you have employed A. F. of L. men. It doesn't make any difference about your contracts. This is United Mine Workers' Territory, and you have got to employ our men."

Do you believe the testimony that we adduced along that line?

Another thing to guide you in determining whether they went there with a peaceful intention and whether they exer-

cised their legal rights of peaceful persuasion. You remember the Hopewell incident. You remember that Mr. Bryan was working also A. F. of L. men in Hopewell on the jobs, and you remember that Mr. Fohl took that matter up with Mr. Bryan. You remember the conference that Mr. Bryan, Mr. Fohl, and Mr. Joinville had in Mr. Bryan's office. You remember that Mr. Fohl said he left without accomplishing anything, and the whole thing just withered away on the vine. Nobody knows exactly what took place between Mr. Fohl and Mr. Joinville except Mr. Fohl said that after that conversation with Mr. Joinville after they went out of Mr. Bryan's office, he never had any more contact with Mr. Bryan, he never followed it up.

When they found Mr. Bryan in Kentucky, can't you hear them saying under their breath, "We've got him now. He is in our territory. We couldn't do anything with him in Virginia. We have got him now. We won't let him do any work out here. We will kick him out of Kentucky."

Don't you know that was in their minds? Don't you know that is what they were doing?

I said there wasn't a particle of evidence to show that there was any complaint from a single employee of Mr. Bryan's, not a particle of evidence to show that any mention had been made of higher wages, different working conditions or anything of the kind. There had been no negotiations, no suggestion to it, or no requests.

And Hart gets this bunch of men. Why did he need all these men to help persuade? He said to make a show of strength. They say he was talking about a show of strength of the union. We say he was talking about a show of strength of force. Their own witnesses say there were not less than 25 or 30. Does it take all those men to go down there and engage in peaceful persuasion, peaceful picketing? Our men say there were many more. One of our men said he counted the men and he knows there were 47. He knows there were that many, and he knows there were more but he did not know how many more. So the evidence ranges from their witnesses there between 25 and 30, with our witnesses up to perhaps 100.

Take their own witnesses, between 20 and 30. What necessity was there for bringing all those men there if they were coming there for peaceful purposes? Our men tell you, one and all, witness after witness, that they came there with a show of force, threats of violence, using language too abusive for me to mention in this courtroom, language that people do not use in peaceful conversations, language which people do not use when they are resorting to persuasion in order to

carry their points. Several of their own witnesses on cross examination admitted that the men said they were scared. I have jotted the names down here. Several of them admitted that they were scared. A man named Jackson, put on by them, said that he had to join up with them to work. Hart himself admitted that he said he could get 500 men and bring them there if necessary, but he tells you that was just said jokingly. Hart himself admitted that there was some cussing there, but it was all just laughing and joking.

Grant Davis admitted that the men said they were afraid, afraid they would be shot and picked off the job, by men around in the hills. Bert Preston put on by them admitted that some of the men said the work was dangerous. This man Higgins—I believe he was the one who couldn't  
 page 2602 } hear anything, and all he could do was read your lips—said that he had to join up in order to get work there. He admitted that much.

But the witness who comes along and paints the prettiest picture of the thing you ever saw and uses language the most expressive and the most characteristic and descriptive of the situation that the expert could use was the man, McClellan. He said all seemed scared, "Sh-h, sh-h! trouble, trouble!" That ominous language tells the tale, sh-h, sh-h, trouble, trouble. It was their witness who admitted that.

Earnest Howard said he signed up because he couldn't work without signing up.

My friend Watkins, this nice looking young lawyer from Breathitt County, Kentucky, who came here and told you that while Breathitt County had this reputation of being "Bloody Breathitt," it had lived the reputation down and it was one of the most peaceful counties in the State of Kentucky, that some lady from Richmond came out there and stayed and came back and changed the name and gave it "Beautiful Breathitt, Beautiful Breathitt."

I asked him, "Mr. Watkins, couldn't you have determined that by examining the criminal records of Breathitt County and seeing whether you have more criminal prosecutions and  
 page 2603 } convictions there now than you did when it de- served this reputation?" He said "Yes." I said, "Did you do that before you came here?" "No." So you can just infer from that that if he had examined those records, they would have been evidence against him.

Another thing which you have a right to consider in determining the purpose for which Hart went there. You will remember that we called for the daily reports of Hart and Hunter. The evidence shows that Hart made a daily report.

I don't mean that he sent in the report every day, but at the end of a week he would report what he did every day during that week. And Hunter did the same thing. From that there were just dozens of reports that were made, but not a single solitary one that covers the period involved here, not a one. You read the other reports and you can see what they were doing at other times, and you will find that they say in those other reports that they closed down the job of Hamill at Ragland, Kentucky. You will find that they stated in one of those reports that on that job A. F. of L. labor was worked. They say in their reports that they closed that job down.

You will find that they closed down the Livingstone Construction Company at Toner, Kentucky, using their language, "job closed down." You will find that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, and you will find that they also worked A. F. of L. labor there when that job was closed down. I

page 2604 } say they closed that job down. I am mistaken about that. They didn't actually close it down so far as this record shows, but the report says that they gave the president of the company a week to think it over and if he didn't sign up, "We intend to close the job down." That is exactly what that report shows.

One of the reports also shows that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, because they refused to recognize the United Construction Workers, and the language is: "Job was shut down."

They gave us a little bit more in another place about the Hamill job. They said they had been trying to get Hamill to sign up for a long time, but they were never able to do it until a man, Fleming, a union representative, went there and whipped the bully on the job. Then they got the contract signed up. That is in their own report.

Gentlemen of the jury, if those reports are that bad about these other jobs, don't you know when they refused to produce the reports covering this period, that it covered all the activities that they engaged in and that if those activities constituted evidence of peaceful negotiations, peaceful persuasion, peaceful picketing, they would be here piled that high if they had that many. Oh, yes, they will answer and say we destroyed those reports in the usual course of business, and

the record shows that they keep them a minimum  
page 2605 } of three months. Some of them say they keep them six months, but in another place they say they keep them a minimum of three months. But you will re-

member that when Mr. Bryan went into Mr. Hunter's office, I believe it was a day or two after this July 26, 1949, a dispute arose as to the exact day or time that Hart went to this job site, and Mr. Hunter says, "I can settle it by looking at these reports," and he looked at the reports and Mr. Bryan saw the reports. He didn't see them well enough and close enough to read them, but he saw the reports and he saw Hunter look at them. Hunter was the regional director and was the boss that was immediately over Hart.

Gentlemen of the jury, I don't believe it is necessary for me to stress any further the evidence on the issue as to whether or not Hart went there with a disorderly crowd and exceeded the limits of peaceful picketing and peaceful persuasion as His Honor has described to you in the instructions.

The next question is, are these defendants liable for what Hart did? I believe this is Exhibit 63. It shows you District 50. You can see Washington and you can see the lines going all out from Washington. It says:

"District 50 members organized in the nation. The United Mine Workers of America has its national headquarters in the Nation's Capital, Washington, D. C. page 2606 } Through its full time legislative representatives the United Mine Workers of America is constantly in touch with matters before Congress. The United Mine Workers of America has 31 districts offices, and District 50 has 33 regional offices with numerous sub-regional offices. These offices have direct contact with legislatures in every state. An experienced staff of field organizers is ready at all times to assist members in negotiating and organizing. Organized on a nation-wide basis, District 50 has brought unequalled benefits to thousands of its members. District 50 will continue to organize the unorganized. District 50 is also doing everything possible to aid the war program of our government.

"The above map shows the great expansion of District 50 United Mine Workers of America, and how it has been able to bring economic justice to thousands of workers in every section of the country. Starting from Washington, D. C., the organizational program of District 50 extends into practically every state in the country and has welded together many of the hard-fought gains won by labor. Many unions much older than District 50 have never reached in their greatest days the success that has come to District 50 under the able leadership of its district officers and international president, John L. Lewis."

Remember, the record shows that Mr. John L. Lewis appoints the top leaders of District 50 subject to the approval of the International Executive Board of the United Mine Workers.

"To make such an organization possible, other districts of the United Mine Workers of America cooperate, and today after six years of fighting side by side with the men who mine the nation's coal, District 50 is one of the most aggressive units of the world's greatest labor organizations. The map also illustrates the great responsibility of District officers O. E. Gassaway, President, Miss Kathryn Lewis, Secretary-Treasurer, Charles S. Fell, International Board Member, and Michael F. Widman, Jr., organizational director," all of whom according to the record were appointed by Mr. Lewis, President of the United Mine Workers, subject to the approval of the International Executive Board.

"District 50 officers are in constant contact with all regional and subregional offices, insuring members of District 50 that their rights as union members and Americans are fully protected. District 50 has a competent staff of field representatives fully capable of organizing and negotiating contracts. These representatives are available for all locals any time any local is in need of assistance. District 50 has a capable staff of lawyers to represent its miners in every state whether they be involved in litigation before the War Labor Board, the National Labor Relations Board, Workmen's Compensation Acts, and so forth. Chief Counsel for District 50 is Attorney Alfred Cannon.

"Every dot on the map indicating regional offices or subregional offices means that Uncle Sam is collecting funds every day through war bond purchases of District 50 members. In practically every section of the United States locals of District 50 have taken a portion of their wages and invested them in the future of America. No union in the country can equal the progress or the expansion program that always has been the aim of the United Mine Workers of America. District 50 has penetrated into areas that other forces of organized labor avoided for years because of the strangle-hold giant corporations had on communities. In the deep South, in the North, on the West Coast, in the West, and in the East, District 50 has marched to victory through the backing of John L. Lewis and the United Mine Workers of America. The benefits won by District 50 are now being given to thousands of unorganized workers in various sections of the country.

"Members of District 50 are urged to place a copy of this map in a conspicuous place in their meeting halls. The map

shows that the members of District 50 from coast to coast have brothers and sisters in the labor movement in all sections of the country. The map also shows that a great deal of organizing is needed to assist the unorganized.

page 2609 } District 50 members can do their part by helping their field representatives organize plants in their own home communities that have not been organized under the banner of the United Mine Workers of America."

Organizing the unorganized everywhere under the banner of the United Mine Workers of America.

So says their constitution, gentlemen of the jury. Section 20 of the constitution of the United Mine Workers of America reads:

"District 50 United Mine Workers of America, subject to the jurisdiction and regulation of the international executive Board, is hereby created and set up under authority of the international union and may adopt by-laws and rules non inconsistent with the constitution."

And the rules of District 50 provides: "This organization shall be known as District 50, United Mine Workers of America, and shall work under and be subject to the constitution of the international union as provided in Article 20."

You see how it couples up.

Then the rules of District 50 say: "The administrative officers, operating under the authority of Article 20—" of the Mine Workers constitution—"shall have general and complete supervision over and administration of the affairs of District 50."

page 2610 } Section 1 of Article 4 of the rules of the United Construction Workers provides" "The administrative officers, operating under the authority of certificate of affiliation granted by the United Mine Workers of America, shall be composed of a national director—" that the national director is A. D. Lewis, the brother of John L. Lewis, appointed by John L. Lewis, subject to the approval of the International Executive Board "—who shall have general supervision over the organizational, financial, legislative and internal affairs of the organization, and a national controller who shall keep the books and records and act as custodian of the funds and property of the national organization."

That national controller is appointed by Mr. John L. Lewis, subject to the approval of the International Executive Board. "The national director"—again A. D. Lewis—"shall have the authority to interpret the rules and he shall render a de-

cision on all points of law or grievances submitted to him by local unions, and his decisions, and interpretations, shall be final unless changed by the International Board."

I will have to hurry along. I would like to read to you some more of those rules and regulations and provisions of the constitution, but the sum and substance of it all is that the organizational affairs and all the principal affairs of

District 50 are managed by officers appointed  
page 2611 } by Mr. Lewis, subject to the approval of the

International Executive Board. The evidence shows that the jurisdiction, so far as area is concerned, of District 50 is co-extensive geographically and jurisdictionally with that of the United Mine Workers itself. No other district of the United Mine Workers is like it. The other districts are sometimes a part of a state, sometimes a part of several states. I believe there are thirty-one other districts.

The evidence shows that even as to those districts Mr. Lewis revokes the charter at will and creates a provisional district, so to speak. The evidence shows that District 50 was createe as a provisional district, which means that it is governed, managed by officers appointed by Mr. Lewis subject to the approval of the International Executive Board, except no doubt they have some local elections and things of that kind and local affairs that don't amount to anything. They may have the right to attend to them.

Gentlemen of the jury, his Honor has told you in those instructions that if the United Mine Workers were using District 50 as an agent or a means or an instrumentality of organizing the unorganized in occupations other than mining, and that William O. Hart was an agent of District 50 and an agent of United Construction Workers, which is admitted,

and that William O. Hart went there and ran our  
page 2612 } people off the job, as we say he did, and if Mr.

Hart then was acting in pursuance of his duties in that respect, then all three of these defendants are liable, and if they did those acts in the manner in which they contend they did them, they are liable not only for compensatory damages, but for punitive damages, as to which I shall say more presently.

Not only is that true, but this evidence shows—and it came out of the mouth of Dixon when he was on the witness stand, the international representatives of the A. F. of L. He says it is the policy of the United Mine Workers, United Construction Workers,—of these defendants, I might say, to shorten it—is to raid jobs where workers are A. F. of L. men and by raiding he meant to run them off, not go there by peaceful persuasion, with Bibles in their hands and Sunday school words

on their lips, and say, "Our union is better than this other one. Now give me a chance to explain it to you. Come on with us." He says it is their policy to run them off.

Some witnesses said that they had a reputation in Eastern Kentucky of running them off. Under His Honor's instruction you can't consider that in determining whether Hart committed the acts we claim he did, but you can consider the reputation in determining whether it got back to the United Mine Workers and whether they knew anything about it or not.

page 2613 } Tom Raney right in the midst of it all, right there with an office in the midst of it all, right with Hunter, right with Hart, in the midst of all of that furor, never heard anything about it in his life. He didn't even know that Mr. Bryan was doing construction work in Eastern Kentucky, and he had been there about two years. He didn't even know it. I wonder what he was employed for. I wonder what his business was. Was he employed to do things in the interest of the unions and to shut his ears and eyes to things he didn't like so he could come here and say that although he was a member of the International Board and was there to assist Hunter and there to assist Hart and there to assist anybody else who needed assisting, if any of them did something they shouldn't do in the performance of their duty, he mustn't know anything about it and he must come here and say "I never heard of it." That is Raney.

Don't you know it wasn't possible for a man like Raney to live in that area and not know it? In Biblical language, this thing wasn't done in a corner. It was done publicly, notoriously, high-handedly, and he never heard of it, never heard of it! I don't know what salary he drew. I don't know whether the record shows it or not, and since I don't remember whether it shows his salary I will not mention it, but I say if they paid him any salary they paid him for doing nothing.

page 2614 } Gentlemen of the jury, all these reports that we have been talking about, dozens of them in the record, all show that they went to the headquarters in Washington. They went right to the desk of A. D. Lewis, National Director of the United Construction Workers, Chairman of the Organizing Committee of District 50, and mind you, the evidence in this case shows that the United Construction Workers didn't have any organizing committee. So the only organizational work that was done there is bound to have been done by the organizing committee of District 50 and Mr. A. D. Lewis, an appointee of Mr. John L. Lewis, was Chairman of that organizing committee, and those reports

went to his desk. The things that I called your attention to a moment ago were lying right on his desk, and he must have read them if we assume that he performed his duty.

There is one other remarkable thing about this case which proves in my mind conclusively that Hart was there in the performance of his duty. In our practice when a complaint is filed against a defendant, the defendants are required to file their defenses so we may know what to meet. So they come in here and file defenses. United Construction Workers don't file a separate defense, District 50 a separate defense, and United Mine Workers a separate defense. Oh, no.

They all join in and file the same defense and page 2615 } they all signed the same defense. I want to show you some things that they say.

Sixth Defense: "The plaintiff is not entitled to any punitive damages for the reason that under the law of Kentucky no defendant and no person for whose conduct the defendant or any of them are legally responsible has been guilty of any wantonness, oppressiveness, recklessness or of such malice as implies a spirit of mischief or gross indifference to the welfare or civil rights of others."

The eight defense: "The plaintiff's injuries and damages, if any, are not actionable"—that means you can't sue for them—"for the reason that they are the result of the exercise by these defendants"—all three of them because they all signed this paper—"and the persons for whom they are legally responsible of their legal rights under the First Amendment to the Constitution of the United States."

So they come here and say over their own signature that we can't sue for it because our damages result from the exercise by these defendants and persons for whom these defendants are responsible of rights under the First Amendment of the Constitution.

The First Amendment to the Constitution of course provides that no state shall establish any religion and then it provides that everybody shall have the right to page 2616 } exercise free speech and assemble peaceably and that sort of thing. That is what they are talking about, but they are putting them there as persons for whom they are responsible and they say "We are not responsible for them because they didn't exceed those rights under the constitution."

Gentlemen of the jury, I come to damages. His Honor has told you that there are two kinds of damages which may be recovered in cases of this kind. One is compensatory dam-

ages, and the other is punitive damages. Then His Honor has defined compensatory damages and he has defined punitive damages.

Compensatory damages, His Honor tells you, is what you might say is the measure of the loss sustained, the loss of profits, the loss of the value of the business connection with those coal companies, and losses of that kind, loss to business reputation, hurting this man's reputation in the business world by having contracts cancelled and being run out of Kentucky, and that sort of thing.

Then there is another class of damages which His Honor says we may recover in your discretion, and that is punitive damages. Punitive damages are not given, his Honor tells you, alone to compensate the plaintiff, but they are given principally, in view of the enormity of the offense committed, for the purpose of punishing the defendants, to deter them and others from the commission of similar offenses; page 2617 } and His Honor tells you if you believe from the evidence that Hart went there and acted as we say he did, that he didn't confine himself to peaceful picketing and peaceful persuasion, but used threats, intimidation, violence, or coercion, and as a result of those acts our people were scared away, so to speak, and failed to return to work, then you have a right to assess punitive damages, to punish these people, to punish them for doing such a thing. So far as this evidence shows, they weren't punished in Kentucky and they can't be punished here except through punitive damages in this case.

When you come to assess punitive damages, gentlemen of the jury, you have to consider this: What would be punishment for one person in a lowly walk of life, of small means, wouldn't amount to anything with persons in a higher walk of life, walking in larger circles with more influence.

Mr. Mullen: I hate to interrupt, but that is an improper argument under the instructions. It has been refused.

The Court: What about that, Mr. Allen?

Mr. Robertson: We think it is proper argument, Your Honor, but we will forego it.

Mr. Allen: I am not going to stress that. I will keep myself within the limits of the instruction.  
page 2618 } The Court: Disregard the last remark, gentlemen.

Mr. Allen: The instruction leaves it up to the discretion of the jury.

The Court: That is correct.

Mr. Allen: I hadn't come to that part. These gentlemen wouldn't let me finish. I am trying to be as fair as I can.

Gentlemen of the jury, in other words, you can allow no punitive damages against one defendant and punitive damages against another defendant, or you can allow punitive damages against all the defendants. All of that is within your discretion, and I say that if you believe from the evidence that District 50 was being used as an agency or instrumentality of the United Mine Workers to carry out their policy of organizing workers in other fields than in the mine fields, then you have a right in your discretion under His Honor's instruction to give us punitive damages against the United Mine Workers.

The Court: Three more minutes, Mr. Allen.

Mr. Allen: Now, gentlemen of the jury, you have listened attentively, and I am not going to consume the three minutes. Either my friend, Mr. Mullen, or Colonel Harris, or both, will follow me in due course. We all know Mr. Mullen. We love him. He is one of us. We still love him, if he is on the wrong side. Colonel Harris comes to us a leading  
page 2619 } lawyer from the great State of Alabama. I know  
you will give him respectful attention, and I know he is going to make you a good speech, but I don't believe even Colonel Harris, with his oratory and persuasion can convince you or any other fair-minded jury that what his clients have done to us is exactly right.

I thank you.

The Court: The Court will recess for five minutes.

(Brief recess.)

The Court: Colonel Harris.

#### ARGUMENT OF CRAMPTON HARRIS IN BEHALF OF THE DEFENDANTS.

Colonel Harris: If the Court pleases, and gentlemen of the jury: I want to say first that I appreciate the nice words that Mr. Allen said about me. I think the compliments of such an able trial lawyer are something that I shall remember. However, it shows how difficult it is for one person to read the mind of another person. I do not intend to indulge in oratory. It does not seem to me to be either the time or the place to deliver an oratorical address, if I were capable of delivering such an address. It seems to me that the problem confronting the jury and the problem confronting me is to give this case a calm, a careful, and a reasonable consideration.

In the first place, when any case comes up, the first question

that you want to know is who is suing whom. page 2620 } I want to make it clear in the beginning—and I hope that you gentlemen will remember it all the rest of the trial—the defendants named in this case are three. They are the International Union the United Mine Workers of America, they are District 50 of the United Mine Workers of America, and they are the United Construction Workers associated with the United Mine Workers of America. Those are the three defendants. Mr. John L. Lewis is not a defendant in the case. They have not sued Mr. John L. Lewis. We are not concerned with the internal management of the United Mine Workers.

Mr. Allen made one inaccurate statement. If you gentlemen will look at the constitution of the International Union of the United Mine Workers you will see that Mr. Lewis is elected by the rank and file of the membership, and if you will read it you will see that such precautions you have never seen exceeded, in my judgment, in your life, such precautions to see to it that the rank and file get to vote according to the way they please and that their vote is counted by men who are chosen for their specific purpose.

We are not here, as I understand the law of Virginia, to try some other lawsuit. We are not here to go into any past history unless that past history throws light on the accusations made against us.

They charge that we, the three unions, inter- page 26621 } fered wrongfully and unlawfully with the business of the Laburnum Construction Corporation. We deny that we interfered wrongfully and unlawfully with their business. You will find in the red folder when you go out, if you care to look at our defenses, that although the Laburnum Construction took page after page after page to state what it was claiming against us, we put our defenses, except the technical denial that we had to put in line by line, we put in our defenses very shortly and very, very simply. We said first of all that we were not guilty. That is the denial required. Then we said that whatever was done was done in the exercise of a lawful strike. We also said that if the plaintiff seeks to recover damages, his damages that he seeks from this jury do not meet the requirements of the law. We put in a defense that the damages he claims are contingent, remote, speculative, and uncertain.

Where does our issue come in this case? This is a case in which the witnesses on one side swear one way and the witnesses on the defendants side swear another way. Under those circumstances it is the province of you gentlemen—and no lawyer and no person can take that function away from

you—it is the province of you gentlemen to pass on the credibility of witnesses and see where the truth actually lies in the case. What did happen?

In the first place, to summarize the things that page 2622 } they charge us with out there on the morning of July 26. First of all, I think that we should all bear in mind that this is something that happened in the State of Kentucky. It did not happen in Virginia. Under those circumstances, as the judge has instructed you, the law of Virginia is simple and clear and to this effect: "Since the events complained of are alleged to have taken place in the state of Kentucky, the law of that state determines the substantive rights of the parties in this case."

Any idea or any experience that you have had with Virginia law is supplanted by the instructions that His Honor has given you with reference to the law in this case, the law that is determining whether or not we were guilty of a wrongful and unlawful act on the morning or the noon hour of July 26, 1949.

As I conceive it, when you come to examine the credibility of the witnesses, one of the reasons we have juries in America is that you gentlemen may bring in to this witness stand all of the knowledge and practical experience that you have gained in the management of your own affairs. You are to say whether a story told you is so remarkable that it is necessarily exaggerated or you are to say whether that story is accurate and true. When things are *to* remarkable to bear belief, that fact alone is impressive on the processes of human reasoning, and I call your attention to the re- page 2623 } markable situation in this case.

What do they claim on that noonday of July 26 that the men with Hart did? They didn't leave out much. I will put them in the order that I recall them. They said, first, that they were taken by the seat of the pants and thrown off. That was one thing they were going to do to them. They said, second, they were going to kick them off, in vulgar language. That was the second thing. They said, thirdly, that they indicated they were going to slash them with knives. They said, fourthly, that they indicated they had hidden pistols. My recollection is that Mr. Bryan said none of his men saw any pistols. Then they said, as number five, I believe, that they were going to drown them, that they were going to throw them in a pond; and then finally, that they were going to have men in an ambushade back in the hills with high-powered rifles and shoot them off.

Have you ever heard of a battle in which not a single shot was fired? Isn't it perfectly remarkable that out there in

Kentucky—and necessarily the life in Kentucky and the habits of the people in the mountains of Kentucky is a different life and their habits are different from the way of living of you gentlemen here in the city of Richmond. The habit of life of those people out there, according to the evidence that they put in, was such that those men were blood-thirsty. They go further. At page 624 of the record Mr. page 2624 } Bryan makes the statement of what he thinks.

Mr. Bryan makes the statement of what he thinks of those people out in Kentucky. Here is a question:

“Question: Bloody Harlem. Doesn’t that go back to the ancient feud days when they got those names?”

Mr. Bryan goes out there with Laburnum in this kind of community, and here is what he says about it: “It is not so ancient. Those people out there have a reputation of being ready to shoot you just as soon as they will look at you.”

Isn’t that necessarily slightly exaggerated? Have you run across any people in your experience that are willing to shoot a man just as soon as they would take a look at him? But that is what Mr. Bryan wants this jury to believe happened and was the kind of people that they had out in Kentucky.

There was a man named Freeman who testified. This is the most remarkable condemnation of a whole people that I have ever run across. I seem to recall that in English history a great orator got up and told them they couldn’t indict a whole people, but notice what Mr. Freeman, one of their witnesses, said at page 786:

“Question: This terrible reputation that Breathitt County has—the people in Breathitt County had that reputation long before July, 1949, didn’t they?

“Answer: Yes, it dates back as far as 1900. page 2625 } We have a statute of a Governor standing in front of the Capital now, from some of their outlaw activities up in that section of the country.”

The Mine Workers weren’t out there. The Construction Workers weren’t involved.

“Question: That wasn’t a United Construction Workers fight?”

And here is what one of their main witnesses says about everybody out in Kentucky, in Breathitt County and the adjoining counties.

"It goes to prove that they are not law abiding citizens."

Do you believe that that man has come in here and given an accurate picture that you are entitled to have of those people out there? If they were as bloodthirsty as the gentlemen on the other side would have you believe, isn't it the most remarkable bloodless experience that you have ever heard portrayed? When you come to look at what happened out there on July 26, there is not a man who was shot, there is not a man that had a pistol drawn on him, there is not a man that had a knife drawn on him. All they said was that they were whittling with a knife. There was not a man that was kicked. There was not a man who was thrown in a pond. There was nobody taken by the seat of the pants.

They said, "Well, we will get around all that. page 2626 } We will go out and prove that they did other things in times past." Well, let's listen to those other things a minute. Have they shown that anybody connected with the United Construction Workers ever shot anybody in Kentucky, that they ever ambuscaded anybody in Kentucky, that they ever threw anybody in Kentucky in a pond? They talk about them careering over Eastern Kentucky, and the Court has charged you that a matter of reputation is not proof of the act that they accuse them of doing on July 26. You will find that is one of the charges that the Court has given you.

With all that time, with all that area, if the United Construction Workers were violent and bloodthirsty men, isn't it remarkable that they didn't bring a man in here who would testify that they had beaten him, that they had mistreated him, that they had done any of the things that they accused the construction workers of doing on that occasion?

The only thing that they have got that I can recall that in any way deals with violence on any previous occasion is where a bully was whipped. I got the idea from that language that an individual and a bully got in a fight. My idea of a bully is a man who seeks a fight, who seeks to trespass upon the rights of others. That is what being a bully means. That fight with a bully is the only specific act that they have found in all their searching in the records of the East- page 2627 } ern part of Kentucky.

They had witnesses who said they closed down the job, but closing down a job is not running people off of a job. That is what a strike means, to close down a job. The law of Kentucky say we had a right to strike. There isn't any doubt about that. The Court has so instructed you.

Under the law of Kentucky we have another right that

some states don't allow. In Kentucky you can form a crowd, and it is not a violation of law for a crowd to form. Some states hold that a crowd is an unlawful thing, but in Kentucky the statute that is quoted to you expressly says that a crowd can form in a labor dispute.

And another thing, out in Kentucky all the men who are engaged in a strike do not have to be employees of Laburnum Construction Company. In other words, the men engaged in picketing can be strangers so far as Laburnum Construction Corporation is concerned. They had those rights. Those rights are absolutely undisputed.

But they come in and say "You forfeited those rights by being guilty of violence, of threats." We deny that we were guilty of violence.

We ask you to bear in mind that this testimony goes on up until August 7, 1949, and the evidence shows that they had a picket line out there for days afterwards, after the 26th.

During that period no living human being suffered any act of violence.

They say "Well, when they were there that day they got men to sign who didn't want to sign." I call your attention to the fact that we have a most remarkable situation there. Two of their witnesses said they knew those men that came over there with Hart. Those men were not a bunch of hoodlums. They were people that were working for Codell, for Allen-Codell, and for Codell-Faulconer. They were people who lived around in that community. Two of their witnesses say they knew them. Isn't it strange, with these men working on the job, these A. F. of L. men, from the previous November until up in July, and they come here to help you gentlemen find the truth, and not a one of them tells you the name of any man that signed a card under compulsion? I mean by that, they complained physical violence where they said one man was on one side and one on another, and one behind him. Weren't you entitled, if that happened, to have them name the man that that happened to? Weren't you entitled to look at that man and see whether or not he was giving you an accurate picture?

No, gentlemen, I submit to you that this case is in many particulars a puffed up case. It is not a complicated case. Although you have been tied up on it a long time, if you go back you will recall that we put on all our evidence in about two and one-half days. When you come to decide the issues in this case, they are not complicated issues.

First of all, did we commit those acts of violence? Did we frighten those people into leaving Laburnum's job? They

have to prove that by a preponderance of the evidence before you ever go any further. If they fall down on that, then that is the end of this case of theirs.

There is something else that is in this case. When anybody claims that a defendant has done them a legal wrong, you have to show two things. You have to show that the legal wrong—this is taken from one of their instructions—was the proximate cause of the damage to the plaintiff. It has to be the proximate cause of damages to the plaintiff. If something else caused the damage to the plaintiff, then even though a defendant had at one time been guilty of a legal wrong, the defendant would not be liable for any of the consequences caused by something else.

I don't intend to argue the remarkable happenings on August first, 1949. Mr. Mullen will argue to you, in the division we have made of this case, that remarkable situation that is in the case from August 1, 1949, but I say, leaving that to Mr. Mullen, there is still something else in this case that shows that no threats or violence or mistreatment of any sort caused those carpenters to quit work. Why do I say that? Because

Bert Preston in the toolhouse, told W. O. Hart pag 2630 } "If you don't put up a picket line, we will surely as hell work. But if you do put up a picket line, we won't work." He didn't stand up to the word "legal," but apparently the word "legal" was used in that discussion, a legal pickett line. And Hart asked him if he put a man down here and let him stand, and he said, "No, that isn't what has to be done. You have to have a sign." Right then and there Mr. Hart made a sign and put it up to meet the suggestion and statement of Bert Preston, the bushiness agent of this A. F. of L. local.

What else do we find about those picket signs? Mr. Bryan evidently thought the picket signs were the thing that were causing him trouble out there because Mr. Bryan, when he first got there, was handed a picket sign that Mr. Ragan had taken. Then Mr. Bryan himself takes up two picket signs on the 27th. If this was a violent and bloodthirsty group of men, can you imagine any greater affront to men who have been told to put up a picket line than to have somebody come and grab his picket sign and throw it over the hill or to throw it into the bushes, and then to take the other two and go up in front of some of the men and trample on it? Yet Mr. Brayan, doing that where these men could see him, never suffered any injury whatsoever.

I say that those men out there have given you gentlemen an exaggerated picture of what went on. I say that those

Kentuckians are not all scrappers on our side page 2631 } and all timid men on the other. You know that.

You have see too much of life to know that men can escape their own blood. In the animal world, do you believe that any pit bulldog is going to let anybody else chase him away? Do you believe that game roosters start fleeing en masse? Do you believe that a bunch of Kentuckians are all scared and are going to let somebody come and take their jobs away from them?

Let me ask you something. If the United Construction Workers had the reputation that they have tried to fasten upon us, that reputation was known to these carpenters when they met and knew that the United Construction Workers were coming. If those men who were working, those carpenters, were frightened, if the Construction Workers had that sort of reputation, then those carpenters wouldn't have gone to work on Monday morning, and they wouldn't have gone to work Tuesday. They would have said, "Hub-oh, these wild killers, these men are coming in here that are violent and bloodthirsty."

No, those men were brave enough to go out to the job when they knew that the Construction Workers were coming, and they quit because a picket sign was put up. They would never persuade me that fear was in their minds and in their hearts.

I don't want to attempt to quote what has been said about the picket line. Let us find the exact words.

If the court please, I only want to speak 35 page 2632 } minutes before I begin to make my conclusion. How long have I been talking?

The Court: Your 40 minutes will be up at a quarter past 12

Colonel Harris: This is the stenographic report, and I assume that the Court Reporter gets it true. You gentlemen don't know me, so I want as much as I can to avoid any question of your having to size me up in order to size up what happened in the case. Therefore, I will take the unusual procedure of reading to you again. At page 996 they are talking about the toolhouse.

"What was said about a picket sign or a picket line there in the toolhouse?

"Answer: The only thing—he told him the only thing we would possibly recognize would be a legal picket line, according to the laws of the Brotherhood.

"Question: He used the word 'legal', and 'according to the laws of the Brotherhood'?

“Answer: The law of the picket line, that is.”

Mr. Robertson: What witness is that?

Colonel Harris: Page 996. I haven't looked back. Chester Trimble.

“Question: You said just a minute ago—”

Here is what he is telling that Bert Preston told him.

page 2633 } “Answer: Not just a man standing up there,  
but one stuck in the ground.

“Question: You said a moment ago that he said ‘one that was legal according to the laws of the union,’ didn't you?

“Answer: Of the union, all unions, that is right.

“Question: You heard Bert Preston say that in the school-house?

“Answer: In words to that effect, I sure did. I don't know whether he worded it just like that but he meant—”

Get this. Does this look like they are frightened to death?

“—but he meant that would be the only possible way we could quit.”

He tells them how to put up a picket sign. He tells them what he expects. He tells them that he will honor it, and they follow his direction and nobody was hurt on the picket line thereafter, although they came along and took three more, I believe, of their picket signs.

That isn't the only thing that is said. There is another witness—this is on page 1011 and 1012, and this is Paris Trimble, another one of your witnesses.

“Question: When you went in the toolhouse I will ask you if this did not happen: Hart said to Bert: and  
page 2634 } by Bert I mean Bert Preston, ‘you will not have  
any more work,’ and Bert said”—

Is this a coward talking?

“—‘We will sure as hell work if you don't put up a picket.’”

Our people put up a picket, and the A. F. of L. carpenters recognized it.

In one place in the evidence they say that of course the men recognized a picket line. Question 18 on page 1065:

"Did I understand you to say that Mr. Preston made the statement that if they put up a picket line you wouldn't walk across it?

"Answer: Mr. Preston told them men there in the shop that we couldn't stop just on their say-so, but if they put up a picket line"—notice his language—"but if they put up a picket line, of course we couldn't cross the picket line."

That is their statement.

The interest of a witness is something that you have to determine, and these A. F. of L. witnesses who came here you have seen for yourselves. There is competition between the A. F. of L. and the UCW. I never have understood that raid meant to go out with force and violence, but it means to get the men to join their union, and that is what they were going to do.

page 2635 } In this case the judge has instructed you gentlemen that in Kentucky those carpenters and laborers had a right to organize.

On the 14th day of July, when Mr. Hart called Mr. Hamilton Bryan, Mr. Bryan asked him not to do anything, but what did he do immediately? He grabbed his phone and telephoned out to Kentucky and got his superintendent and said, "Get busy and get the carpenters helpers and common laborers in the A. F. of L."

Those men had been working out there since the previous November. They hadn't tried to organize them in the A. F. of L. Mr. Bryan himself said, 'I believe at page 623 of the testimony, that the contract which he claimed to have—I don't think he used the word "claimed"—the contract which he had with the A. F. of L. did not cover carpenters helpers and common laborers.

It somewhat looks to me—and I mention it for you to consider—it somewhat looks to me as if Mr. Bryan on that occasion and all along was somewhat in the attitude of hunting a lawsuit. He made this remarkable statement: "I spent most of my time writing down what happened." He doesn't tell you that that was just writing a diary.

Then on the fifth day of August he goes over to see Hunter and he spends from four o'clock in the afternoon until about eight or eight-thirty at night talking to Hunter, page 2636 } and Hunter argues with him about the advantages of the UCW, and Mr. Bryan swears that he was taking notes all that time, and he says that "Mr. Hunter didn't know whether I was going to negotiate or whether I was going to sue him, and if I sued him, how, when, and where I would do it."

I say another thing indicates there was no violence out there. On Saturday after the 26th Mr. Bryan went to Louisville, Kentucky to see his lawyer, and he spends a great deal of time in a law office. I don't know who those lawyers are. He didn't tell us. He doesn't tell us what he told those lawyers. All he tells us is that those lawyers told him he couldn't get police protection. I submit that if he had been able to report to those men that there was any violence or any danger they would have been able to get police protection. This sergeant of police who comes up here—Mr. Bryan is under the impression that the man was shot in the foot or the leg, and you saw the place where the bullet went in somewhere about there (indicating). That man on direct examination said Bryant didn't complain that there was any violence. On cross examination he said he didn't know whether he did or not, but I submit that if Bryan had reported to him the situation that these A. F. of L. witnesses come in now and tell you, that sergeant wouldn't stay away from there.

The Court: Your time is up, Colonel, unless you want to continue.

page 2637 } Colonel Harris: No, I do not. I want to see that Mr. Mullen has all the time possible for his presentation.

The Court: You asked me to stop you.

Colonel Harris: Thank you very much. Thank you, gentlemen.

The Court: Gentlemen, the court will recess for five minutes.

(Brief recess.)

. . . . .

page 2647 } AFTERNOON SESSION.

2:00 p. m.

(The following procedures were had in Chambers:)

Mr. Robertson: If Your Honor please, before lunch you stated to Mr. Mullen and me that one of the jurors had asked what the tax situation would be upon any recovery that might be allowed here, and six of the jurors had wanted that information all together. I STATED THAT I did not know what the law *as* and would like to find out. I asked Mr. Graves, the tax expert from our office, to look into it, and he says Mr. Mullen is right, as you always are, Mr. Mullen—

Mr. Mullen: Thank you very much.

Mr. Robertson: —that compensatory damages are taxable and punitive damages are not taxable. I don't think that that question can be answered unless both sides agree to it. We are willing to have it either answered or not answered, whichever way the defendants prefer.

Colonel Harris: I say no.

Mr. Mullen: I don't see how it comes in the case. Of course it is up to the discretion of the Judge entirely.

It could be prejudicial in giving punitive damages and it could be prejudicial in giving greater compensatory damages in order that the plaintiff would get more out of it, taking into consideration that part of it would go to Uncle Sam.

Mr. Fred G. Pollard: If it is explained that page 2648 } compensatory damages are taxable, it should certainly be explained to the jury that any profits he might have had would also have been taxable equally. So as to compensatory damages it doesn't make any difference.

Colonel Harris: It occurs to me that it injects a highly prejudicial element into the case. I have never run across a case in which the disposition that the plaintiff would make with any recovery after he got it becomes of any material importance in the case. It isn't what he is going to do with the money afterwards. It is whether he is entitled to it now.

Mr. Mullen: You have an expert on the jury, Goldman, who writes these tax letters.

The Court: Would it then be your suggestion that I just not say anything about it?

Colonel Harris: That is right.

The Court: That is agreeable with you gentlemen?

Mr. Robertson: Yes.

The Court: All right.

Suppose this juror should ask me the question, I will tell him that I don't think I should answer it. Is that satisfactory?

Mr. Robertson: Yes.

Colonel Harris: Yes.

Mr. Robertson: That that is not a proper page 2649 } question in this case.

The Court: That it is no matter of their concern or something of that sort.

Colonel Harris: That is right.

(The following proceedings were had in open Court in the presence of the jury:)

The Court: Mr. Mullen.

ARGUMENT OF JAMES MULLEN IN BEHALF OF THE DEFENDANTS.

Mr. Mullen: If Your Honor please and gentlemen of the jury: I deeply appreciate the patience and attention that you have given to me and my associates in presenting this case from our side. You have had a hard job. You have been take away from your business. But that is one of the things that make our American way of life that we are so anxious to defend against our many enemies. In serving on the jury you are helping to maintain that American way of life.

I am much obliged to my friend, Mr. Allen, for the testimonial he gave you as to the affection in which I am held. I hope it is true, and I hope that during the 51 years I have been practicing at this Bar I have so conducted myself as to deserve it. I may say in return that I have the highest regard for all the counsel on the other side. I have known them, known them for years, and I have nothing but  
page 2650 } the highest regard for them.

Mr. Allen said that I was on the wrong side. Well, I think it is known to you that I am what is known as the businessman's lawyer, or if you want to put it, a corporation lawyer, although that sometimes is used in derogation. However, I don't think that I am on the wrong side when I undertake to defend a group in their fundamental rights, and the laboring man has certain fundamental rights that have been a struggle for him to get. Those rights are recognized by the Constitution of the United States and the highest Courts of our land. I think that I am not on the wrong side when I undertake to help them defend their fundamental rights just as much as Mr. Allen says they are helping to defend fundamental rights.

There has been a great mass of evidence taken in this case, and a couple of hundred exhibits. I would say that 50 per cent of that hasn't much, if any, bearing on this case. There are certain fundamentals that you will have to determine in order to reach your verdict in this case.

We have stated to you that the common laborers were organized by the United Construction Workers, that what they did was within their fundamental rights as shown by the Constitution of the United States and by the laws of Kentucky,

and you have been instructed as to what those  
page 2651 } laws were and what rights they give. They claim that we did not properly exercise the rights we had. We claim that any damage or loss in this case was occasioned by the acts of Mr. Bryan. Those are the ques-

tions that you have to decide before you decide anything else, so they are the questions which I want to talk with you about today.

The first thing is that it is admitted that the common laborers were not organized in any union. The Court has instructed you that they had a right to organize. They were not covered by the contract Mr. Bryan had with either the Richmond Council or with the local union. Mr. Bryan recognized that when he testified in regard to the Paintsville contract that he didn't have anything to do with the common laborers. "Other than carpenters and millwrights, this agreement did not affect anybody else." That was a contract made without consulting in any way, without affecting in any way those common laborers.

Mr. Allen has said that what we were attempting to do would be a breach of contract, and that as guaranteed in the Constitution the obligation of a contract could not be impaired. These common laborers were not a party to that contract. Their rights were not consulted when that contract was made. It provided only for the millwrights, carpenters, and like skilled labor. So there isn't any question of any derogation of the rights of any of the parties to page 2652 } that contract for anything that the common laborers did.

The first question is, were the common laborers organized into a union under the United Constitution Workers? That Mr. Bryan has undertaken to deny. Starting away back prior to July, Prock Jackson has testified that while he was a laborer for Laburnum he wrote to Tom Raney and asked him to send someone there or to come there and organize the common laborers. He did not wait for that. He had enough initiative to change his job so as to get a higher rate and go into the Codell Company. Then on July 8 Mr. Robinson and Mr. Hart went to the job site and talked to some of the laborers. They wanted them to organize them. They signed up four of them at that time. They signed up Lee Bach, the foreman of the laborers. They signed up Green Staev. They signed up Matt Miller. They signed up Burl King. They gave to Lee Bach the cards to sign up other laborers. The testimony is that Lee Bach told them at that time that they wanted to be organized.

Then about the twelfth of July when Mr. Hart was over at the Codell Company, he got word that they wanted to know what he had done with Laburnum for them. So he sent them word that he would talk to Laburnum and let them know. Then he called up Laburnum on the 13th or 14th of July and told them that he was organizing the common laborers and would

like to have a meeting for the purpose of dis-  
 page 2653 } cussing a contract. Mr. Bryan said he told him  
 that he could not negotiate with them, but he  
 asked him not to do anything until he talked with them again.  
 On the 19th Mr. Hart got word from the representative of  
 the common laborers that they wanted to know what he had  
 done, and if he hadn't done anything they were going to strike  
 themselves. So he asked them to come to the meeting on the  
 24th in order to discuss the matter. That was Sunday, July  
 24. They had a meeting at the Carver schoolhouse, and in  
 that meeting were representatives of the Codell Construction  
 Company, already on strike, the Allen-Codell Company, and  
 there were 9 out of the 16 laborers present at that meeting.  
 After Mr. Hart had reported to them that he had not been  
 able to do anything, those 9 laborers organized and elected  
 Jerry Barnett and Ossie Lovely as stewards to represent  
 them in negotiating in connection with Mr. Hart. That is not  
 denied. That was a complete organization. They took the  
 obligation at that time with the UCW. There was no ques-  
 tion of forcing them to do that. They didn't have to come to  
 the meeting. They went there of their own accord. It wasn't  
 necessary thereafter for them to sign any cards. The only  
 purpose of signing a card thereafter was for the check off.

Following that meeting, they adopted a plan for striking,  
 and on the 26th came to the Laburnum site, first going to  
 Allen-Codell, then coming to the Laburnum site.  
 page 2654 } These men came with them for the purpose of a  
 picket line. There these laborers who had al-  
 ready come there with the UCW, who had already obligated  
 themselves, signed up cards, and those four who had already  
 signed again signed, and all the laborers except one, that is,  
 15 out of the 16, signed up, 9 of them there in addition to hav-  
 ing already obligated themselves.

So I don't think there can be any question but that there  
 was an organization at that time.

Mr. Bryan says, however, that the common laborers were  
 in the A. F. of L., that they had signed up previous to that  
 time. On that point they have produced certain cards signed  
 by all the laborers, A. F. of L. cards, signed on the 21st of  
 July, but those cards were never turned in to the A. F. of L.  
 union, and the president of the A. F. of L. union at Salys-  
 ville tells you that they could not take in laborers, that it was  
 a union of carpenters and carpenter apprentices.

Mr. Bryan had given instructions to Mr. Delinger after the  
 telephone conversation to have those laborers signed up in  
 the A. F. of L. He instructed Mr. Delinger to disregard the  
 UCW and pay no attention to them. Mr. Delinger thereupon

went up to the top of the mountain, he said, and talked to Monroe Sublett, the president of the Paintsville union, and he told him, "You had better try the Salyersville union."

Mr. Delinger, under instructions from Mr. page 2655 } Bryan, gave Mr. Poe time off to go and sign these men up.

You saw those cards. You heard the handwriting expert, Mr. Cassidy. He tells you that all those cards that were filled in were filled in by someone other than the signer, and all were filled in by the same person. Also the financial secretary of the Salyersville union has told you that those cards were never turned in, that they never held a meeting to take them in, and nothing was ever done, and Mr. Ragan has testified that those cards were turned over to him in July. They weren't signed the 21st of July, these matters were not concluded at that time, and he turned them over, cards that should have been in the records of the Salyersville union if they were a part of their official records.

Poe was a carpenter who was an employee of Laburnum Corporation, and Mr. Bryan testified that "Bob Poe was a carpenter who has worked for us for some time and became business agent of the Salyersville Local. Pursuant to Mr. Delinger's request he arranged to have those applications signed, and he gave them to me through Mr. Ragan and there was no question about the genuineness of them whatsoever."

Mr. Bryan has stated in his evidence that no inducement was held out to the men to sign. Let's see what he said. "Mr. Delinger told me he would discuss it with the representative of the union and that Mr. Sublett thought it was a good idea that the labor should be taken into page 2656 } the Salyersville local union as carpenters helpers. He told me neither one of the business agents had the forms and they would phone to Louisville and ask them to rush them out. As soon as the forms came, we were going to talk to the laborers about it." Mr. Poe was allowed to go out and talk to the laborers and sign them up.

Then this question: "You were going to change the classification from laborers to carpenters helpers in order to get them in the union?"

Answer: "That is right, and maybe give them a wage increase."

Mr. Bryan testified here the other day he had never heard about a wage increase. His memory was evidently bad because he had testified on cross examination to me just what I have read to you.

So that is the situation there with regard to the A. F. of L signing them. It never amounted to anything. It was never acted on, and they never became members of the A. F. of L. union.

The Court has instructed you that the common laborers had a right to organize and that if the plaintiff restrained or coerced them, the plaintiff was acting unlawfully.

Mr. Bryan undertook to select the union into which those men would go. That was not within his province. He had no right to do that. When he gave through his page 2657 } manager instructions to have them signed up in that way and to make inducements to them, he was in law restraining their right of free election.

The next thing that comes up is the question, was there a legal picket line or was there a strike? Mr. Bryan testified he never heard of a strike until he heard me mention it in my opening statement. I think the evidence is very full on that. Mr. Bryan testified: "When I got to the office at the job site on July 26, 1949, Mr. Ragan handed to me a placard, a piece of cardboard, sometimes called a picket sign, which had been placed on a barrel just outside of our office, which Ragan had taken down—"

Mr. Sublett said at the meeting that night, the 26th, that the carpenters had "Mr. Bryan will you put on a pair of carpenter's overalls and lead us across the picket line tomorrow morning?" I told him, 'Mr. Sublett, yes, I certainly will.' "

Then Mr. Bryan testified that on the 27th when he went back there he found a picket sign near the office, and he went over and pulled the picket sign down. Those picket signs have been shown to you here.

On Sunday the 31st it was testified he went to the job site. He was asked, "Did you go to the schoolhouse when you got out there on the job site?"

page 2658 } "The first place we went to was the schoolhouse." Was anybody there?" "Nobody was there but there was a picket sign."

He made the same reply when he got to the office.

So there were picket signs. That large black and red one was the one that was there at the office at the time.

After being questioned about the picket sign he took down, he was asked, "The only use of a picket line is in connection with a strike, isn't it?"

"I don't know whether it is the only use. You generally associate a picket line with a strike."

So Mr. Bryan certainly had notice of a picket line, and a picket line means a strike.

Then Bert Preston, who was the business manager, was there. Bert Preston got rather mixed up on his testimony here. He denied his affidavit and the deposition he had previously given. On cross examination he admitted he told Hart if the UCW established a legal picket line the local union would honor it and if they did not have a picket line the next day they sure as hell would work.

Bert Preston testified he told Hart that he would have to put up a card to show what he was picketing for, and then testified that he told Starr that they had put up a picket line and they would have to recognize it. Bert Preston said:

“The end of it was that he was going to picket, page 2659 } and he told one of the fellows to walk out there and stand, and I told him we wouldn’t recognize that kind of picket, that they would have to put up a card to show what they were picketing for.”

“Question: Did he do that?”

“Answer: Yes, sir.”

Henry Starr also testified as to where the picket sign was put up.

“Yes, sir. He went out there to put up one and Bill Maynard, of the coal company, asked him not to put it up.

“He then took it down and put it on the road five or six hundred feet over to the highway and left it there.”

Jack Patrick and Paris Trimble both testified that they heard Bert Preston tell what I have just read you that he testified to, and Jack Patrick said, when asked why he didn’t go back to work, “In the first place, they threw a picket line on it, and in the second place if they hadn’t, I would not have gone back.”

Then Chester Trimble testified that Hart said: “I am going to stop the job.”

“Bert said ‘how?’” Hart said, ‘I am going to put up a picket line.’ Bert said, ‘A picket line, according to law, we can’t cross it.’ He said ‘I will send a man over there at the foot of the stairs.’ Bert said, ‘By God, we will  
page 2660 } to by him. He doesn’t mean nothing standing there.’”

So Hart wrote out a picket sign and put it up just as Bert

Preston had told him he would have to do to establish a legal picket line.

Mr. Lonnie Dixon, one of their witnesses, testified:

"Did you go back to work that afternoon?

"No, sir, I didn't.

"Why?

"They threw a picket line up.

"Were you scared to go to work?

"Well, I didn't cross the picket line.

"Was it on account of the picket line or on account of being scared or both?

"Well, we are supposed to honor a picket line. We ain't supposed to cross that line, you see. I wasn't afraid of nobody, but I would rather not went across."

Otto Preston confirms what Bert Preston said in the two letters. He also confirms that Preston, the next day, on the 27th, asked Hart if he still had his picket up and when he did he said, "I have no talk for you."

LeGrand Mayo said that Bert Preston said, "They are going to put up a picket line, and we can't cross the picket line, and we will have to wait and try to get it straightened out."

page 2661 } Then LeGrand Mayo testified that on the 27th,

"Well, they still had their picket line up and men. There were the pickets, but at that time they had moved it over to about where Laburnum Construction office was and they said there would be no work and we sat around for a while. The men I seen there that day were still there with their pickets that morning."

Mr. Salvati testified that he was present on an inspection trip on one particular day when the trouble arose.

"Did you see a picket line at that time?

"I did.

"Did you note any violence or hear any threats while you were there?

"I did not."

There is an outsider testifying.

Mr. Haslam, the superintendent, testified that he was called down to the tippie where the men were as soon as they came there, and that there was nothing in the way of violence, nothing unusual, and he testified that on the 27th the picket line was there.

Mr. Hart has testified the same thing as to what Preston

told him, and he testified that the men were there with him to support the picket line.

Grant Davis, a carpenter, testified that when he went back on the 27th there was a picket sign at the fork page 2662 } of the road, and he and the people with him halted at that picket sign. They did not go through it because it was a peaceful picket sign.

"There were two pickets that I seed of at that picket line, and they had a picket sign tacked up on a stick. Mr. Bryan tore the picket sign down and then asked the men to go to work."

Grant Davis went back to the top of the hill. He didn't have to cross the picket line to do that. He went around. Some of the boys said they were afraid to go to work and some said they weren't afraid, but they would not go through the picket line because they thought they ought to stay out to sympathize with the other boys, that is, laborers. He heard no threats made to shoot anybody or beat anybody. He saw no one disorderly.

"You were not afraid to go back?"

He felt he ought to stay away to sympathize with the other boys. He said the boys who were afraid to go were just natural cowards.

Mr. Harrison Daniels, a carpenter, testified that at the meeting on the 26th Bert Preston said he would not cross the picket line. He saw Mr. Bryan take the picket sign down on the 27th and went back to work on the 27th at the top of the hill and Delinger called him off. They all met at the office and Bryan was still trying to get the men to go page 2663 } back to work and the men just decided they wouldn't cross the picket line and go back to work. This is one of the carpenters testifying. Nobody threatened Mr. Bryan when he took down the picket sign. He heard no cursing or threats to shoot anybody. He later saw Bryan in the Herald Hotel and talked to Bryan. Bryan told him he didn't know anything that would do him any good. Asked if he was afraid to go back to work, he told him he was not afraid, just as Grant Davis had.

Mr. McClellan was at the carpenters' meeting. He said the picket sign was taken down before he got there. He saw Bryan lead the men to the tipple. He went to work.

Here is the one that Mr. Allen took so much store by, who said "Sh-h! Sh-h. Trouble, trouble." He didn't say that.

He said the man who came there and wanted him to call the people down from the top of the tippie was the one who said that, and he refused to do that unless and until Delinger or Patrick came there, and they came and took the phone out of his hands and called the men down.

Lee Allen, who was there to get a job, testified he saw the picket sign, and he refused to go back when Bryan offered him 90 cents, that is, he refused to sign up. He testified he was not afraid to go to work.

Lee Bach went back on the 27th and talked to Mr. Bryan there. He told Mr. Bryan the reason he did not  
page 2664 } go to work was that he honored the picket line and would not cross it.

So there we have the question of the picket line.

That shows that there was a strike.

In addition to that, it is not denied that the laborers at the meeting on the 24th at the Carver schoolhouse unanimously voted to go on strike. They adopted a plan, namely, that the Codell Construction men, who were already on strike, would join Hart. They would then go to Allen-Codell and those men would quit work and join them, and then they would go over to the Laburnum site, and the laborers there would quit work and join them.

So I think it is conclusively shown that there was a strike, that there was a picket line established.

They further claim that this was a disorderly mob that came there. What is the evidence on that point? The evidence is that these men were composed of the laborers of the Codell Construction Company, the Allen-Codell Company, and the laborers of Laburnum who joined them. Many of the men testified they knew them, that they were neighbors and they lived around there. They went there for a common purpose. They were all working there on the development of that mine under their respective employers for the Pond Creek Pocahontas Corporation. They had a common interest in being organized and in being represented in nego-  
page 2665 } tiations with their employers. They went there for that purpose.

Mr. Bryan testified that he had a report from his people that there were from 75 to 100 persons, that Laburnum's workers had been threatened and intimidated, that a lot of the crowd was drunk, that a lot of them were armed, that his employees were outnumbered and that they didn't have any choice. You remember there were 64 employees of Laburnum there, some of them working at the schoolhouse, some working on the tippie, four or five working up on the top of the mountain. On cross examination, however, Mr. Bryan testified,

when asked to read his notes, that: "Many of our workers believe that some of the group headed by Hart were carrying guns or pistols. While nobody saw any guns, some of our employees thought they saw the outline of pistol handles or bullet cylinders concealed under the shirts or in the pockets of some of the group."

Henry Starr puts it at between 50 and 75. He claims the men were drinking, that he saw two guns sticking under their belts and other prints of guns under their belts. He saw no knives. No disorderly conduct.

The cursing was not addressed to any particular person. All through this you will find that nobody testified that he was cursed or that he was threatened. They speak of it just in general language.

He said Hart made threats. He is the one page 2666 } Who said he was afraid to go back. Henry

Starr was the foreman of the carpenters. He had to justify what he had done.

Bert Preston said there was something near 40 men. Bert Preston said he never saw a drunk man, and never saw any weapons. That is their own witness testifying.

Now take the three Hackworths who told a remarkable story in that it was almost exactly word for word from each of the three brothers. They said they saw from 35 to 50 men. They all claimed that some were drunk. They all say they saw no guns, although Jack Hackworth claimed that one of the men rubbed up against him so he could feel a gun in his shirt. The testimony shows that the Hackworths were working on some lumber going to the schoolhouse, which was on saw-horses. They were on one side and Mr. Hart and his men were on the other side.

The only man who goes clean up in the air is Chester Trimble, who said from 100 to 150 men. Paris Tribble saw 60 men.

Jack Patrick, the steward, said he did not see any drinking. He didn't say he was afraid. He referred first to the picket line. That was the first reason he didn't go back.

I read you what Lonnie Dixon said, that he was not afraid to go back but would not cross the picket line.

LeGrand Mayo said he didn't see any one take page 2667 } a drink, no one hit him, he was not harmed in any way. He put his finger on what it was. He said there was just loud and boisterous talk. Loud and boisterous talk isn't violent unless it is followed by some act.

Delinger testified he counted 47 men and perhaps there were more there. Of course you remember his description of them as a movie picture mob, that the men were badly dressed.

Certainly they were badly dressed. Most of them had come off from work, had on their working clothes. Those who were working in the quarry, in the dust of the quarry, of course their clothes looked dirty.

Prock Jacison, who was there at the quarry, testified that there were no drunk men when Hart came there.

Hart testified he had between 20 and 30 men, and that they were composed of the laborers of the three companies I have mentioned. It has been suggested by one of the counsel on the other side that Hart was referring only to the men he had at the schoolhouse. There wasn't any other for him to get after that. And the men at the schoolhouse said, "When we eat our lunch we will come on up to the tippie, and they did, so they were all together at the tippie."

John McClellan talked to the A. F. of L. men on the 26th. He said there was no cussing, no threats, no drunks, no violence, no guns.

Lee Allen, who went there to get a job, testified page 2668 } tied to the same thing.

Lee Back said there were from 20 to 25 men, none drunk, not *outline* of guns. Employees were not forced to sign, but signed willingly. In fact, most of them were signing up a second time, having already obligated themselves.

Burl King estimated between 20 and 30 men with Hart. Ernest Howard said none of the men were armed. He heard no threats.

Those last four men were these laborers.

The only testimony is they claim that one man, one of the laborers—they saw a man get on each side of him and a man behind him and said, "sign up." That is the only evidence they have offered in this case of violence.

Haslam, who was certainly disinterested, saw no disorder and nothing unusual, and said there were 25 to 30 men. As I said, Salvati saw none, but he saw the picket line.

The state trooper said he investigated and there was no violence there.

On the other days after the 26th there was no crowd there. The testimony is that nobody was hurt, nobody was hit, nobody was shot at, and yet Mr. Bryan who, if all this disorder was threatened, all this violence was threatened, would be in the eyes of those men the chief devil, went around there and nobody ever shot at him, nobody ever threatened him or went around at night. Although those roads, he said, were so dangerous, nothing happened to him. Nothing happened to him when he pulled down the picket sign, and if there was ever an affront to a union, it is to pull down their picket sign. Nobody stopped him. Mr.

Robertson said all he was asking, he was hopeful they would honor the picket line, that if they went across the picket line, that was that. The men did go across the picket line there, and none of them was hurt.

The men who testified that they were afraid to go back were the leaders of the A. F. of L. As I have shown you, all of them recognized there was a picket line. Perhaps they had to justify themselves in what they did, and as a secondary thought they said they were afraid to go back.

A strike, gentlemen, is not a pink tea, and the court has instructed you, "minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character."

He also advised you that the rights to bargain, to associate collectively, and to go in a crowd are not lost because others who are not employees of the plaintiff join with them in asserting the employees rights.

So even if there had been outsiders, they were not violating the law.

page 2670 } The court has further instructed you if the men were frightened off by the reputation of Breathitt County for violence, that that is not a responsibility of or a liability of United Construction Workers. The only excuse these men give, other than that they didn't want to cross the picket line, was that they were afraid of the violence by reason of the reputation of Breathitt County. If that is the case, the Court has instructed you that the defendants are not liable by reason of anything the men did through fear generated by the reputation of Breathitt County for violence.

You all know what a strike is for. The purpose of a strike is to close down the operation of a business until a contract can be negotiated. It was entirely within their rights, so the court has instructed you, under the laws of Kentucky, for these men to strike.

It is for you gentlemen to say, on the evidence that you have heard, a good deal of which I have outlined, whether there was violence or whether there was just minor incidents, as the Court said, which would not affect a man of any strength of character. We submit that they were entirely within their rights when they went there when they set up a picket line, that no violence has been shown, and that they had the right under those circumstances as the court has instructed you—"In the exercise of these rights, such employees had the right to interfere with the plain-

page 2671 } tiff's business without being liable in damages for such interference."

So much on the question of whether UCW was within its rights when it went there and when it established a picket line, when it maintained that picket line, from that time on.

The other phase of the question, the position that we took was that Mr. Bryan's own acts were the cause of any loss of business or any loss of business connection. Mr. Bryan said that when he was called on the 14th he told Mr. Hart"

"I told him that we had agreements with the A. F. of L. unions, and it wouldn't work out, that I didn't see how we could do it. So I told him I would think about it. I didn't see how I could do it. I asked him to think about it and to let me hear from him again before he did anything."

What did Mr. Bryan do? He asked this man not to do anything until he talked with him again. He immediately picked up the telephone and phoned his manager to get these men in the A. F. of L. He phoned him to ignore the UCW. He went out there on the 19th or 20th of July. He didn't go anywhere near Mr. Hart. He didn't try to talk to him. He never asked Mr. Hart, "Let me see whom you represent and let us sit down and talk about it. I think that is extremely poor business judgment. I think any of you businessmen  
page 2672 } would have said, "All right, let's talk it over."

You might not reach any agreement, you might still maintain your position, but certainly if you felt that your business was being risked, you would say "Let's sit down and talk."

Mr. Hart had the right to think that when he asked him not to do anything until he talked with him again.

If a lawyer phoned me that he had a claim against a client of mine and after a few minutes discussion I said, "I want to think it over. Please don't do anything until I talk to you again," and then I immediately turned around to do something to defeat that claim, I think that I would be disbarred from the practice of law.

Mr. Robertson: If Your Honor please, I think this is improper argument. Mr. Mullen has no right to testify in the case like that. He is arguing the testimony, not what would happen if he did something that would cause him to be disbarred.

Mr. Mullen: I was merely illustrating—

Mr. Robertson: I know, I think it is an improper illustration.

The Court: Go ahead.

Mr. Mullen: Let it go.

Mr. Robertson: I don't think you will ever be disbarred.

Mr. Mullen: Thank you. I won't ever do such a thing.

As I say, he went out there and didn't try to  
page 2673 } do anything and didn't have any talk with Hart.

But he did talk to Delinger about getting the men in the A. F. of L. That was rather an abortive effort as I have already discussed with you. He was simply following a plan that had worked over at Hopewell. At Hopewell he had 37 common laborers who were not in any union. Mr. Fohl signed up 31 of those. He signed up 10 of them in April, 1948. He signed up 9 more on October 11 and October 15. That was 19 of the 37. There are four cards that have a date on them, but failed to have the month. There were six, I think, that are not dated. He had a majority long before he ever went to Mr. Bryan.

He phoned Mr. Bryan on the 21st of October, according to Mr. Bryan's testimony, and told him he wanted to talk to him, that he represented his laborers. Mr. Bryan put him off until the 27th. He put them off until the first of November. I said, "Mr. Bryan, what did you do?"

He said, "I immediately phoned Joinville and told him to get busy and sign them up."

Those men had been signed up, some of them, for six months, all of the 31 and before he ever went to Mr. Bryan, and they had had meetings to obtain initiation fees and dues, and yet Mr. Bryan followed that plan and he undertook to follow the same plan out there in Kentucky.

Mr. Allen said that the reason they went out  
page 2674 } in Kentucky was because of that occurrence in

Hopewell. If they wanted to get after Mr. Bryan by reason of that, they had plenty of time to do it. Mr. Bryan had eight contracts in West Virginia, which is in region 58, over which Mr. Hunter was in charge. He wasn't disturbed on any of those contracts. It was only here, where his common laborers were not organized, where they sought organization, where Mr. Bryan tried to thwart their organization and a union of their own choosing, that any trouble occurred.

Mr. Bryan was not there on the 26th. He was not there and doesn't know what happened. He has only reports, what he wrote up for his witnesses to sign, you remember he said was mimeographed in Huntington. That is what he has been largely depending on. When he saw Mr. Hart that afternoon, Mr. Bryan immediately started to ask what the hell he was doing, shutting down his job? He didn't say to Mr. Hart, "Let's sit down and see what all this means. Let's talk this over and let me know whom you represent. I would like to see what can be done." Wouldn't you businessmen have

followed that course if you thought your business was in jeopardy?

Instead of that, he told him he wouldn't negotiate with him. "I told Mr. Hart that I was going to finish the job and I wasn't going to use United Construction Workers men."

He said at the meeting on the night of the page 2675 { 26th, "I said that based on my experience with

United Construction Workers that afternoon I didn't care to make an agreement with that organization or to use any of the men."

He testified in answer to a question that I asked him, "I had just as soon negotiate with Mr. Hart as with a robber in my home." He hadn't ever met Mr. Hart. He didn't know whether Mr. Hart was an angel or a devil. He at least could have sat down with him and tried to find out and see if there was any way to prevent trouble. No, he didn't do that. He was going to have his own way. "I am not going to do any negotiation with you. I am going to finish the job, and you just go jump in the lake as far as I am concerned."

Mr. Robinson, who was with Mr. Hart, went back there on the 27th. First, before that, on the 26th I asked Mr. Bryan, "You didn't try to negotiate, didn't try to get a peaceful settlement of it?"

"There wasn't anything to negotiate about."

He never asked Mr. Hart, "Let me see your cards," or anything else. If Mr. Bryan disputed that he represented them, he had means open to him to find out whom he represented; he had a right to ask for an election by the National Labor Relations Board in any labor dispute, and they would determine once and for all who represents any group of men.

That would have disposed of the matter, but he page 2676 { didn't do that. He said, "I told him we had agreements with A. F. of L. unions and it wouldn't work out." He said he told him that over the phone.

We put Mr. Cundiff on the stand, who followed Mr. Bryan there and did work, and Mr. Cundiff said, "Yes, I employed skilled labor in the A. F. of L., and I employed common labor in the UCW. I was there for seven months. I never had any friction whatever in working the two together."

Mr. Bryan had been working union men and non-union men. That is harder to do than to work two unions.

Mr. Robinson said that he went over there and talked to Mr. Bryan. Mr. Bryan said he made no threats. He said to Mr. Bryan, "If you are talking about a strike, we can settle it," and Mr. Bryan said "How?" He said, "Let's sit down

and talk the matter over and see if we can reach an agreement." Mr. Bryan again refused to do so.

On August 1 Mr. Bryan testified that he was at the job site and that Mr. Hart came over there, and he had Mr. Hart talk to Joinville, and Mr. Bryan testified that he said to Mr. Joinville, "You can't work unless the men join the UCW," but when Mr. Bryan read from his notes it shows that what he told Mr. Joinville in Mr. Bryan's presence was, "You can't work unless you recognize the laborers." That was all he was after. There is plenty of evidence all through this to show that he was after no one except the laborers.

On August 1—I don't care what had happened page 2677 } prior to that—he said "Mr. Hart told me—I said for the first time—the only people he was interested in were the laborers, and if I would recognize the UCW as the representative of those common laborers they would all go back to work."

Gentlemen, what would you have done if that had been your business? Wouldn't you have grabbed that opportunity—

Mr. Robertson: If Your Honor please, that is improper argument.

Mr. Mullen: That isn't improper.

Mr. Robertson: The Court has ruled time and again that you don't put the jury in a situation like that.

Mr. Mullen: I am not asking them to answer any question here.

Mr. Robertson: Yes, you are. I submit it is improper.

The Court: Just ask what the average person would have done under the circumstances.

Mr. Mullen: All right, what would the average businessman have done under the circumstances? Wouldn't the average businessman have grabbed that opportunity? Wasn't that an opportunity that Mr. Bryan had to prevent any loss he is now claiming damages for?

page 2678 } If Your Honor please, I have until 10 minutes or until a quarter past?

The Court: You have about until about 12 minutes after.

Mr. Mullen: Also at that time he asked Mr. Hart to throw over the laborers and let the carpenters do the work that the laborers do, which Mr. Hart very properly refused. The next day he asked Mr. Hart to come over to Salyersville and there was a meeting of some 10 or 12 of the high men in the A. F. of L. They talked and talked and finally wouldn't talk to Mr. Hart. So Mr. Bryan came out and said the A. F. of L. wouldn't let him do anything.

The A. F. of L., if they had a contract with him to furnish him with workmen, certainly fell down on the job, and when

the other party to a contract falls down on the job, is a man going to sit still and say, "Nevertheless I am bound by it. I ain't going to do anything to save my business or to help my business in one way or the other." He had ample opportunity. He was willing to throw over the Paintsville Union and take the Salyersville union. He had a perfect right to go and make an agreement with these men. He had it at all times, as a matter of fact.

Then he goes back to Huntington, and he talks it over with Mr. Salvati, and then he has them write him a letter terminating those contracts, and Mr. Salvati says "I understand," so and so. Mr. Salvati said he didn't know of it.

Then he goes to Mr. Hunter and talks with him for four hours, leaving him under the *impressing* that he is trying to negotiate a contract. After talking for four hours he turns around and says, "Mr. Hart doesn't know whether I am going to sue him or what I am going to do."

But one very significant thing right there. He said to Mr. Hart, "I could organize a separate corporation to do this business here." Again, wouldn't a business man have taken that means which he himself recognized in order to save his business and to save his connections if he wouldn't follow the other course? He recognized that there was a way open to him to do that.

So it goes on to May 15, and he goes over to talk to Hunter again. Hunter said, "You as an American citizen have a perfect right to bid in Mingo County, but if you do bid I will try to organize your men, and if I succeed I will expect a contract." It was entirely within the rights of Mr. Hunter and the UCW to do that.

But he goes back and tells Mr. Salvati that Mr. Hunter said if I get a contract he ain't going to let me build the houses, he ain't going to let me complete it. That wasn't what Hunter said. That was the basis on which Mr. Salvati wrote him the letter.

His business wasn't broken off at the time of page 2680 } this suit. He was bidding, he continued to bid, he was asked to bid, he was offered the opportunity of bidding, and he bid after this suit. They were contracts not only down there at Evanston, but in other places. The evidence is that he did bid on contracts and he bid about \$75,000 or \$80,000 higher than anybody else, and added conditions with it which made it look like he wasn't trying to get the contract.

I think it is true that Mr. Salvati was his friend. I think

he was a very good friend of Mr. Bryan's. I think he did everything after August 4 to give Mr. Bryan an opportunity to use some business judgment and to continue his work out there, and Mr. Bryan could have done it by using business judgment. I don't know of a worse example of poor business judgment than he exercised in this case, and the failure to exercise good business judgment was what terminated his business relation with the Pond Creek Pocahontas Company and its associated companies.

I think that and the stand of the A. F. of L. after they failed to live up to their contract are the basis of any loss that he had, because he could have prevented it. He could have followed any of the courses that I have told you were open to him, which he himself knows, one of which he himself pointed out. I can't imagine any contractor refusing to stay in business. You have to go in various union territories if you are building all over the country. You have to adapt yourself to the territory that you go in. All he had to do was to reach an agreement with those 15 men and save the other 48 jobs and go on with his work.

Gentlemen, I have tried to go over this matter from the standpoint of a businessman. I have tried to show you just what were the legal effects of what was done. I have tried to show what was open to Mr. Bryan. I do not possess the oratorical gifts of my friends on the other side. I can only talk as a plain businessman. I think that I have shown you that our position in this is the correct position, that it is justified by the evidence, and I leave the matter in behalf of my clients in your hands with that explanation of what we believe the case is.

I thank you.

The Court: Gentlemen, the Court will take a five-minute recess.

(Brief recess.)

The Court: One hour and 15 minutes, Mr. Robertson.

ARGUMENT BY ARCHIBALD G. ROBERTSON IN BE-  
HALF of the PLAINTIFF.

Mr. Robertson: If Your Honor please, and gentlemen of the jury, we come now to my final part in the trial of this case. Four weeks ago all of us were called from our different walks of life, and for the past 28 days you have listened to a

story that has been unfolded here which I believe you will never forget. When we separate this evening and go our several ways I believe your verdict will be flashed from one end to the other of this land because I think this case represents far more than the mere sum of \$500,000 and far more than what Laburnum gets out of it.

I think, as you will recall, it is a case where Hart, whose own boys called him a liar, has won the first half of his bet, "I'll bet you \$500 you will never finish a job in Kentucky unless you use UCW workers." The verdict, the news that is going to be flashed from this courtroom tonight is, does Hart win the second half of his boast, "Nobody yet has ever yet been able to buck the United Mine Workers of America, and you can't do it, either. We have shut down other people throughout Eastern Kentucky and in West Virginia, so why should you complain?"

It is for that reason that this case has been brought here, which is a case to cover compensatory damages to make good the losses, present, prospective and past, that I am going to mention in a little while, and also to punish this wicked and cruel and arrogant "one organization." I dare say that the lights will be burning this evening at 900—15th Street, Northwest, where John L. Lewis maintains his office and where his brother, A. D. Lewis, maintains his office and where his daughter, Kathryn Lewis, maintains her office, and where they can communicate by telephone with the niece and her husband, Fohl, in Richmond.

I came here of course with an orderly, organized argument, and as almost always happens when you are the last one to speak in a long case like this, you have to cast it all aside and just discuss what appears to you to be the main points in what has been said by the other speakers, and that is what I am going to do now.

First I call your attention to two remarkable things here. In my opening statement I said to you it is admitted that the United Construction Workers is a division of District 50, and it is admitted that District 50 is a district of the United Mine Workers of America. The Court says in one of its instructions it is up to you to say whether those two defendants were acting as the agent of the United Mine Workers.

I call your attention to the fact that although three speakers have spoken for these defendants here, not one of them has said one word denying that District 50 and United Construction Workers in everything they did here, good, bad or indifferent, were the agents of the United Mine Workers of America, and I say by their failure to deny it here in their

argument, they have admitted it and that all three of them are the "one organization."

I say to you further that not one word has been said—and they have the best lawyers in the State of Virginia on the other side—not one word has been said here repudiating one thing that Hart said or did. I call your attention—just as they come to my mind, the will come back to your mind sometimes—who was it who said that Hart said "Yes, I will have 500 men here from Beaver Creek and there will be some butt kicking here on this job. It was a good thing you pulled out of there because I had men in the hills who would knock you off the job."

I say they have admitted agency. They have admitted that they are all three in the same boat. If you believe that Hart did anything wrong, then they are all part of the same stick and all subject to the same verdict. It is one organization. Where does it lead, and who do you think pulls the strings and calls the tune and runs the show?

Let me do as I said I would do and come to the comments I want to make, and I will try to move on. I realize, when so much testimony has been introduced here that covers so many witnesses and so many pages, how easy it is to be unable to remember precisely and accurately what they said and to quote them unfairly or incorrectly. I hope I will not do it, but I don't want to slow the thing up by going back to my notes any more than I can help.

As Mr. Allen pointed out, if Hart, who David Hunter says is a liar, was going to the school house to sign up six or eight laborers, why did he take 20 or 30 men there, page 2685 } according to his own admission? Have you heard anybody else in this case say, on the other side?

They just assumed to you that the laborers were all that were involved in this thing. According to our testimony it was the carpenters, the carpenters' helpers and the laborers, all along.

We do not deny the right to strike. We do not deny the right to picket peacefully or to assemble peacefully. But you cannot kick people and threaten people and coerce people off the job.

I am not going to waste my time or your in arguing to you whether or not Ham Bryan is worthy of your belief. I think you believe him. I am not going to call the roll of these witnesses about the threats and force and coercion and the danger that was out there in that dark and bloody country. I think you are convinced there was.

I don't care whether there was a strike or whether there wasn't a strike, or whether there was a picket line or whether

there was not a picket line, if you have the right to strike, you have the right to picket peaceably; you haven't the right to bring 500 men from Beaver Creek and run you off here, plenty rough, or lay out in the bushes and shoot you off the tippie, or "Sh-h! sh-h! trouble, trouble!" You can't pooh-pooh it. When anybody tries to pooh-pooh it, they are a city man who never has been out in the bushes.

I would like to say to you again that what we  
page 2686 } say is that this business relationship was terminated on July 26. That is what ran us off.

That was the last time we ever got a dollar of work. Everything that happened out there after that that we put on here was just evidence to demonstrate and prove and show what they had done to us at that time. I am coming back to that.

Talk about future profits, I can't forbear saying this here. Fohl, the nephew-in-law of Lewis, said over in Hopewell the job was finished, and therefore they couldn't worry about that, and they let it wither on the vine. And also Bryan said that when Fohl claimed he was representing all the laborers there at Hopewell, he checked up on it and found it was a lie, that he didn't do it, and that he had no confidence in him from then on.

Then when Hart, the liar, called upon Bryan either the 13th or 14th, according to Bryan he said "We are not so much interested in what you are doing now. It is what you are going to do in the future," these two hundred houses, all this big work. That is what Bryan was interested in, too. That is where Bryan lost a lot of his money, and that is why Bryan took this unattractive job in Breathitt County under unfavorable conditions, because he knew after he got out there and got his organization set up and running smoothly, it would be just

like amortizing something in the manufacturing  
page 2687 } business; he would get going and going good in the future.

There is something very interesting here. I know how hard it is of anybody to listen to something being read, and I am going to make it short, but I call your attention to one of the most interesting things in this case. Bear in mind my proposition so far is this: That they had the right to strike, that they had the right to picket peaceably, but they didn't have the right by threats or force or coercion or intimidation to run them off the job. Nobody here has repudiated the authority and the actions of Hart. They don't say "We didn't give Hart the authority to do what he did." They don't say that Hart went beyond what he had a right to do. They say whatever Hart did was right, lawful, peaceful, and proper.

They said that Hart was representing the United Construction Workers, and that these men that he signed up were signed up in the United Construction Workers, and the proper local for them to go into was 778-A, and that is the one they took their obligation in, and that is the one they were in. They say everything Hart did was right and proper.

If you please, I refer you to the rules of the United Construction Workers. Article 10, Strike Policy, Section 1:

“The United Construction Workers recognize the local union as having the initial local authority on all page 2688 } matters concerning strikes or grievances of whatsoever nature, no strike action shall be taken, however, until it has been approved by the majority of the workers involved, and no strike shall take place without first obtaining sanction therefor from the National Director or his designated representative.”

The National Director is there in Washington, A. D. Lewis. You come to rules of District 50 United Mine Workers of America, Article 6, Strike Policy, Section 1:

“No strike action shall be taken which does not comply with existing laws and before it has been approved by a majority of the workers involved, and no strike shall take place without first obtaining the approval thereof from the administrative officer of District 50.”

A. D. Lewis, the Brother of John L. Lewis.

Have you heard of them approving it in here?

On the contrary, do you come to this in these interrogatories which we asked them, and I am referring now to interrogatories to the United Construction Workers.

“When and upon whose authority did United Construction Workers Local 778-A decide to take strike action against the plaintiff's work in Breathitt County, Kentucky, and was the so-called strike against plaintiff which took place in Breathitt County, Kentucky, on July 26, 1949, sanctioned page 2689 } by the National Director of United Construction Workers or his designated representative, and if so, when and by whom was such sanction given?”

And here is the answer under oath, filed in Court:

“No formal strike action was ever taken by Local Union

778-A and consequently there was no occasion for nor was any request made to sanction any strike action."

Their whole idea is—I am not saying this of counsel. I won't stop to pay compliments. Mr. Mullen knows he is a friend of mine of long, long standing, and I won't stop to talk about it now. I say on the part of their clients it is a flim flam to work up a defense here that they are not entitled to. Whether I called for these books here which set forth their duties and obligations and called for their sworn answers to questions.

Then I come to the picket signs which are numbered 1, 2, and 3.

The first one is "UMW Picket line, contractors—Laburnum, UMW, United Mine Workers of America."

They never repudiated that picket sign. They never repudiated it, or they never repudiated Hart. If you find a verdict for anybody in this case, I submit to you that because the principal is liable for the acts of his agent, you have to hang it on the United Mine Workers and punish them to the extent that they feel it.

page 2690 { Then I come to picket sign No. 2 which never was repudiated. What does it say?

"District 50, U. M. W. of A., Local 778-A, Picket Line."

Mr. Mullen says the "picket line" means a strike, and as I say we never had any strike and no strike was ever authorized or ratified or anything.

Then I come to Picket Sign No. 3, which I think Hart said he supplied:

"On strike, Local 778-A."

Hunter was right in what he said about Hart, wasn't he? Doesn't it pin it on him? Isn't he lying there? "Carpenters Helpers and Laborers, District 50, U. M. W. of A."

I say that defense is so shot it is like Dixon if he doesn't keep out of Kentucky. It is shot so full of holes it would take all the sand in the Big Sandy River to fill him up again.

I might as well come to this now as anywhere else because it goes right to the heart of the case. Colonel Harris didn't go into it in detail like Freddy Pollard did, but he discussed somewhat the amount of the damages. I say to you that I have no right to argue to you that you can't return your verdict. "We the jury on the issue joined find for the defendants," and by the same token nobody on the other side has a right to

say to you that you can't return your verdict here in either punitive or compensatory damages or both in the page 2691 } full amount of \$500,000 and that is what I am going to ask of you. I submit that we have asked too little.

Why do I say what I say? I come here to this first thing that they blew up for you. The \$617,500 is what Salvati said under oath that he had authorized to be done, that he didn't have to go back to his board of directors that they were ready to proceed with it and give the work to Bryan, and that they didn't do it because they were run out of there.

Now, let's take it generally first. You will go over the instructions of the Court. I won't stop to read them now. But let's see whether we have a substantial business there that has a record of performance sufficient to justify you in giving damages.

We have a concern here which is a young company as companies go, organized in 1937, which came under this young man's management in 1942, along in there, and over 28 months of performance out in these coal fields out there it showed a profit at the rate of \$28,000 a year. They have no right to argue to you because they didn't get the work, because they didn't do the work, that they are not entitled to damages. If that was the law, this court would not have given you the instruction that it did. The door is wide open for you to give it or refuse it. I am not talking about these page 2692 } figures now. It is just 5 per cent on that. If over a period of 28 months they had averaged at the rate of \$28,000 a year, if you project that out for five years, that is \$140,000. If you project it over a period of ten years it is \$280,000. Salvati has told you without contradiction that he is the president of this whole Island Creek empire, the greatest commercial coal company in the West Virginia field and the third largest in the United States, and that under their plan of development this work would have gone on there for years and years indefinitely. I say if you project their \$28,000 for five years or 10 years you are well within moderation. I say when Salvati said he had this work for the asking, that he had this work for the asking. The fact that they did not do it has got nothing to do with their right to get the profits from it. He may have laid off of it one way or another, like you can't get one contractor and the thing can wait, and you wait. You can't get one doctor or one lawyer, and you may go to somebody else or you may wait. It was significant to me that when I asked Cundiff from Indiana, "When did you do that work?" He said in November 1949, which was after this

suit was instituted and it may well be that this suit, as I hope it has, has put the fear of God in them enough to leave him alone.

They made the argument here that there was no damage to business reputation. Do you think it has done it page 2693 } any good? Here is Salvati who heads up the Island Creek empire, with a list of associated and affiliated companies there as long as your arm. They are driven out of the coal fields of West Virginia and they are driven out of the coal fields of Kentucky, and I think it is a fair argument to say they are driven out of the coal fields anywhere in America where the United Mine Workers are in control, and if you can name me somewhere where they are not, I never heard of it and the spider web exhibit bears me out.

Whose accounting testimony are you going to take, Coleman Andrews' and Hugh Baird's, or Mr. Holt's? Who thinks that every time you add a dollar to your gross business it is going to add an equal dollar to your overhead? Do you think that that work yielding that much profit put 6.6 additional overhead on him or that that profit of \$319 did it or that \$250 did it or that \$125 did it or that \$27,125 did it?

We have sued here for \$500,000, and I say we have sued for too little. I say that we distribute it around that way because they asked us to break it up, and before the suit was tried that was the best way we knew how to break it up. I say it is moderate and conservative and reasonable on every element of compensatory damages.

But here is where I say over and above all that, we sue for too little: The evidence in this case is that this page 2694 } great international union has more than 650,000 members, that District 50 has more than 112,000 members, that United Construction Workers has 46,000 members, that of the dues that come from the Virginia District, of every dollar—what was it—50 cents to the International Union, 35 cents to District 50, and 15 cents for the home boys.

I say it is within your discretion to do it, and as I say the Court has left it wide open to you because if it hadn't it wouldn't have put those instructions to you in the form that they are in. You give or withhold as your honest diserefion and your honest judgment tells you is fair and right.

If you should come to the point—I don't think you will—that you say, "Well, I don't know, they didn't do the work, they might have been overcome with some unexpected cost problem there that doesn't show up at this point. I think it is too uncertain and too speculative." I don't think you will

think that, but it is within your discretion if you choose to do it, to award \$500,000 punitive damages against all three of these defendants so it can be the one sum of \$500,000 against all three of them, to be collected out of any one you can get it out of, but only collected once. It would be the way of a Virginia jury of saying, "You shall not pull this kind of stuff in this country of ours and get away with it, and page 2695 } if you take any such insolent and arrogant thing as that, we will put this on you just exactly as we were asked to do and as a deterrent to these three defendants in the future and as an example to them and as an example and deterrent to others to keep them from going ahead and doing likewise."

I have said that Bryan thought he had demonstrated Fohl was not telling the truth about the Hopewell incident. Hart's own boss, David Hunter, said it was a lie, and I asked Hart what he had to say about that, and he said that was unfortunate. They didn't bring David Hunter here to testify to you, and I expect somebody here on the jury to say, "Yes, you summoned John L. Lewis and why didn't you bring him here?" I will tell you why. Because we think we have proved our case up to the hilt for \$500,000 without him, and we had no intention of letting him come here and pull a grandstand play. There is nothing unfair in that, because if they wanted him they could get him here at any hour of the day that they choose to call him.

Mr. Mullen: He is going outside the evidence now, I think.

The Court: I sustain the objection.

Mr. Robertson: Arnett, who repudiated his statement to Bryan. I don't think I have to bolster up Ham Bryan in Richmond. I think he is worthy of the rock from whence he is hewn. I felt sorry for Arnett on the stand. page 2696 } Didn't he let the cat out of the bag when he said, "I live out there in those mountains, and all those people are my neighbors, my friends, my kinsmen." What do you think they would do to him if he didn't come through?

I am going to ask you something else, which I will come to a moment if I have time. All of our people had signed up with the A. F. of L. We told you about the kind of a guy Robert Poe is. It looks like he betrayed everybody. But he signed them up in the A. F. of L., and a number of these other things very mysteriously are not dated. I can prove to you again that Hart is a liar because when he phoned Bryan he told him he represented the laborers, the majority of the laborers, and it turned out afterwards he had signed up but

four on the 8th of July, and according to his own admission he didn't sign up any more until that Sunday meeting, the 24th of July after he had phoned to Bryan, after Bryan had heard about it and he phoned Bryan on the 14th. Then they come here and say 778-A established that picket line and pulled that strike, and there is their sworn answer to the contrary.

I want to say this, too. No pattern of behavior? What do you think after you have heard this testimony? Do you think that Hart and a group of lawless men were going up and down Eastern Kentucky pulling acts of violence and doing at Wheelwright, Kentucky, and at the other towns that page 2697 } have been named here in Kentucky just exactly what they did here? Do you believe the deposition of Nelson Baldridge who was doing that paint work over at Wheelwright for the Inland Steel Company over there? In the vernacular expression, when Hart and his mob stopped them there, what did they say? They said, "Get out, boys," and the boys hit the ground.

What was that report that we had? The pattern of the reports was, every report that Hart made to David Hunter, every report that Robinson made to David Hunter, every report that was made, a copy of it went to A. D. Lewis in Washington. They are all gone for that period, except the one—they didn't get down to one—that called Hart a liar. They didn't burn up the one that said that Robinson had lost his nerve and it looked like he couldn't stick on the job and they would have to get rid of him unless they could pump him up again. They didn't destroy the one that said that Hart—it may not be Hart—that Hunter was going all around through Kentucky with Tom Raney.

I was never more amazed because I thought they were going to deny agency, which I say now because they didn't say a word about it in their argument they have admitted. Were you ever more surprised in your life than when Tom Raney got on the stand there and says, "Sure, we have adjoining offices, we are on the same floor, in the little 7800-people town, we have the same"—I don't think he said the page 2698 } same telephone number there. "We have been using the same post office box for years and years. He comes into my office and asks my advice and asks my assistance and asks me to go around and help him and I do it whenever I can."

I am just following these things as I have made the notes as the others were speaking.

Which one of their witnesses was it—I can't recall his name now—but it is significant that of those four people that Hart

signed up on July 8 when he got them out there with all this peaceful situation in the toolhouse, and out at the job site, every one of the four signed up again. They were asked "How did you happen to do that? That is mighty funny. You had signed up before. You had taken the obligation before." That is one of the outstanding events of an union man's life. "Just unthoughtfulness on my part."

I would like to say this. I think my time will be up at 25 of 5, won't it, Your Honor?

The Court: That is right.

Mr. Robertson: I am going to have something more to say about that later. It is a very significant thing to me, and I thought it was a pathetic thing in this case. It is admitted here that in Eastern Kentucky the United Mine Workers, the one organization, is far stronger than the A. F. of L. out in those hills. You can look at the picture there—page 2699 } somebody has moved it but it is there for you to look at them if you want to—and see that dark and bloody country, and there is mighty little law up in those hills except what a man is man enough to make for himself. If you don't believe it, you walk up Whippoorwill Hollow at night with Monroe Sublett. I thought it was a pathetic thing when that group of men, a minority group, mind you, but not asking any favors or any special privileges or any unique consideration like we hear of these minority groups so much now, but just unlettered courageous men who wanted to testify to what had happened and had the courage to do it. Did you realize the spot they are on? Do you realize the spot they are on now? As contrasted to that, do you realize—I had the chart made up, but I won't stop to talk about it now—that every one of those laborers or carpenters who came here and testified for them is either now—I think I am correct when I say now at the time he testified was a member of the United Mine Workers or United Construction Workers or District 50? They got on the band wagon, on the strong side, and when the word came to come here, it took no moral courage for them to come. It would have taken a whole lot of moral courage for them to say, "I thank you, I will stay at home."

Another thing that that chart will show, and which is borne out from the testimony, is that some of these people out there—and I don't know that they blamed them—page 2700 } joined all three unions at the same time, paid dues into all three of them, some into all three, some into two, some into only one. The testimony here is that "If I belonged to one of these three defendant unions, I wasn't scared. I knew nothing would happen to me. Anybody who gets scared is just a natural coward. I wasn't scared. No,

I belong to the United Mine Workers. I belong to District 50. I belong to the United Construction Workers, our one organization," like Gasaway talked about.

Do you think Bryan could get any police protection out there? According to my notes Homer Howard, or whatever his name was, said he told Bryan if he thought there was danger he had better bargain, and Bryan had the guts not to take it lying down. I am going to have something more to say about that.

Now I come back to Mr. Pollard, and I think I have covered all I need to say about him. In the first place he argued to you that we had no right to claim anything for destruction of our business relationship. I very properly said you have no right to argue that to the jury because the Court has expressly told the jury we have got a right to recovery if the jury thinks we have proved it and chooses to give it to us. You ask me, "How do you compute the value of that relationship?" I say under the instructions of the Court the best

way I know to compute it is that through out the  
 page 2701 } 28 months we have been there we have been making money at the rate of \$28,000 a year, and if you project the five years that is \$140,000, and if you project it ten years, it is \$280,000. I think you have a right to project it longer if you want. I say I bulwark that statement on the testimony of Baird and Coleman Andrews, that whatever he would have made there from the time he was run off would have substantially been net profits as well as gross profits because he could have absorbed it in the overhead that was already set up there.

Damage to reputation. You notice in one of the instructions of the Court that the damage to a man's reputation is such that you just have to estimate it the best way you know how. I don't mean anything out of order here in view of who is in this Courtroom, but it is a stock thing in the cases. A slander and a lie goes around destroying a woman's good name, and you sue them for it, and what is the measure of the damage? The measure of the damage can not be put in dollars and cents. It can be put at whatever a jury thinks is fair and proper and correct. The damage to this business reputation can not be put in dollars and cents. It can be pointed out that they are ruined within the Island Creek empire and all its associated and affiliated and subsidiary companies. They are ruined so far as doing any more work in the coal  
 field of Kentucky is concerned. They are ruined  
 page 2702 } so far as doing any further work in Eastern Kentucky or West Virginia is concerned. What do

you think will happen to them if they go to Pennsylvania or Illinois or down in Alabama where my friend, Colonel Harris, hails from? I say they have suffered great damage and wrong in their business reputation.

They say if Laburnum had been the low bidder they would have gotten the job. What did Salvati say? Salvati said "I was going to give it to you regardless of the other things." I think I might say this right now. I know how hard it is to remember the testimony of witnesses. Salvati's deposition is short. It was given on two occasions. If you want it, ask for it to be sent to the jury room to you. So far as we are concerned anything that has happened in this case, exhibits, transcript, evidence, anything is at your disposal. You might, for instance, want to be reminded that Haslam, the superintendent there, who left on his vacation while the going was good, said that two or three men down there told him they were scared to go to work.

You see there is no order in what I am saying, but there is truth in it. Let me come back to some of the things that Bert Preston said. I refer to page 860 of the record.

"By Mr. Robertson:

"Question: Mr. Preston, you testified yesterday that after you elbowed your way into the toolhouse, and page 2703 } when Arnett called Hart a God damned liar, that that was about as tight a situation as you were ever in in your life."

"Answer: Yes, sir."

Then there were some objections.

"Question: Why did you tell him you would honor a picket line?

"Answer: It was my only way out."

"Do you think they had him on the spot?"

"It was my only way out."

"It was the tightest situation I have ever been in in my life."

"Question: As you understand picket line, was what he had out there a legal picket line?

"Answer: No, sir.

"Question: Why?

"Answer: He didn't have anybody on the job."

Now I turn to page 864 of the record:

"By Mr. Robertson:

"Question: Based on what you heard, what you saw, and what you did, and what you know, there at the job site on the 26th day of July, 1949, did the A. F. of L. men quit on account of the picket line, or because they were scared to work?"

There were some objections by Colonel Harris and the Court said to answer the question.

"Answer: It was through fear that we quit, page 2704 } instead of the picket line."

You remember, my friends came in with a tremendous to-do about the Virginia Mechanical Corporation, which is organized to do the plumbing and electrical work for the Laburnum company, and Coleman Andrews says it is sound accounting practice to lump it all together with Laburnum, and Mr. Holt said it was not. You can take it, there it is wide open, whichever way you choose to take it.

So when they broke it down and they separated, they found that if you include Virginia Mechanical Corporation, you get a profit of \$58,700 some dollars, and if you exclude Virginia Mechanical Corporation it cuts it back to \$56,000. If you look at Instruction J, subsection (e) it says you can either throw them all together or separate them and treat them separately or pull them out as you want. Instruction J, subsection (e).

Did you notice this? Did you hear Freddy Pollard say anything about punitive damages? Did you hear Colonel Harris say anything about punitive damages? Did you hear Mr. Mullen say anything about punitive damages? I tell you that one of the main purposes of this case is to make a demonstration and inflict a punishment and make an example of all three of these defendants, and just as you say of an individual, the higher and more powerful and more dominant an organization is, the more blame-worthy it is, and the page 2705 } more drastic the punishment should be. Suppose

that my cook goes up in my bureau drawer and steals \$50. She is blameworthy. She is ignorant, she has no education, she has been denied all opportunities in life, and that should be considered in meting out her punishment. Suppose I, who by mere accident have been given privileges in life, suppose that I embezzle or steal or murder or rape, I think the higher the station the greater the punishment should be for an example and also for punishment.

Now I am going to tell you something else. Colonel Harris called this a puffed-up case. Do you think it is a puffed-up case to Laburnum? Do you think it is a puffed-up case to

those men who had the temerity to come in here and *temerity to come in here and testify* for Laburnum? Do you think it is a puffed-up case to the men who came in here, who are subject to the discipline of the membership of these three defendant unions? Do you think it is a puffed-up case to the three defendants in the view they seem to be taking of it?

Colonel Harris talked something about Trimble. I have forgotten what he said, but Trimble was father and son, and the father was the man, I don't think they called him on the stand, who had one eye. They testified for us, both of them. The father's nickname is Peewee. I think I asked him when he was on the stand, "You are not young. page 2706 } You have no physique. What were you doing in the toolhouse if it was so hot in there?"

He said, "One reason, I was an officer of my union, and another reason, my boy was in there and I was trying to help him out of a jam." They didn't tell you about the jam in there on that. They just told you something else that Peewee said.

I have a few more notes here about what Mr. Mullen, I believe it was, had to say. He talked about McClellan. They tried to laugh that off. You remember, McClellan was the redheaded fellow that worked on the high line. I think he got \$2.25 or \$2.50 an hour. He looked like a man able to take care of himself all right, to me. He said, "No, I wasn't scared," and I don't believe he was, just like I don't believe Bryan was scared, but he said—he didn't say it like Mr. Mullen said it, and I can't say it like he said it, but you heard him, "Sh-h, sh-h, trouble, trouble!" Do you think that was a fake, that that was a brushoff?

McClellan also said that at that union meeting in Paintsville some of the men said they were scared and they weren't going back to work, and I think he said that Bert Preston said that it wasn't safe for them to go back to work. Remember the testimony. Preston said anybody who went back there ought to pack not less than a .38.

They talked about Jack Patrick here, this A. page 2707 } F. of L. steward on the job. Jack Patrick said also, I thought it was unsafe there and dangerous to work, and I ordered the men off the job for that reasons."

I think I have demonstrated about the strike, from the provisions of their own rules and regulations, from their own sworn answers, from their own picket line. When they talk about this puffed-up case, what do they try to work it around to? They try to work it around that "If Bryan had gone ahead and recognized 15 or 16 common laborers, and done

what we told him to do, everything would have been all right." Do you think you can boil this case down to any such proposition as that? I say without any sacrilege and without any levity, that when they were talking that way I remembered the story of one who was tempted in the wilderness and they took him up to a high mountain and showed him all the kingdom of the earth, and part of it might have been the coal fields of West Virginia with the construction work, and part of it might have been the coal fields of Kentucky with its construction work, and part of it might have been Pennsylvania and Alabama or whatever you want to do, if you will fall down and worship me. He said, "Get thee hence, Satan."

I leave it to you who you compare Satan with.

They can't twist this thing around. They cannot twist this thing around to David Hunter, who didn't come  
page 2708 } here to say a word to you, that in his talks with Bryan he said, "If you get any more work out here we are going to do our best to organize in a peaceful, lawful way."

You know and I know that the only fair summary of what Bryan said is that David Hunter said it and Hart said it and everybody who has spoken for these defendants before this suit said it, "As an American citizen you can come and bid if you want, but if you come out here and work in our territory, you have got to join our organization, and if you don't, you don't come, and if you do come, we will run you out by whatever means is necessary to do it."

If Your Honor and gentlemen of the jury please, I am not going to take all of my time. I have covered this case as well as I know how. I hope I have brought back to your memory some phases of it that may help you to recall the whole picture that has been unfolded here. I have said that under the instructions of the Court, you are free—

"The court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages—"

Bear in mind I am talking only about compensatory damages.

"—then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of—

"(1) Profits under its contract dated October  
page 2709 } 15, 1948, with Spring Fork Development Company, provided you believe from the evidence

that such profits are reasonably certain as defined in other instructions;

"(2) Profits the plaintiff might have realized from alleged promised cost plus 5 per cent contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such properties are reasonably certain as defined in other instructions;

"(3) Any loss as defined in other instructions to plaintiff for destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions;

"(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

"And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrongful acts of the defendants or any of them.

"Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with  
page 2710 } a view to the enormity of the offense to punish the defendant, and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act—" Just think of Hart—"where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner or maliciously and with a design of injuring plaintiff in its business, or where the wrongful act is accompanied by insult, indignity, oppression or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases the jury may assess the damages at any sum which you may believe from all the evidence in the exercise of sound discretion the plaintiff ought to recover, not exceeding the amount claimed."

The amount claimed here is \$500,000, and we are not limited to what we put it as broken down in the itemized statement there. You can award it in any amount you deem proper up to \$500,000.

I will never again, probably, try another case like this. We will never again, you twelve gentlemen and I, be with twelve

on the jury and me speaking to you again as I am now. But before I close my case there are a few things that I cannot find it in my heart not to say.

page 2711 } I wish, after all this puffed-up case, this lack of threats, intimidation, force and violence, danger, this laughing it off, I wish in the face of what has been said about that to pay my tribute here to Ham Bryan who, as I said before, is worthy of the rock from which he is hewn. He has a stout heart—

Mr. Mullen: I object, Your Honor.

The Court: I don't believe you need to go into that.

Mr. Robertson: I don't think you have liked any of it. I will leave that out. I will say this: I will say this and and if they don't like this let them stop it. That I feel that I speak here not only for this plaintiff, but I think that this case is a test case and a beacon light of this old Commonwealth of ours, and I think it is going to be flashed from one end of this land to the other. I speak for far more than for the sum of \$500,000. I speak for far more than the Laburnum Construction Corporation. First of all, I speak for my dead partner and dear friend, Norman Flippen, from whom I inherited this case. And I speak also for those men who came here belonging to a minority group from Kentucky who had the temerity and the hardihood to come here and tell the story which they did. I speak in behalf of the men that live in the far reaches of those Kentucky hills, and I think I speak also for the men who came here and testified against this plaintiff

page 2712 } because I believe they live under the shadow and the threat and the iron control of a despotic "one organization" from which they should be freed. I believe that this Commonwealth that we love was one of the very first—

Mr. Mullen: He is getting away off there.

The Court: I think you had better stick to the evidence.

Mr. Robertson: You don't seem to like it. I interrupted you. That is all right. I will say one more sentence and then I will quit.

I will say to you, return your verdict for whatever compensatory damages in the different categories the proof makes you feel in your heart and mind you are justified in returning, and then I say to you that whatever the amount of that damage is, whether it be great or small, I ask you to add to it a sum of punitive damages which brings the sum total of your award to \$500,000. I ask you to make that the challenge and the answer of this jury in this state to any such insolent, arrogant, tyrannical behavior as has been pulled against this plaintiff here.

The Court: Gentlemen of the jury: The case is now in your hands. The first thing you do is to elect a foreman. After you have reached a verdict, if you will advise the Court, the Court will assist you in putting the verdict page 2713 } in proper form. When you have reached a verdict here is a buzzer for you to ring, and the sheriff will then come in and we will receive the verdict. The Courtroom will be excluded, Sheriff. The jury will deliberate in the courtroom. Everyone else will leave.

(Whereupon, at 4:25 o'clock p. m. the case was submitted to the jury.)

(At 11:55 o'clock p. m., the Court, Sheriff and Reporter returned to the Courtroom and, in the presence of the jury, but in the absence of counsel, the following proceedings were had:)

The Court: Adjourn Court until tomorrow morning at 12:01.

(Whereupon, at 11:55 o'clock p. m., Friday, February 16, 1951, a recess was taken until the following day.)

(At 12:01 o'clock a. m. Saturday, February 17, 1951, the Court reconvened, pursuant to recess.)

The Court: Call the roll of the jury.

(Roll call of the jury.)

The Court: All right, gentlemen.

(The jury resumed its deliberations.)

(At 12:25 o'clock a. m. the Court, Mr. Robertson, Mr. Mullen, and the Reporter returned to the Courtroom and the following occurred:)

page 2714 } Mr. Phil J. Bagley, Jr. (Foreman of the Jury): Gentlemen, we have reached a verdict. We understand there is a form to be filled out and that is what we are requesting at this time, the form that we may give our verdict in at the proper time.

The Court: You tell in your own words what your verdict is and then I will retire to Chambers with counsel and write

the verdict according to your verdict, then you sign it, if that is your verdict.

Mr. Bagley: "We the jury find for the plaintiff and believe that all the defendants are jointly and severally liable. We set the damages as follows: Compensatory, \$175,437.19; punitive damages at \$100,000. A total of \$275,437.19.

The Court: All right. You gentlemen just wait here.

(At 12:26 a. m. the Court and counsel met in Chambers and the following occurred:)

The Court: Mr. Dudley, suppose you read back what the jury had to say.

(The statement of the Foreman of the Jury, appearing above, was read by the reporter.)

(Discussion off the record.)

The Court: As I understand, there is no objection to the form of the verdict.  
page 2715 }

Mr. Robertson: That is correct.

Mr. Fred G. Pollard: That is correct.

Your Honor, to save time we move the Court—

Mr. Robertson: If I were you I would wait for the verdict.  
Excuse me.

Mr. Fred G. Pollard: I ask the Court's permission to poll the jury before the jury is discharged, to determine in connection with our motion for mistrial based on the editorial from the News Leader, to determine whether or not any of the jurors have read that editorial.

Mr. Robertson: If Your Honor please, we absolutely oppose that under the Virginia decisions upon the ground that they waived the right to do it. Before the argument of this case was started this morning the Court asked counsel if it wished the jury polled, and counsel declined to answer until after they went into a conference, and then they came back an announced through Mr. Mullen, the senior counsel, that they did not wish the jury polled. Having done that, they waived the right to have it polled, and they cannot now wait until after an adverse verdict against them and then come in here and try to take advantage of something that they waived and thereby get two bites at the cherry. The purpose this morning was to waive it in order not to antagonize the jury, and now tonight they are making an attempt to take a fresh

crack at something after they got an unfortunate page 2716 } result for them.

Mr. Allen: Furthermore, they cannot inquire into the reasons for grounds for the verdict after the verdict has been rendered. The jurors cannot be interrogated on that subject.

The Court: The motion is overruled, Mr. Pollard.

Mr. Fred G. Pollard: We except.

At 12:31 o'clock a. m. the Court reconvened, and the jury returned a verdict as follows:

"We the jury on the issues joined find for the plaintiff against all three defendants jointly and severally and assess against all three defendants jointly and severally and assess compensatory damages and \$100,00 punitive damages."

The Court: All right.

Gentlemen, I want to thank you for your deliberations. I know it has been a sacrifice to each and every one of you to serve four weeks straight on the jury. I want to assure you that I deeply appreciate it. On behalf of the Commonwealth and the City of Richmond I also wish to thank you. You are excused.

(The jury was excused and left the courtroom.)

Mr. Fred G. Pollard: May it please the Court, we ask that the Court withhold entering judgment on the verdict for a period of two weeks in order to give the defendants time to confer with its counsel in connection with any motions that it might desire to make as to the verdict.

The Court: Your request and motion are granted, Mr. Pollard, and the Court will not enter judgment on the verdict at this time.

Mr. Fred G. Pollard: We of course under that ruling have reserved the right to make any such motions that we might desire to make, sir.

The Court: Yes.

Mr. Allen: Your Honor, don't you think in that situation that an order should be entered receiving the verdict but entering no judgment upon it?

The Court: I don't see any objection to having an order receiving the verdict if you think one is necessary.

Mr. Allen: I think that should be done, sir.

The Court: Enter an order receiving the verdict but no judgment entered on the verdict at this time.

Mr. Mullen: Do we need an order granting us the two weeks' time?

Mr. Allen: No, you don't need that.

The Court: I don't think so.

Mr. Mullen: If anything should happen in the meantime that would not affect it.

The Court: I don't think so. The minutes will show that I withheld entering the judgment at this time page 2718 } and the record will show it.

Mr. Robertson: You are not threatening the Court, are you, Mr. Mullen?

Mr. Mullen: No, I am not threatening the Court.

The Court: Adjourn Court, Sheriff, until Monday morning at ten o'clock.

(Whereupon, at 12:40 a. m., Saturday, February 17, 1951, the Court adjourned.)

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#### PROCEEDINGS ON MOTION TO SET ASIDE VERDICT.

. . . . .

Received & filed Aug. 16, 1951.

Teste:

WILBUR J. GRIGGS, Clerk  
By E. M. EDWARDS, D. C.

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#### ARGUMENTS ON DEFENDANTS' MOTION TO SET VERDICT ASIDE AND GRANT NEW TRIAL.

Richmond, Virginia  
May 18, 1951  
9:30 a. m.

Before Honorable Harold F. Snead, Judge.

page 2 } Appearances: For the Plaintiff—Archibald G. Robertson, Esq., George E. Allen, Esq., Francis V. Lowden, Jr., Esq., and T. Justin Moore, Jr., Esq., of counsel.

For the Defendants—James Mullen, Esq., M. E. Boiarsky, Esq., Fred G. Pollard, Esq., Willard P. Owens, Esq., and Robert N. Pollard, Jr., Esq., of counsel.

Mr. Fred G. Pollard: May it please the Court, I should like to request that Mr. Willard Owens of the bar of the District of Columbia, and Mr. M. E. Boiarsky, of the bar of the State of West Virginia, be admitted to practice in this court.

The Court: It is a pleasure indeed to have you gentlemen practice in this court. If you will come around, the clerk will administer the oath.

(The oath for admission was administered.)

Mr. Fred G. Pollard: Your Honor, the defendants have a motion as to the jurisdiction, which was filed returnable to 9:30 this morning.

Mr. Allen: I did not hear that. What was your last word?

Mr. Pollard: That the motion was returnable for page 3 } 9:30 this morning. We will like to have that heard first, and we would also like that not to cut down the time that has been allotted for argument of the motion to set the verdict aside.

Mr. Robertson: If Your Honor please, that motion, which we do not think affects the jurisdiction of this Court, was served on us on April 30. We made no point of the time and we filed a memorandum in opposition to it which was filed in here May 15, I think. Apparently Mr. Fred Pollard hasn't gotten in step with Mr. Robert Pollard. Mr. Robert Pollard called me at my office and the substance of our conversation was this—that the plaintiff made no objection at all on account of whatever time that motion was filed. And we understood, and I told Mr. Pollard, that we didn't expect him to make any point of the time May 15 when our memorandum in opposition was filed. I understood him to say that no point would be made of those considerations to either side.

Then he asked "What about the time for argument?" I said then, and say now, the Court has allowed three hours to the side for this argument, which does seem to me more than ample for anything that could be said here helpful to the Court today. As I said to Mr. Robert Pollard, every question now before the Court, covered in these memorandums which were filed here, was argued *ad nauseam* during the page 4 } four weeks of the trial and during the six or eight pretrial conferences.

I also told Mr. Robert Pollard it was all right with me if he got additional time, provided the amount of it was agreed

to in advance, and provided we go on and get through with this thing at this one hearing without adjourning this matter over.

I am going to ask that the two things be argued together and go along here; and if they want to present their argument on the motion first and follow it up with whatever they want on their motions to set the verdict aside, and get along and get through with the whole thing at once, I do not see any reason to break this up in segments and drag it out longer.

Mr. Pollard: Your Honor, my understanding of what Mr. Robertson told my brother was that he did not care what happened, as long as we finished.

Mr. Robertson: That's substantially true.

The Court: The Court would like to finish this today. How much time would you want, Mr. Pollard?

Mr. Pollard: Forty-five minutes, Your Honor.

The Court: Would there be any objection on your part for you, in opening your argument, to discuss your motion, and then proceed to discuss the motion filed to set the verdict aside?

page 5 } Mr. Pollard: Your Honor, in that connection, Mr. Boiarsky is going to argue the motion as to the jurisdiction. Mr. Mullen has prepared an argument to open.

The Court: I will grant your request. We will hear argument on the motion as to jurisdiction first.

Mr. Pollard: That will not interrupt the three hours?

The Court: No, but I would request that if you could hold the three-hour argument down to less time that you do so.

Mr. Pollard: Thank you, sir.

The Court: Mr. Boiarsky?

## JURISDICTION.

Mr. Boiarsky: If it please the Court, there comes on at this time the motion of the defendants to enter judgment for the defendants, and each of them, and to dismiss the plaintiff's notice of motion for judgment on the ground that the Court is without power, authority, and jurisdiction to herein determine the issues in this action because such determination would be repugnant to, and in violation of, the Labor Management Relations Act of 1947; federal statute being 61 Statutes 136, chap. 120, secs. 1 and following, Public Law 101, and to Article 1, Sec. 8, of the Constitution of the United States.

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page 21 }

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Mr. Lowden: If Your Honor please, I think it would be well, at the outset, to remind the Court that we did not bring an action alleging unfair labor practice. We did not bring an action in any way based upon the National Labor Relations Act. Our action was predicated upon the law of tort—the law of tort of the State of Kentucky. The defendants in their Answer to the action agreed with us that is what this action was.

I think the Court should fully understand what the gentleman is urging here. His proposition is this—that the State of Virginia has nothing to do with assault and battery if there is a labor union involved; the State of Virginia has nothing to do with dynamiting people's homes if it is an outgrowth of a labor dispute; the State of Virginia has nothing to do with the mass picketing; that the Virginia court in the *Luray Tannery* case had no authority whatsoever to take any action despite the fact that that case went to the Supreme Court of the United States and our court was upheld. He is saying to you that the injunction—I think it was in this court—that was issued a month or so ago, that you had no jurisdiction to do that. And he is saying that all of our courts are powerless to protect adequately the citizens of Virginia for, as he says, assault and battery, and matters of that kind. That is the issue he seeks to raise.

There are several reasons why I think that the contention, particularly in this case, is preposterous. But before I get to those, there is a matter of time that I think I should mention. Your Honor will recall that this case was started early in December, 1949. The matters on which the action was based occurred in July and August, 1949, nearly two years ago. The defendants had from December until, I think, sometime in October to file their Answer in this case. As the Court knows, they have adequate counsel, they've got a roomful of them, as a matter of fact—all competent. They had no reason, as I see it, if you take their own statements at face value, for they contend that the only remedy was before the National Labor Relations Board.

The statute of limitations, in such case, is six months, which had expired at the time almost the Notice of Motion was filed in this case. So they had no reason to string it out. And I am sure these gentlemen are well aware, or should have been, such an argument, if valid, existed. So what they have done is permitted this case to drag on over a year. They have

taken up, I would say, at least two months of the Court's time on an eight-hour a day business basis; they had a jury of very substantial citizens sit in these chairs for three weeks taking their time up; and then they wait until two month after the jury's verdict and come in and say, "Oh, the Court didn't have jurisdiction."

Personally, I think that demonstrates one of two things—either they had no confidence in this point and they are now raising it merely as a last resort to try and inject into this case a federal question, primarily, I would think, for the purpose of delay, or they were trifling with the Court and the Court's time. I think the defendants are estopped from raising any such motion at this time. I don't think it is a jurisdictional question, in the first place, because the action brought before this Court was a tort action and Your

page 24 } Honor had jurisdiction and power over that.

The defense that they raise in this motion is not one of jurisdiction in the sense that the Court had no power. It did have power over the tort. And they submitted to that jurisdiction in their Answer, both in person and as to the subject matter. I think that the rule is that having put yourself in that position you are estopped to raise anything but pure jurisdictional points, and I do not believe that this one is; and, therefore, it is too late to raise it. But that is a preliminary matter and I will now address the main issue that they raise.

As counsel has pointed out, prior to 1947 the old so-called "Wagner Act" had no provisions dealing with unfair labor practices by unions, and the Board, which was the trier of most issues under the Wagner Act,—and the word "exclusive" was used in that Act, incidentally,—would be faced with this proposition. There would be a representation as to which union represented a company's employees. If management coerced the people, employees, it could throw the election aside, but if the union went out and coerced them, the Board had no interest in that because there was nothing in the Act to cover that. So it worked in a very one-sided way. Then in 1947, after it became apparent that the old Wagner Act was a very one-sided proposition and was not work-

page 25 } ing as it should, the Congress amended that statute and passed additional legislation to cure some of the evils that had cropped up during the administration of the old Wagner Act, and they did include in the new Act a section 8 (b) which proscribes certain practices on the part of unions and states that they shall be unfair labor practices.

For the purpose of this particular part of my argument, I will assume that the acts that occurred out in Breathitt

County, Kentucky, were unfair labor practices. So that the only question is whether or not in enacting Sec. 8 (b) (1) of the National Labor Relations Act, as amended, the Congress deprived employers of their right to redress, resulting from destruction of their property, and whether or not that section, standing by itself, deprives the State of Virginia, the State of Kentucky, or any other state, from dealing with practices of violence. I think it is almost obvious that it didn't.

I think the rule of law is—and we will agree that in some cases the Congress can, and has, preempted fields. I think the power of Congress to do that, if that is what it intends to do—we wouldn't argue about it; I didn't do it here—where there is a case of traditional state sovereignty, in the field of state action, a field in which the Congress has the power to legislate, and the field in which the Congress does  
 page 26 } subsequently legislate, the test of whether or not they have preempted that field is a simple one. In order to do it, they must clearly have intended so.

In enacting Sec. 8 (b) (1), the Congress did not intend to preempt the State of Virginia or the State of Kentucky from dealing with violence, assault and battery, and other matters. And if you look at the legislative history of the Act, it couldn't be stated in more plain language.

Back in 1947, early in the year, when the matter of amending labor disputes first came up—not amending labor disputes, but amending the labor Act first came up, a hearing was held and they called in a man named Paul M. Herzog, who was then Chairman of the National Labor Relations Board, and they asked his opinion as to various amendments which were being considered to the National Labor Relations Act. One of them was legislation substantially similar—in fact, I think it was word for word—to Sec. 8 (b) (1); namely, that it is an unfair practice to interfere with, restrain, or coerce employees in rights guaranteed them under the Act. Mr. Herzog made it perfectly plain that he thought any such legislation would be unfair to the unions because it would create two penalties  
 page 27 } against them—one under the state law and one under the Act. Then he went on to say it was ridiculous for the Congress to have our little Board to try to supervise the entire country in matters of violence, police matters, and he recommended against the provision.

Later on in 1947, different bills were introduced into the two houses of Congress, and these two bills ultimately became the Taft-Hartley Act. In the Senate, it was Senate Bill No. 1126. And in the Senate Committee on Labor and Public Welfare, the part of the Taft-Hartley Act with which we are here concerned came up as an amendment, and it was an amendment

supported by Senators Taft, Ball, Donnell, Jenner and Smith. They said that this Sec. 8 (b) (1) ought to be in the law. Then if you will look on page 10 of the brief, you will see that they said this:

"Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board."

Should not also be. They are the gentlemen who introduced this particular language in the bill. The bill culminated into the Taft-Hartley Act. Its counterpart in the House was H. R. 3020. And there were differences in those two bills, and after each House had passed its own bill, they had to go to conference and the conference committee had to get the two together, and subsequently it was passed.

In the conference report on that bill, the people page 28 } who are responsible for it made these statements—that in Sec. 10, where it says that the Board's power to handle unfair labor practices shall not be affected by other remedies, they stated this:

"By retaining the language which provides the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

There couldn't be any point to that.

The particular question that we are here discussing has not yet been before the Supreme Court of the United States, but there have been contentions made in that court concerning matters in the field of labor relations. There have been contentions made that the states cannot do anything which conflicts with federal legislation. In the brief, I have briefly summarized the nine Supreme Court cases dealing with the general subject of conflict between federal and state legislation in the field of labor relations. In all of the cases so far decided by the Supreme Court,—and they have all dealt with state legislation rather than torts,—there has been a conflict between what the state wanted to do and what the federal law prescribed.

page 29 } For example, in the most recent case, was one dealing with the Act in Wisconsin, similar to our

Public Utility Labor Relations Act. In the Wisconsin Act, they said that employees of public utilities cannot strike—period; whereas, the National Labor Relations Act says they shall have the right to strike. Clearly, in a case like that, assuming it to be a matter affecting commerce within the power of the Congress, the federal legislation is the one that governs. But we are not confronted with that case; we have no conflict here. Even assuming the unfair labor practices, there is no conflict.

The Circuit Court of Appeals, for the Fourth Circuit, had something to say about the contention being made here this morning. And I am not going to take up much of your time. I have it set out in the brief in full. But this is their conclusion. They discussed Sec. 10 and then came down and said this, after reading that same language:

“The conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.”

“The last sentence of the quotation does not mean, of course, that a general remedy in the courts was being given by the act, but merely that an option existed where a remedy in the courts was given by the act, or existed otherwise.”

page 30 } So that our Fourth Circuit Court, although not called upon precisely to pass on the point made it plain what they think of such a contention as we have here.

Similar contentions as the ones we have been hearing this morning have been made in other cases, and we have cited several in our brief. I would like to read just one short paragraph from a case in New York:

“The defendant moved to dismiss the complaint upon the ground that it was insufficient upon its face and also upon the ground that the Court had no jurisdiction of the subject matter of the action. The second ground urged for dismissal may be readily disposed of. Of course, this Court has no jurisdiction to entertain proceedings to remedy alleged unfair labor practices under the National Labor Relations Act. Exclusive jurisdiction with respect to such matters is vested in the National Labor Relations Board. However, the complaint is not based upon alleged violations of the Federal statute, but is based upon common law tort principles. The fact that the grievance complained of in a common law tort action may also constitute an unfair labor practice under the Federal statute does not deprive the state courts of jurisdiction over

the common law tort action. The motion for dismissal for lack of jurisdiction is therefore denied."

By way of summary of that point, I would just like to review, briefly, three things. When suing for common law tort, the ruling principles of law is in order for federal  
 page 31 } legislation to knock out such an action, its intent to do so must be plain. The federal intention, as read to you, is clearly that where two remedies exist, one before the courts and one before the Board, the remedy before the Board is in addition to, and not in lieu of. And, finally, it is preposterous, it seems to me, to be here now, after ~~four~~ years under the Taft-Hartley Act, when there have been hundreds of cases, a great many in Virginia, where the remedy we seek here now has been in effect given by our courts—under circumstances perhaps not so outrageous, but at least similar.

Coming down to whether or not what happened in Kentucky, what we are suing for, is also an unfair labor practice under the National Labor Relations Act, the National Labor Relations Act says that it shall be an unfair labor practice to restrain or coerce employees in their rights guaranteed under Sec. 7; and their rights are to form, join a labor organization, or so forth, or not to join.

This case before the Court this morning is not a case seeking damages for wrong to the employee. We are suing them for what they did to us—and that isn't mentioned as an unfair labor practice in the National Labor Relations Act. The Sec. 8 (b) (1) was a protection to employees and not for employers. Our case is just a plain common law tort  
 page 32 } to an employer that arises out of destruction of his property, a property interest in Kentucky, I say by force and violence; that such action of tort law is not, and was not intended to be, covered by the National Labor Relations Act.

It is a peculiar thing, the claim of the union in this case has been that they represented these people. That is how it got to be a labor dispute. The United Mine Workers wanted to represent our employees. If this was a labor matter within the meaning of the National Labor Relations Act, that Act provided them a way to go and be certified so that if they represented these people we would be compelled to bargain with them. Why didn't they do it? Because they hadn't complied with the Act and, therefore, no representative question affecting commerce could arise because the union wasn't qualified under the National Labor Relations Act. Sec. 9 (h) says the Board shall not even investigate a question of representation where the union has not filed anti-Communist affidavits.

So we had no federal question of representation and they could not raise it because they had not qualified.

One last matter I should like to comment upon. In order for their argument to be before the Court, it must appear in the record that this was an unfair labor practice affecting commerce. They certainly could not contend that page 33 } if this was an intrastate and local matter the National Labor Relations Act, in proscribing unfair labor practices affecting commerce, certainly would have nothing to do with one affecting commerce. Not only wouldn't it have anything to do with it, but Congress wouldn't have any power to legislate in that field. In our case, it seems to me that the defendants were very careful—at least most of the way through it—that it would not appear in this case whether or not interstate commerce was affected by this matter that occurred in Kentucky. And I say to the Court that there isn't any evidence here that any affect on commerce would have resulted. Therefore, there is nothing in the record to show that this would have been an unfair labor practice within the meaning of the National Labor Relations Act. Since nothing appears to that effect, his major argument falls down because he hasn't even gotten an unfair labor practice within the meaning of Sec. 8 (b) (1).

So, in summary, I say, *first*, they are too late; *second*, we do not have a factual situation that comes within the meaning of Sec. 8 (b) (1) for two reasons: (1) We are not suing for a wrong to the rights of employees; (2) The matters alleged do not affect commerce; and, *third*, even if they are an unfair labor practice, or could have been so called under that section, the power of this Court is not in any way affected page 34 } by Sec. 8 (b) (1) and the common law remedy for tort for acts of violence remains just as it always has been.

Thank you.

The Court: Mr. Boiarsky?

Mr. Allen: May it please Your Honor. I suppose this gentleman has the conclusion, and I should like to make a few observations here, sir. I shall not repeat, but shall undertake to supplement what Mr. Lowden has so well said.

I think considerable light may be thrown on this subject by approaching it from the angle of the importance which the common law occupies in our system of jurisprudence. This great body of the common law consists of broad and comprehensive principles created by judicial decision based on justice, reason, and commonsense. These principles have been determined by the courts, by the needs of society, and are

susceptible to adaption to new conditions, usage, and relations as civilization progresses. Flexibility and capacity for growth and adaptations is the peculiar boast and excellence of the common law—that the common law provides a remedy for every wrong. It is but the crystalized conclusion of the judges arrived at from applying the principles of natural right and justice to facts actually experienced in the cases. And you might say it is but an accumulation of the wisdom page 35 } of the ages.

The common law is so important in our system of jurisprudence that the courts everywhere—the United States courts and the state courts—laid down this doctrine, which is not disputed by any court, that no statute passed by any legislative body has the effect of repealing any part of this great body of the law unless it expressly says so, or the implication is so strong that it is absolutely necessary.

We not only have the common law as a part of our system of jurisprudence in Virginia adopted by statute, but in Kentucky they have adopted it by constitutional provision. So where this tort arose the common law of England prevailed by constitutional enactment.

When Congress came to enact these labor laws, those Congressmen are presumed to know that the common law existed in the various states, and that unless something was put in the labor laws that repealed the common law, the common law remained in effect. These laws, as amended by the Taft-Hartley Act, create the National Labor Relations Board, and they give to the Board broad investigatory powers. The Act creates offenses in the industrial word known as “unfair labor practices”. It defines those practices on the part of the employer and defines those practices on the part of the employee. The Labor Board is given the authority page 36 }

to determine what acts come within the definitions of unfair labor practices and to enter cease and desist orders to compel labor or management, as the case may be, to desist from following those practices. The only court that has any jurisdiction in the premises is the United States Court of Appeals in the proper district to enforce the orders of the Labor Board.

Sec. 303 (a) of the Taft-Hartley Act declares, for purposes of that section only, what constitutes unfair practices; and section (b) of the Act provides that any person injured in his business or property by reason of any violation of section (a) may sue not only in the district court of the United States but any other court having competent jurisdiction of the parties—that's the first time that appeared in the labor acts—

and shall recover damages by him sustained. Now this section provides that it shall be subject to Sec. 301.

Sec. 301 provides for the bringing of suits for the violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. That section provides that both labor organizations and employers shall be bound by the acts of its agent, and for the purpose of determining whether any person is acting as agent, the question of whether the specific acts performed were actually authorized or subsequently ratified shall page 37 } not be controlling.

Nobody has here read these sections which are so vital to this case, and I might read them at this point. Sec. 301 (a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Then they go on with the further provisions there about the conduct of the suit, and it winds up with that provision about agency.

Now you turn back to Sec. 303 (a) and you find there:

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—"

See how it is limited?—

" \* \* \* where an object thereof is—

page 38 } "(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

There is no use to read the rest of those in detail, but the heading of it indicates "BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS". There is nothing in any of those sections that applies to this case. That is the section which winds up

"Whoever shall be injured in his business or property by reason or any violation of subsection (a)"—

which is the one I read—

"may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained \* \* \*"

While I am here, however, I will read Sec. 10, and this is the only respect in which I am going to repeat what Mr. Lowden said. This is in the Taft-Hartley Labor Management Relations Act, of 1947. It tells you what the Board is empowered to do.

page 39 { "Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8)"—

which is the one over here that defines unfair labor practices, both on the part of the employer and on the part of the employee.

Now here is the language that was in the other act, which is excluded from this Act: "shall be exclusive"; that is cut out of the Act and it reads:

"This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise \* \* \*"

This book is Gregory Katz on Labor Law, and he comments on that section at page 959 and says:

"The language of section 10 (a) of the former act that the jurisdiction of the Board shall be exclusive is omitted in the present act on the ground stated by the House conferees, that by retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment the conference agreement makes it clear that when

two remedies exist, one before the Board and one before the court, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." (Not checked.)

Now going back to the question of the effect of the common law. If that provision had not been in the Act at all, and the other language had remained as it was, still page 40 } under the construction which the courts have placed upon the statutes which change or modify or tend to change the common law, the courts would still have said that this common law remedy was not affected. But with that in the statute, you cannot get around the proposition that the common law remains as it was.

Mr. Robertson: May I interrupt one minute? It has been called to my attention, Your Honor, that our 45 minutes are up at 11:15, and the other side has three more minutes out of their 45. My suggestion is that either side use what they want from now on, but it be charged against the other three hours.

The Court: Is that agreeable, gentlemen? In other words, each side will have three hours and 45 minutes.

Mr. Boiarecky: That is all right, except I believe Mr. Robertson is a little bit off of my time.

Mr. Robertson: I may have given you too much.

Mr. Boiarsky: I understand that I have about 10 minutes.

The Court: All right, you will have 10 minutes.

Mr. Allen (Con'd): In the famous case of *Erie v. Tompkins*, 304 U. S. 64, the court said (p. 78):

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest

page 41 } court in a decision is not a matter of federal concern. There is no federal general common law.

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In the later case of *Meredith v. Winter Haven*, 320 U. S. 228, the court held that *Erie v. Tompkins* did not merely free federal courts from the duty of deciding questions of state law in diversity cases but instead placed on them a greater responsibility for determining and applying state laws in all

cases within their jurisdiction in which federal law does not govern.

Now illustration after illustration could be made from the actual cases showing the application of the principle and how far the courts go in holding that the common law of a state is not affected by any legislative enactment either by the legislature of that state or by the Congress unless it plainly so appears. I will illustrate the application of the principle by reference to only one case, and I think this is a good application of it because the case was brought under the Federal Employers Liability Act, and the Federal Employers Liability Act, of course, as we all know, and as every case has held, creates a new right. We know that the law is, when a new

right is created, and the statute creating that right  
page 42 } and creating the remedy specifies the time within  
which the action must be brought, it must be  
brought in that time. It must be brought within that time. So the Act says that the suit must be brought in three years. There is no "saving" clause in favor of an infant whatsoever. In this case of *Scarborough v. Coast Line*, a boy seventeen years old was injured. The claim adjuster told him that he had three years after he got 21 to bring his action, and he waited until after he got 21 to bring his action, and the district court dismissed it on the ground that the limitation was three years and couldn't be altered by any misrepresentation like in an ordinary statute of limitations which goes to the remedy only, because in this case the statute went to the right. The Circuit Court of Appeals said no, it is part of the common law; that is a part of the common law, this matter of estoppel to plead the statute of limitations, and we are going to apply it to a federal statute. They are the only cases I will cite there.

When we come down to the labor acts here, I will hand you one of these books up while I am talking about it. Every argument that is made by my friend on the other side is disposed of, in my opinion, by the well considered case of *Thayer Co. v. Binnall*—there are two cases. I am going to read just  
page 43 } enough of the facts and then the reasoning to  
show Your Honor how applicable the reasoning in  
this case is to our case. These are suits in which the plaintiffs, Thayer Company and H. N. Thayer Company, seek to have the defendants, officers and members of Local 154, United Furniture Workers of America, C. I. O., enjoined from alleged unlawful conduct in connection with strikes at the plants of the respective plaintiffs. Now, mind you, this case was brought, Your Honor, in the state court and was removed to the federal court, and the motion was made in the

federal court to remand on the ground that the federal court did not have any jurisdiction but it was a matter for the state court. And it was remanded.

“The bills of complaint allege, in substance, that the plaintiffs have entered into collective bargaining contracts with the Thayer's Workers' Council and the H. N. Thayer's Workers' Council, as the collective bargaining representatives of the employees of the respective companies, that these contracts are still in force, and that the companies have no contracts with the aforesaid Local 154.”

That is exactly Mr. Bryan's case. He had entered into collective bargaining contracts with the A. F. of L. He had no contracts with these other labor organizations.

“It is alleged that Local 154 has injured the plaintiffs by calling a strike at their respective plants, by inducing employees of the plaintiffs to violate the existing contract page 44 tracts by engaging in the strike, and that this was done for the purpose of compelling plaintiffs to violate their contracts with the respective Workers' Councils”—

Mr. Bryan's case, compelling him to violate his contract with the A. F. of L.—

“and to enter into contractual relations with Local 154”—

in Mr. Bryan's case, enter into contractual relations with that organization out there—

“which has not been certified by the National Labor Relations Board as bargaining representative of plaintiffs' employees.”

What is the name of that outfit out there?—the United Mine Workers, United Construction Workers—they have not been certified as bargaining representatives. In other words, they sought to compel Mr. Bryan into relations with them when they had not been certified by the National Labor Relations Board.

“It is further alleged”—

which is the case in our case—

"that defendants, many of whom are not employees of plaintiffs, have engaged in large numbers in picketing, obstructing entrances to plaintiffs' plants, intimidating employees and others who wish to enter the plants, and have prevented trucks of public carriers from entering plaintiffs' premises."

Now coming on over here to discuss other see-  
page 45 } tions that we have here before us for discussion:

"Section 301 (a) gives this court jurisdiction over suits for violation of contracts between an employer and a labor organization. But that is not the present case. Plaintiffs allege that no contracts exist between them and the defendants, hence they cannot be considered as suing for any violation of such a contract. Furthermore, plaintiffs do not now seek damages in their complaints. The gist of plaintiffs' complaints is not that defendants have violated any contract to which they are parties, but that they have unlawfully interfered to induce a breach of a contract between plaintiffs and the Workers' Councils. This is a distinct cause of action, and one over which this court is given no jurisdiction under Section 301 (a).

"Section 303 (b) gives this court jurisdiction over suits for damage to business or property resulting from violations of the secondary boycott and jurisdictional strike provisions of Section 303 (a). But the conduct of the defendants set forth in the complaints here does not involve a secondary boycott or a jurisdictional strike and is not such as to constitute a violation of Section 303 (a). It is true that it is alleged that Local 154 and its members, the defendants, have engaged in a strike against the plaintiff-employers here, and have encouraged others to do so. But this falls within the prohibition of the Act only when done for one of the objects enumerated in the section. There is nothing to indicate such a purpose here. Nothing appears to indicate any activity here for the  
objects listed in Section 303 (a) (3) and (4) but  
page 46 } defendants contend that the complaints allege unlawful activity for the objects named in Section 303 (a) (1) and (2). But there is no allegation here of any attempt to require any employer or self-employed person to join any organization. And insofar as the activities of the defendants have been directed toward the plaintiff-companies themselves, there is no indication of any purpose to require these companies to cease in any way from doing business with other persons. Sec. 301 (a) (1). The object of the strike is alleged to be to require bargaining with a labor organization not certified under the Act as the bargaining representative

of the employees. But it is the plaintiff-companies themselves and not any *other* employer who would be forced to bargain with the uncertified union. Sec. 301 (a) (2).

"The defendants would violate the Act if they induced or encouraged employees of any employer other than the plaintiffs 'to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services' with the object of forcing such other employer to cease to do business with the plaintiffs or with the object of forcing the plaintiffs (employers other than the employer of the employees thus induced to act) to bargain with the uncertified union. But the complaint makes no allegation of an inducement or encouragement of a strike of or of any concerted action by employees

page 47 } of any one except the plaintiffs. Defendants complain that such an allegation can be found in the statement of the complaints that defendants and their associates who are on the picket lines have refused to permit public carrier trucks that normally transport goods to and from the plants of these plaintiffs to enter upon the plaintiffs' premises. This is too vague a statement to be construed as an allegation of encouragement or inducement to action by the employees of such carriers, much less as an effort to encourage concerted action on their part. In the light of its context, the statement amounts to no more than a specific allegation under the general charge that the pickets have unlawfully interfered with free access to the plants.

"Plaintiffs in their complaints have nowhere expressly laid claim to any right or remedy given them by any federal law. They contend that their complaints are based solely on alleged unlawful interference with their contractual rights and right to do business as given them by the common law of Massachusetts, and that they ask only the remedy of injunction traditionally available to them under the equity jurisdiction of the courts of that state. A fair interpretation of their bills of complaint shows that that is the only cause of action which they purport to set forth. To construe these bills as stating a cause of action which plaintiffs may have under federal law, but which they have elected not to pursue, would be a tortured interpretation of them which I cannot adopt.

"Therefore, I conclude that the complaints do not state any cause of action based on the Constitution or  
page 48 } laws of the United States and, in particular, on the Labor Management Relations Act of 1947. Diversity of citizenship being lacking, the case is not one over which

this court has jurisdiction, and the cases are remanded to the court from which they were removed."

I think that case, if Your Honor please, fits this case like a glove. It is identical in its facts except that in that case injunction was sought, and in this case damages was sought. I do not think that there is anything in this case in any way, shape or form, any way you go about it, by which it can be said that any other court, or any other tribunal, was given jurisdiction to the exclusion of this Court.

Supplementing Mr. Lowden in one respect there about the attitude of these gentlemen and the belated filing of their plea, I call Your Honor's attention to the fact that in one of the pretrial conferences, when the matter of instructions was discussed, counsel for the defendants insisted that the Kentucky law be given to the jury in the form of a Kentucky statute. Your Honor will remember the argument that we had upon that. Of course, they come back and say that consent cannot give jurisdiction of the subject matter; and we all know that if it is actually jurisdiction of the subject matter that is involved, and a court has no jurisdiction of the  
page 49 } subject matter before it, why you cannot give consent, nothing you can do can give the court jurisdiction. And the court, of its own motion, may say, "I haven't got jurisdiction," and throw it out, even though nobody raises the question. But that is not the case here, as Mr. Lowden pointed out. It is not a question of the jurisdiction of the subject matter at all, and the plea comes entirely too late.

Mr. Robertson: If Your Honor please, I just wanted to take about five minutes to relate what had been said here for a moment in the past.

Mr. Lowden, in his argument, said that there was nothing in this case to show that anything had transpired affecting interstate commerce within the meaning of the Act. It shows just the opposite. Your Honor will remember that the testimony was that the tippie never stopped a day, and that they made sure it would not stop a day, and that Hart said he didn't want to stop the tippie because he didn't want to get in bad with Tom Raney. Therefore, Mr. Lowden said that there was no evidence here that anything that was done affected interstate commerce. I say the positive testimony is that it did not affect interstate commerce in any way at all, and if there was nothing else in the case but that, it is not within the meaning of the Act because it does not interfere with interstate commerce and in nowise affects in-  
page 50 } terstate commerce.

Mr. Lowden pointed out here that the Act safe-

guards the rights of employees. Here is was, the Laburnum Construction Company, no right of employees or anything about it, but you ran this company out of Kentucky. Everything else was incidental to that. There is nothing in here about collective bargaining. You ran this company out of Kentucky. That's this case. It has been admitted time and again. I went through the digest of the pretrial conferences. It has been admitted in there time and again.

As the Court, of course, will remember, this case is governed by the substantive law of Kentucky and the procedural law of Virginia. As Mr. Lowden says, nobody has questioned the right of Congress to preempt the field of interstate commerce, if they want to preempt it, but as Mr. Lowden said, in a perfectly devastating way here, not only they had the intent to not preempt the field, but it shows that they expressly intended not to preempt it.

I don't think I need say anything more about the late date that puts this thing so far up. As I understand the argument here of the other side, that if, incidentally to any labor dispute, there is a murder, like there was out in Harlan County, Kentucky, the state court has no control of that? Suppose there is a strike, like there was in Danville, and they blow up a non-striker's home—the state court got to sit page 51 } down and let them keep on blowing them up until they get something out of Washington?

One of these cases stated in Mr. Lowden's brief—referred to advisedly as Mr. Lowden's brief; I think it is a perfectly splendid piece of work, and I challenge a search of the authorities and find that they are not fairly and fully covered there. So if you are going to have murder, or rape, or arson, or dynamiting, incidental to any labor dispute, has the court got to sit by and take it until Mr. Herzog can come in and do what he thinks is right under the Act?

It said here in the beginning that these cases follow a pattern of the points that are raised and the way they try to kick the state court out. Every single argument that is made here this morning has been made before in this trial, and every single argument made here this morning was made in the *Luray* case, which I followed through with Mr. Lowden from the time the first pleading was drawn until the petition for writ of *certiorari* was denied in the Supreme Court of the United States. The argument here is what the state court of Page County did there, as approved by the Supreme Court of Virginia and the Supreme Court of the United States, that nevertheless this Court has got no jurisdiction here.

As we said here, of course, it seems to me that page 52 } my friend on the other side has vaguely questioned him from beginning to end. He assumes that there has been an unfair labor practice within the definition of the Act. He assumes the intent of Congress to preempt the field against the verbatim statements of the reports in Congress. This case here, of course, was not based on that. Mr. Lowden, in his brief, used an expression which he did not mention in his argument, which they raised in their other brief, that we claim they are "outlaws" under the Act. And they are, as Mr. Fohl admitted in his testimony. And if they wouldn't sign the anti-Communist affidavit and wouldn't qualify under the Act, they can't get under the Act and raise any question under it at all. Then, as Mr. Allen says, it is strange indeed that they would come here today and seek sanctuary under the Act under which they have no rights whatsoever.

There was no strike. Remember Local Union 7785; you remember about the picket signs; you remember about the claim that they were on strike; and you remember the answer to the interrogatory that there never was any strike sanctioned at all. So the only point I want to make, Your Honor, was just to call your attention to the few highlights on the facts here in addition to what has been said on the law.

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Mr. Allen: If Your Honor please, in a case like this, whether a motion is made to set aside a verdict upon the alleged insufficiency of the evidence, or whether it is made upon the ground of alleged errors made by the court or by counsel in the course of argument, the court has to view the case as a whole, considering that we took four weeks to try this case. Errors that might be sufficient to set aside a verdict in a case that has taken only one day wouldn't be sufficient to set aside a verdict in a case that has taken four weeks, and tried as this one was tried. As I say, the court has to view the case as a whole and all of the proceedings.

In this case, every question that has been raised and argued here was raised and argued during the course of the trial, except the question of the excessiveness of the verdict. Every question that was raised in connection with instructions was

raised during the course of the trial, argued at page 154 } length, authorities cited, and briefs filed on all important points. Your Honor patiently and with consideration heard everything that everybody had to say and then ruled. Now in the light of that picture, and in the light of the time that was taken, what is there in this case to justify the Court in setting aside the verdict?

They say that the damages are speculative. Now that has been recognized as a ground upon which to set aside a verdict ever since we have been trying cases, but whether a verdict is excessive or not depends upon the particular facts in each case; whether the damages are speculative or not depends upon the facts of each particular case. They talked about the contracts that Mr. Bryan didn't get and the speculative nature of the question of whether he could have gotten them, and all that sort of thing. If there has been a violation of a man's fundamental rights, and some damage is established, a different rule is applicable in a case like that and a case where it is speculative as to whether any damages were suffered.

I think a late case in Virginia—and the law in Virginia is not any different from the Kentucky law—a case that deals with speculative damages and contracts which were not obtained, is the case of *Fensom v. Rabb*, 190 Va. 788, 58 S. E. (2d) 18. To show you how speculative the situation was there,

page 155 } Fensom was operating a manufacturer's agent's business. Finsome had been operating that business for a number of years. Every year he made contracts for a year at a time. The contracts were never made for longer than a year, and they were reviewed at the end of each year. Rabb comes up and buys the business from him upon the representation that he was in good standing with the manufacturers whom he represented, but upon the distinct representation that Finsom didn't have the contracts but a year at a time. They were not transferable, but as long as he—as long as the manufacturer is in good standing, the greater probability was that the contracts would be renewed. Now to show you the exact facts in the case—

The Court: As long as the manufacturer was in good standing? or you mean the manufacturer's agent?

Mr. Allen: Manufacturer's agent. The testimony shows that as long as the manufacturer's agent was in good standing the greater probability was that the contracts would be renewed.

Now the entire business, which Rabb paid \$25,000 for, consisted of nothing on earth but the renewal of those contracts. And here is what the court said:

“ \* \* \* The contracts of The John Fensom Company with the manufacturers whom it represented were annual, and for all practical purposes contracts-at-will due to the revocability clauses therein. The plaintiff knew this. There page 156 } was no assurance any one could give that the manufacturers would renew their contracts from one year to the next. The defendant could not make any guarantee of this and the plaintiff knew it. Even if the manufacturers contemplated renewing their contracts with The John Fensom Company under its traditional ownership, that would be no assurance on its face that they would renew the contracts under new ownership and management. No uncertainty existed in the minds of either party concerning this. The contract in this respect was an aleatory one. The only factors, therefore, to guide a purchaser of such a business would be those which bore on the probability of such a renewal, and of those, the most important one would be the present standing of the defendant with the manufacturers. The defendant represented that he was in “good standing” with the manufacturers.’ ”

Now it turned out that he was not in good standing with two of the manufacturers and the plaintiff did not get the renewal of those contracts. The court held that as to one of them there was sufficient evidence to show that this representation that he was in good standing was made, but as to the other manufacturer, there was not sufficient evidence of that. So they reversed the case.

There was a verdict below and affirmed by the trial court, but the court of appeals reversed it as to the insufficiency of the evidence as to one, the one out in Knoxville, Tennessee; but as to the other one, they said there was ample page 157 } evidence to support the verdict. The case came back and it was never tried any more. By holding the plaintiff's right to recover, the case was settled.

So there you have a case in which the man didn't even have any assurance that he could get those contracts, and he paid his money for nothing on earth but the representation that The John Fensom Company was in good standing and the evidence that since he was in good standing with the manufacturers, the great probability was that the contracts would be renewed. Now if that wasn't speculative, I don't know what was speculative. There couldn't be anything more speculative than that. The plaintiff was even assured by the defendant, says, “I haven't got the contracts, I can't transfer them to you, they are only annual, but I'm in good standing with them and the chances are that you would not have any trouble renewing them.”

Another late Virginia case on the speculative damages is the case of *Jefferson Standard Life Insurance Company v. Hedrick*, 181 Va. 824. Hedrick, a broker, through whom—an agent of the Jefferson Standard, a broker, through whom Hedrick was trying to negotiate a loan through the Jefferson Standard, represented to the man who was applying for the loan that he had filed the application with Jefferson Standard for the loan. And it turned out he had not filed  
 page 158 } it and the man did not get the loan, so he sued the Jefferson Standard for damages. By the way, the court here, in holding the Jefferson Standard liable for the torts of its agents, laid down a very broad doctrine, just as broad a doctrine as the Kentucky cases lay down, with reference to a principal being liable for the acts of its agents. Then it went on to say:

“Counsel for the defendant, in his argument before this court, contends that the amount of the damages has not been proven with certainty. This is not a new question before this court. We have often held that one should not be allowed to escape all liability simply because the precise amount of the damages for which he is responsible is uncertain. Where the existence of a loss has been established, the quantum may be fixed when the facts and circumstances are such as to permit of an intelligent and probable estimate thereof.”

Citing a line of cases.

“Here the loss to Hedrick was not merely uncertain and speculative. Positive and distinct damages have been established. They were such as fairly, reasonably, and naturally flowed from the wrong in the ordinary course of events. Their approximate amount was based upon the estimates of those who were qualified to pass upon the nature and extent of the damages.”

Then they go on at considerable length there to the effect that one who is clearly liable for some damages  
 page 159 } cannot escape because the damages cannot be proved with certainty.

Now I say that the rule about speculative damages, after all, where a person's right has been violated and some damages necessarily flowed and accrued from a violation of that right, and when you come to the question of the amount of damages, speculation necessarily comes into it. As a late

Supreme Court case said, in the case of *Lavender v. Kurn*, 327 U. S. 645, the Supreme Court of the United States, in commenting upon the language of the supreme court of Missouri to the effect that the verdict was the result of mere speculation and conjecture, said this:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

So in every verdict there is bound to be a good deal of speculation and conjecture; and if you lay the foundation by first showing, as we have done here, beyond a peradventure of a doubt, the violation of the plaintiff's rights, then we certainly have established a considerable amount of damage. And

after you pass that point, speculation and conjecture are bound to come into the case, and it comes into every case. And when you have a jury as we had here, properly instructed, as we claim it was, who deliberated some six hours on the case, why then there is no such thing as speculation now to set aside this verdict.

I listened with a great deal of interest to Mr. Mullen about what he had to say with reference to the conduct of counsel throughout the case and the remarks made by counsel, and particularly the arguments of counsel before the jury. I do not believe Mr. Mullen has tried any tort cases for many, many years. If he had, and had heard the arguments that are permitted in tort cases involving fundamental rights, such as are made here, I do not believe he would seriously insist that the arguments which counsel for the plaintiff made to the jury is ground to set aside this verdict.

In every tort case involving such facts as are involved in this case, involving a man's constitutional right to do business, involving a man's freedom of contract and freedom of work, and that sort of thing, those cases afford a basis for, as Judge Browning said in one case, "oratory", and, as he said in another, "the day of oratory has not passed." And a man has a right to resort, to a certain extent, to "oratory" if he has any oratorical powers. He has a right to do it.

Take the case of *Commonwealth v. Beatty*. I don't reckon Your Honor is old enough to remember that.

The Court: Murder case?

Mr. Allen: Yes, sir; tried down in Henrico. It is in the books. The court refused a writ. Mr. Windenberg was assisting the attorney for the Commonwealth and got up there and argued to the jury very forcibly: "You acquit this man Beatty, then go out here to the cemetery and dig up the bones of Paverius and apologize to him in sack cloth and ashes; go to Charlottesville and dig up the bones of McCue and apologize to him for convicting him." That is the type of argument Windenberg made. And able lawyers like Mr. Harry Smith and Mr. Hale Carter got that record up, applied to the court of appeals for the writ of error and they refused it.

I wonder if my good friend Mr. Mullen has read any of those speeches in "Classics of the Bar"? Take this man up here in Washington, some years ago, sergeant-at-arms in Congress, who locked a man up at the orders of a congressional investigating committee; and the United States Supreme Court held that it was a violation of his constitutional rights, they didn't have a right to lock him up. And so he sued the sergeant-at-arms for damages. Read the speech that was made in that case, Mr. Mullen. It tops anything

Mr. Robertson said.

page 162 } Take the old case—with all due respect to Mr. Robertson, who made a good speech, but that lawyer out-did him in that case—but take the case of *Tilton v. Beecher* where the preacher was sued by Tilton for criminal conversation, alienation of affections of his wife. Take the speech that the plaintiff's lawyer made in that case and compare it with what Mr. Robertson said. Mr. Robertson was mild in his argument. Now talk about the "one organization" and the "great organization", the record shows that. Their own testimony shows that it is one great organization, the exhibits show it.

Another thing, may it please Your Honor, you don't always have to have evidence before the jury for every argument that a lawyer makes. You can base your argument on what is a matter of common knowledge. The size of this organization is a matter of common knowledge; the wealth of the organization is a matter of common knowledge. The newspapers were full of their being fined hundreds of thousands of dollars, and millions of dollars, just in recent years. All of that is a matter of common knowledge. It wasn't mentioned in that way. The fact that it is a great organization is a matter of common knowledge; that it is a large and powerful organization is a

matter of common knowledge. A man has a right to base an argument on that.

page 163 } Mr. Mullen says the argument that I started out—I didn't withdraw the argument because I thought it was not proper to make,—I would have done it, of course, if Your Honor had ruled and said so—but I withdrew it to avoid any argument with Mr. Mullen in the midst of my argument before the jury and went on to something else. But it was certainly permissible to argue in that case, and the court of appeals of Virginia has said—I think in the case of *Clem v. Holmes*, and I know they have said it in a number of other cases—that what would punish one man would not be felt by another. That is exactly what they have said. And they have held repeatedly that evidence of financial wealth is admissible in cases of this kind.

Now Your Honor ruled against us on that in this case, introducing specific evidence of it, because there were three organizations here. But, as a matter of fact, upon the evidence, they all constitute one organization, they say, in their documentary evidence. We were entitled to have that evidence, but we didn't have it. But we did have the fact, admitted by them in documentary evidence put out by them, which was put before the jury, that they are all one organization, backed up by John L. Lewis, president of the Mine Workers. That's all in the evidence. And we had a right to make an argument for punitive damages based on a showing of that kind. What

Mr. Robertson said in that respect was absolutely page 164 } not out of line.

Going back to the question of the excessiveness of the damages, there is an article that has just come out in the California Law Review, written in the last month, reviewing all of the large verdicts that have been rendered in the United States for years. And the author states that the trend of the verdicts has followed the trend of the rise in the cost of living. The value of the dollar has gone down. This verdict of \$275,000 now, why ten years ago \$150,000 would have been about what this \$275,000 amounts to now. And the author says, and he quotes from case after case, where the courts say that that is a matter of common knowledge and the juries have a right to take that into consideration, and the courts should consider that matter in passing upon the excessiveness of verdicts.

You have here positive proof of a sizeable sum of a definite loss. You have a connection with the third largest coal company in the world. You must remember, Your Honor, that

upon considering a motion to set aside a verdict, you have to discard every particle of testimony of the defense that is in conflict with any of our testimony. Mr. Bryan said that when he took this job out there that they told him (this first job) that he wouldn't make much money out of it, it was a difficult job, the place was difficult to get to, but if he took that and got started out there, and did that well, page 165 } they'd give him work for years and years. That's a matter a jury had a right to consider. He didn't have to enter into any binding contract with them. It was a probability of what he would get. Mr. Bryan said they liked him; he liked them: their relationship was fine. And with the standing and responsibility of the Bryans here, you can imagine if they did their work satisfactorily that they would be in Kentucky no matter how long doing this type of work. As he said, they had construction work going on all of the time.

Now that is the opportunity that this plaintiff had, and this plaintiff was deprived of that opportunity. Mr. Mullen said that they didn't lose the business until after this thing happened, sometime afterwards, that they still got some more work out there and didn't lose out until sometime afterwards. In the *Rabb* case, the plaintiff didn't actually lose the contracts until nearly a year afterwards—but he lost them.

With that setting, with the proof of some substantial damages, the jury had a right to make probable estimates, and had a right, to a certain extent, to deal in speculation and conjecture.

So far as the punitive damages are concerned, I agree with Mr. Moore here, the punitive damages were not large enough.

What is a hundred thousand dollars to the United page 166 } Mine Workers? 650,000 members. That was before the jury. What assessment would it take against each member to pay a hundred thousand dollars? Why, it would be *de minimis*. Take the United Construction Workers—they had nothing like the United Mine Workers, but they had a large number of members. Take District 50, the evidence shows, was both territorially and jurisdictionally coextensive with the Mine Workers with thousands and thousands of members. Why, a few cents each assessed against the United Mine Workers would pay the hundred thousand dollars. I say the verdict could well have been two hundred thousand dollars for punitive damages.

What yardstick would the Court have to measure the punitive damages by? Going back to the argument of Mr. Robert-

son to the jury, Mr. Robertson couldn't say, with all of his flow of language and his oratory, he couldn't paint a picture as strong as the picture itself, the picture that was put up right on that post there, the picture which showed the spider-web, the reaching out all over the United States and up into Canada. Mr. Robertson couldn't paint the thing as bad as it was from the evidence. I say his argument didn't go outside of the bounds of the evidence at all.

Mr. Mullen made some argument to the effect that Mr.

Bryan's notes showed a situation different from page 167 } the testimony. Well, Mr. Bryan's testimony is what was before the jury, and the notes were before the jury too. Our court of appeals has said, and the United States Supreme Court has said, that even as to the plaintiff's own testimony they can select that which conforms to their views and supports their conclusions. They held that in the case of *Blue & Grey Atlantic Greyhound Lines*, and so did the United States Court of Appeals for this circuit. I believe you were in that case, weren't you?

Mr. Robertson: That is one I won.

Mr. Allen: You won one and I won one.

Mr. Robertson: You got over on the other side.

Mr. Allen: But in that case the bus driver testified two different ways. In his testimony, Mr. Robertson tried to get him to say all sorts of things. And he testified to one effect that would convict him of negligence and then he testified in another instance—

Mr. Robertson: After you got him.

Mr. Allen: —to the effect that he wouldn't be convicted of negligence. Well, the jury found a verdict acquitting the bus driver and putting the verdict all on somebody else. And the trial judge set the verdict in favor of the bus driver aside and entered judgment against the bus company along with the other defendants. It went up to the court of appeals and they reversed the trial court and said that the page 168 } jury had a right to accept any part, or all, of the bus driver's testimony. They could believe all of it, or that part that was against him they could discard.

So apply that to Mr. Bryan. If Mr. Bryan did testify, as Mr. Mullen says, different from his notes, and I do not question Mr. Mullen's accuracy on that, his sworn testimony was given on the witness stand; and if his sworn testimony supports the verdict, the jury had a right to accept it. And that's what they did.

I am not going to say anything much about this charge that Mr. Bryan and Mr. Robertson both made, about the United

Mine Workers and United Construction Workers being outlaw organizations. As a matter of fact, if Your Honor will go back and read that transcript carefully, you will see when Mr. Bryan came out with that statement he was sort of in a state of desperation. Mr. Mullen, on cross examination, was just driving—"Why wouldn't you negotiate with these people? You, over yonder at Hopewell, you wouldn't negotiate with them there, and you wouldn't negotiate with them in Kentucky—why wouldn't you negotiate with them?" Now he wasn't using that exact language, but the whole tenor of it was trying to pin Mr. Bryan down and make him admit that he refused to negotiate.

Mr. Bryan then says, "They are an outlaw organization. I wouldn't negotiate with them. I would just as soon negotiate with robbers." And I say Mr. Mullen pressed him into that. Whether Mr. Mullen pressed him into it or not, it is a matter of common knowledge and evidence in this case that so far as the law we have been arguing about and talking about here, they are an outlaw organization. They are outside of the law of the Taft-Hartley Act. The National Labor Relations Board has no right to hear any complaints that they might have to make. And as a result of that, and the jury had a right to consider that, they took the law in their own hands and tried to handle the situation.

I say that was not a remark for which Your Honor can set aside the verdict, and that Mr. Robertson's argument in that respect was not improper.

All of this talk about the "biggest lawsuit", Mr. Robertson saying the biggest lawsuit he ever had, I don't suppose it was necessary for Mr. Robertson to say that. Certainly it is the biggest one I ever had; and I daresay it was the biggest one Mr. Robertson ever had; and I reckon everybody on the jury knew it was the biggest one ever tried around here. It was the biggest one any lawyer in Richmond ever had, so far as that is concerned. It is a foregone conclusion. That certainly is not anything for which to set the verdict aside.

page 170 } All of these cases, dealing with remarks of counsel and remarks of witnesses and things coming out in the testimony, and this, that and the other happening, are all thrown in, so to speak, and the court is called upon, in the last analysis, to say have these defendants had a fair and impartial trial, according to law? And when it has been shown to the court that they have had a fair trial, according to law, that is the end of the case. The statute itself says so.

Now I ask Your Honor, after four weeks of trying this case, hearing every question argued as we went along, hearing all of the instructions discussed at length—and, by the way, take that set of instructions and read them at one setting, right from the beginning to the end, and I don't think anyone can say that a better, fairer set of instructions were ever given to any jury. When you consider the instructions and consider the time and the deliberation which was given every question that was raised, how much better, if any, could any court try this case than it was tried, in the absence of some light from on high? If you set this verdict aside and grant a new trial, could we try the case any better? Could Your Honor try the case any better? Could any trial judge try the case any better, in the absence of an opinion from the court of appeals? We have all done the best we could.

page 171 } As the court of appeals has said in cases like this, counsel sometimes will—I don't say Mr. Robertson stepped out of bounds here, I don't think he did, in view of all of the circumstances, but if he did, the court of appeals has said that it is sometimes natural for men in their zeal for their client's interest to step a little out of bounds and make arguments that are improper. It is to be expected. But unless it be shown that it really affected the jury and prejudiced the defendants, why then there is no error and the court should not set the verdict aside on that account.

I think, sir, that these defendants here have had as fair a trial as they could get any where. Naturally, in view of matters of common knowledge concerning the United Mine Workers, there is going to be probably some prejudice against them. But that was as fair a jury as was ever impaneled. They were good businessmen. It was an old common law jury of twelve men; each side had a right to strike off three men. It is the fairest way to get a jury—a good jury. They were all high men, men selected as a special jury to try this case with the privilege of either side getting rid of three and you wind up with twelve, and without exception. Nobody excepted to any juror, and nobody today has excepted to any juror. And there is no evidence of any passion, page 172 } bias, or corruption, and they were the three words used to justify the setting aside of the verdict.

Mr. Robertson: If Your Honor please, I would have preferred not to have argued this case at all. I do not think that there is anything that has been said here on either side today that is not set out in the memorandums that have been filed with the Court. You remember the memorandums that we

have filed throughout this trial, you remember the trial memorandums, and you remember the various other memoranda we filed in the pretrial conferences and throughout the trial. They are all now summed up into these last two memorandums that we have put here. They represent all that we have to say, in the best way we know how to say it.

As long as I have got to argue the case, there are some number of things that I am going to refer to very briefly. But, first of all, I am going right to the heart of the thing that concerns me personally, and that is whether or not there was any impropriety in any remarks that I made throughout the course of this trial or any argument that I made throughout the course of this trial. I say to this Court and to everyone in this courtroom now that my conscience is clear, that I think I was within my rights and the rights of my client, that I have

no apologies to offer, and that everything I did  
page 173 } was justified and I had a right to do it. My friend,

who told the jury that he moves in these higher realms, that he hadn't tried a case for years, that "I'm a business man and lawyer," has forgotten that a jury trial is a fight and not a pink tea party. And as long as I am fighting for my client, I am going to take advantage of every legal right my client's got, to the best of my ability, and I am not going beyond what I've got a right to do, if I can help it.

Now I am not going to belabor this point, but I am going to say two other things. That motion that was made on March 29 for a mistrial on the alleged ground of improper comments and arguments by me, why Mr. Mullen came in later on, on February 16, and said that the real purpose of that thing was to shut me up and that it was not intended to get a mistrial. I say then that there has been some plain talk here today and there have been some harsh things said of me, but if that was what he was driving at, it was a fraud on the court. He made out like he was asking for a mistrial on account of my misconduct, when, according to his own senior counsel in this case, his statement was for an entirely different purpose. Is that coming clean with the Court? and can senior counsel in a case be pulled out of his admission by a junior counsel in the case, as they attempt to tell Your Honor here today?

page 174 } I want to say one other thing while I am on this. I am going to assume Your Honor's memory is as bad as mine. It is perfectly amazing how you can forget these things. And I say if you can go back to that motion on the 29th of March, as I believe is set forth again verbatim in their brief here, and I hope the Court will go back to

the record and read the context and the settling within which the different remarks were made—I don't know who prepared that motion and I don't care—I say that the way the remarks were lifted out of that context, the way they were distorted, the way they were misinterpreted, constitutes as unfair an attack upon counsel in the case as I have ever known since I have practiced law; and I say it was a scurrilous attack on me.

I have only one other thing to say on that. I do not want there to be any mistake here as to where I am standing on it. I am not apologizing for what I say. I say what I said was justified within the law and I had a right to say it and it was my duty to say it. But I want to say this other thing. I don't care what exceptions have been made here and there under the particular facts of a certain case; I say that the law of Virginia is this. There is one incorrect statement in these briefs that we filed. I wrote that part of it. I said they failed to object when the argument was made. In many instances they did. Mr. Mullen cited time after time page 175 } and thing after thing here today that he never took any objection to at all. In the others, what did he say? He said, "You are going far afield there." And the Court would tell me to stop. Well, I think that was an objection to it and I was wrong when I said they made no objection in the instances where they did make objection. But he took no exception. And when the Court told the jury to disregard it, that satisfied him and he sat silent. And I tell Your Honor that the law of Virginia is this—that if Your Honor is against me in the trial of a case and you make an argument to the jury that I think you've got no right to make, and I really mean business, and I make an objection to it, and the court says, "Gentlemen, disregard that statement," if I'm not satisfied with that, I've got to risk coming out and showing my colors and antagonizing the jury and saying, "Well, that is all right, Your Honor. The damage has been done. Now I ask for a mistrial." And if the Court refuses a mistrial, I except and save the point. And if I haven't got the guts to do that and run the risk of turning the jury against me, but have nevertheless got enough confidence in my part to say, "Well, you may stick me here, but I am going to save it for the court of appeals,"—and they didn't have the *hearti*-hood and they didn't have the courage to come along here and risk turning the jury against them; but then page 176 } weeks after the case is over, they come up here and say, "We want a mistrial." That's all I've got to say about the alleged comments of mine.

Now, if Your Honor please, I know that the Court will read these briefs that have been filed here preparatory to this argument on both sides. I think we have done, in our brief here, a piece of work that will be as helpful to the Court—I believe it will be more helpful to the Court than any brief I have personally had any part in making up.

The reason I am taking the time for this. Your Honor, I want to sort of prepare Your Honor to get the benefit of the brief. There are 2,500 pages, about, of transcript for the actual four weeks of the trial. There are approximately another 500 pages of transcript of pretrial conferences. When they say, for instance, that there is no evidence here to support the verdict, if we try to go through that mass of transcript and put it out into the brief, it would be so long that it would just be an imposition upon the Court, and it would be so boring no human being could keep his mind on it. The reason I say that, I happen to know that it took ten days of good, honest, hard work to prepare this digest of the trial transcript from 2,500 pages; and there is some of the dreariest reading in it as you ever read in your life. But if you turn

back there to Appendix B, that whole thing is  
 page 177 } digested down to 73 pages, and Your Honor can  
 turn there to that trial transcript digest, and if  
 you read it through from beginning to end, it will call back to your mind the high points and the essential points of this case fairly digested, the things that are against us as well as the things that are in our favor. And then there is a reference to the transcript where you can turn immediately to it without searching for it, if you want to.

Likewise, we have made a digest of the pretrial conferences, and it will show many things there. I will tell you the reason we did it. All through those pretrial conferences, counsel for these defendants made what we considered then, and we consider now, many damaging statements against themselves. And when I read it last night, I was pleased when it called back to my memory that in the pretrial conferences, as Mr. Mullen himself admitted, it is all one organization composed of constituent parts,—and, of course, it wouldn't have made any difference whether he admitted it or not anyway, because the constitution of the United States Mine Workers says so in Article 2, and they keep on saying so in all of the interrogatories and answers that we have cited in our brief.

I will come on to these notes that I jotted down here while  
 other people were arguing the phases of the case  
 page 178 } not based on the motion to dismiss, and I have  
 very little to say.

While Mr. Allen was talking about that article which appeared within the past month from, I believe he said, the University of California, it came back to my memory—I can't remember the case, but I'll bet somebody else in the courtroom can remember it—that during the flush times that attended World War I, down in the Newport News area, there was a personal injury action that came up from there and went to the court of appeals; and I think there was a verdict of some 30-odd or 40-odd thousand dollars, which apparently at that time was the biggest personal injury award ever made in Virginia. And the court of appeals, in its opinion, said the court will take judicial knowledge of the decreased purchasing value of a dollar. That's right along the line of what Mr. Mullen was saying there. I have nothing more to say about that.

As to this breach of this business relationship, that was put squarely before—squarely before—the jury as an issue of fact; as to the date when it occurred was before the jury as an issue of fact. Well, suppose they do keep on bidding, suppose they do keep on trying to get business, suppose they do keep on in correspondence and in conferences and in interviews, and you still don't get any business, haven't they destroyed your business relationship so far as any page 179 } good is concerned? haven't they lost the customer?

Talk about uncertainty of contracts, these contracts were cost-plus-5%, and what constituted cost was defined in the contract. So you have the definition of "cost" and on top of that you have your 5%. Is there anything speculative about that? They said in there that home office expenses should not be allocated to the job, but what confined meant was job costs. It was job costs plus 5%.

The destruction of a business connection—I stated about the date of that. Why do these things keep running back in your mind? When they sat silent there about my argument, why does it come into your mind "He who has remained silent when he ought to have spoken will not be heard to speak when he ought to remain silent?" And when you talk here about loss of business connections and damage to business reputation, why does the old definition of good will keep coming back into your mind?—nothing in the world but the expectation that the old customer will come back and do business at the old stand. And they stopped it here. Damage to business reputation? How can you tell how much they have damaged my reputation by what they have said here today? If you attack a woman's chastity, how much can you

tell about that as to how much value there is to their reputation? Afraid to go on the record, afraid to ask page 180 } for a mistrial, but I voted for Dewey and I feel like the woman "nothing now makes any difference"; and they ran us out of Kentucky, they ran us out of West Virginia, they made it impossible for us to do business with these big people. Now what other big people are going to handle us? What other big people will want us when they are afraid they will get involved with the United Mine Workers—this "one organization."

If I understand Salvati's testimony, and I read it here very recently, it is this, which I believe is a fair interpretation—that we had this empire composed of the Island Creek Coal Company, and the subsidiary and associated and affiliated companies, and we covered such a broad field that had so many difference phases of operations that we were always doing work of the kind that Laburnum is equipped to do; and that we would be engaged in that business indefinitely; and because of the confidence that had in Laburnum, and the type of work they had done and their standing with us, we were going to give them that work on a cost-plus basis indefinitely. And it was profitable work and a valuable business connection. I think that anybody fairly reading Salvati's testimony will bear me out on that.

I do not think this will stand up. Mr. Mullen says the construction business is a hazardous business, an page 181 } uncertain business, therefore you can never be sure of your profits. That may be the experience that has caused them to go into cost-plus-5%. And if your costs are defined and your plus is defined, you are not very apt to go broke.

Mr. Mullen referred here to something that he says for the first time today, so far as I recall, that was unfair in my opening statement. Why didn't he get up and object to it? Why didn't he say something to Your Honor about it? Why didn't he say something to the jury about it? Why didn't he object and ask for a mistrial? Why didn't he take an exception? Why did he wait until today?

I say just exactly what Mr. Allen said, that all of these defendants are outlaw organizations under the Taft-Hartley Act, and that is just the garden variety of the vernacular of the day that everybody in this room has heard them so described in the press, in conversation, and everywhere else, and there is no misunderstanding about it and nothing unfair in saying it. Fohl was the man who said, "We didn't have to go to the Taft-Hartley Act, we could get just as good

results in other ways, we could do better outside of the law than inside the law"—that particular law.

I haven't enjoyed it here today. I have been knocked around enough in jury trials too, generally representing the defendant, and I have been kicked around right page 182  $\frac{1}{2}$  smart, and have had to sit and take it when it was dished out to me, and it was at least some satisfaction to me to find out that I had learned, in some measure, to dish it out. And if it got under Mr. Mullen's hide to the extent that it seems to have done, I think I have made a far better argument than I had any idea I made, because he's not any spring chicken either.

The jury was out six hours. You remember they came in after twelve o'clock at night. They weren't swept on by any great Churchill eloquence from me. Your Honor knows that jury. Do you think anything I said really influenced that jury? Do you think that anything any lawyer in this case said really influenced that jury? Or do you think what influenced that jury was the testimony that came from the witnesses?

About the income tax question. It might have been said in the brief, I don't remember, but the first time it has ever been said verbally what they wanted with those income tax returns has been said here today. They didn't tell the Court when the Court ruled on it what they wanted to prove with it, or what they hoped to prove with it. But I don't think that makes any difference because I remember this, Your Honor, and I think this will call it back to your memory. When the question was whether they were going to answer the jury's question or not, we came in, and I remember it so vividly because it was Mr. Lowden who made the suggestion to me, he said, "Let's tell them either way they want is all right with us, and we can't be in error then. Whatever they want to do is all right with us." So we came in and told them that. And my recollection is they went in a huddle by themselves outside of chambers and came back and said they didn't want it to go to the jury. And everybody agreed that it was a thing which should not go to the jury.

The size of this organization—and that is in answer to one of the interrogatories and it is shown in our digest there. The sizes of these organizations are in the evidence. The United Mine Workers—650,000; my recollection is United Construction Workers—112,000—or maybe District 50—112,000, and maybe the other one—42,000.

If Your Honor please, we submit that there is no error in

this record, that this is a fair verdict, fairly arrived at, and we ask the Court to enter judgment on the verdict.

\* \* \* \* \*

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The Court: Gentlemen, I want to thank all of you. I will let you hear from me as soon as I can. Court is adjourned.

(Whereupon, at 5:55 p. m., the proceedings adjourned.)

\* \* \* \* \*

A Copy—Teste:

M. B. WATTS, C. C.

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**1942**

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Vol. 2214]

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday, the 23rd day of January, 1952.

UNITED CONSTRUCTION WORKERS and others, Plaintiffs in error,

against

LABURNUM CONSTRUCTION CORPORATION, Defendant in error

From the Circuit Court of the City of Richmond

Upon the petition of United Construction Workers, affiliated with the United Mine Workers of America; District 50, United Mine Workers of America; and United Mine Workers of America, a writ of error and supersedeas is awarded them to a judgment rendered by the Circuit Court of the City of Richmond on the 5th day of July, 1951, in a certain notice of motion for judgment then therein depending wherein Laburnum Construction Corporation was plaintiff and the said petitioners were defendants; and it appearing from the certificate of the clerk of the said circuit court that supersedeas bond in the penalty of \$325,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

A Copy, Teste:

— —, Clerk.

Vol. 2215]

VIRGINIA

In the Circuit Court of the City of Richmond the — day of —, 19—.

Harold F. Snead, Judge; Wilbur J. Griggs, Clerk

I, E. M. Edwards, Deputy Clerk of the Circuit Court of the City of Richmond, do hereby certify that the defendants in the suit of Laburnum Construction Corporation vs. United Construction Workers, Affiliated with United Mine Workers of America, District 50, United Mine Workers of

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America and United Mine Workers of America, have executed a suspending and supersedeas bond in the penalty of Three Hundred Twenty-five Thousand Dollars (\$325,000.00) in accordance with the statutes in such cases made and provided.

(S.) E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond.

Rec'd. January 23, 1952. M.B.W.

[fol. 2216]

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday, the 2nd day of February, 1953.

UNITED CONSTRUCTION WORKERS and others, Plaintiffs in error,  
against .

LABURNUM CONSTRUCTION CORPORATION, Defendant in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond on the 5th day of July, 1951

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel, but because the court is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy, Teste :

— — —, Clerk.

1945

[fol. 2217] OPINION BY JUSTICE JOHN W. EGGLESTON—Richmond, Virginia, April 20, 1953

Present: All the Justices.

Record No. 3989

UNITED CONSTRUCTION WORKERS, Affiliated with UNITED MINE WORKERS OF AMERICA, District 50 United Mine Workers of America, and United Mine Workers of America

v.

LABURNUM CONSTRUCTION CORPORATION

From the Circuit Court of the City of Richmond, Harold F. Snead, Judge -

This is a tort action instituted in December, 1949 by Laburnum Construction Corporation, sometimes hereinafter referred to as the plaintiff, or Laburnum, against United Construction Workers, Affiliated with United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America, sometimes hereinafter called the defendants, for recovery of compensatory and punitive damages in the aggregate sum of \$500,000.00.

The notice of motion for judgment charges that in July, 1949, while the plaintiff was engaged in certain construction work in Breathitt county, Kentucky, pursuant to contracts with Pond Creek Pocahontas Company and Spring Fork Development Company, the defendants' agents came to the site of the work and demanded that the plaintiff's employees become members of the United Construction Workers, that plaintiff recognize that organization "as the sole bargaining agent" for its employees on such projects, and threatened that if the plaintiff and its employees refused to comply with these demands it would not be allowed to continue with its work on these projects; that upon the refusal of the plaintiff and its employees to yield to these demands and threats the defendants' agents by "a series of violent, malicious and unlawful acts," so threatened and intimidated the officers and employees of the plaintiff that it was unable to continue with the construction projects and

was compelled to abandon them. It was further alleged that as the direct and proximate result of such acts of the defendants' agents the plaintiff was greatly damaged and injured "in and about its property and reputation," its profitable business connections were lost and destroyed, and it was deprived of large profits which it would otherwise have earned.

Each of the defendants filed a plea of not guilty and grounds of defense, denying all of the material allegations of the notice of motion for judgment.

After a protracted trial the jury, by their verdict, found all of the defendants "jointly and severally liable" and [fol. 2219] awarded the plaintiff "compensatory" damages of \$175,437.19, and "punitive" damages of \$100,000, making a total of \$275,437.19. The defendants filed a motion to set aside the jury's verdict as contrary to the law and evidence and grant a new trial, assigning numerous errors during the proceedings. While this motion was pending the defendants filed a motion to dismiss the plaintiff's notice of motion for judgment and enter a final judgment for the defendants, on the ground that the court was "without power, authority and jurisdiction to hear and determine the issues in this action because such determination would be repugnant to and in violation of the Labor Management Relations Act, 1947 (61 Stat. 136, ch. 120, Section 1, *et seq.*, Public Law 101), and to Article 1, Section 8, of the Constitution of the United States." These motions of the defendants were overruled and judgment was entered on the verdict. We granted writ of error.

### Jurisdiction

We shall first deal with the assignment of error which challenges the authority and jurisdiction of the lower court to hear and determine the issues in this action. The contention is that the conduct of the defendants' agents upon which the plaintiff's action is grounded—that is, coercing [fol. 2220] plaintiff's employees to become members of one of the defendant unions—constitutes an "unfair labor practice" in violation of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U.S.C.A., Sec. 151, *et seq.*), as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C.A., Sec. 141, *et seq.*); that that Act "estab-

lished a single paramount administrative authority for the redress and prevention" of such practice; And that although the Act does not "provide for damages to the employer" because of such practice, yet the State courts are deprived of jurisdiction to entertain "any action for damages based upon such conduct."

The defendants argue that the record shows that Laburnum is a Virginia corporation, with its home office in Richmond, Virginia; that it engages in industrial construction work in several States; and that at the time of the acts complained of it was engaged in construction work for two large coal producers with mines in Kentucky and West Virginia, whose output was being shipped in interstate commerce. Hence, it is said, the labor dispute in which the plaintiff become involved and out of which its cause of action arose, so affected interstate commerce as to be within the purview of the Act.

[fol. 2221] Section 1 of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*), as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Sec. 141, *et seq.*), hereinafter referred to as the "Act" recites that its "purpose and policy" are "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (61 Stat. 136, 29 U. S. C. A., Sec. 141.)

Under Section 7 of the Act, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities \* \* \*." (29 U. S. C. A., Sec. 157.)

[fol. 2222] Section 8 of the Act provides that certain conduct on the part of an employer or a labor organization shall constitute "an unfair labor practice." Under its terms, "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: \* \* \* ." (29 U. S. C. A., Sec. 158.)

Section 10 of the Act provides these remedies through proceedings before the National Labor Relations Board and in federal district and appellate courts: The Board is empowered to prevent unfair labor practices affecting commerce (Sec. 10(a); 29 U. S. C. A., Sec. 160(a)), and to that end may "issue and cause to be served upon" a person charged with any such practice "a complaint stating the charges in that respect" (Sec. 10(b); 29 U. S. C. A., Sec. 160(b)), conduct a hearing upon the charges and, upon a finding that they have been sustained, issue an order requiring such person to cease and desist from such unfair labor practice (Sec. 10(c); 29 U. S. C. A., Sec. 160(c)). A right of appeal from a final order of the Board is afforded to an appropriate United States circuit court of appeals (Sec. 10(f); 29 U. S. C. A., Sec. 160 (f)). Pending a hearing of the matter before it the Board may petition an appropriate United States district court for, and such court may grant, an "appropriate temporary relief or restraining order." (Sec. 10(j); 29 U. S. C. A., Sec. 160(j).)

[fol. 2223] We may assume, without deciding, that the acts of the defendants so affected interstate commerce as to come within the purview of the Act and, at the instance of the plaintiff, could have been dealt with in the manner there prescribed. But it does not follow that that was the only redress open to the plaintiff. It did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law tort for which admittedly the Act affords no redress.

It is settled by recent decisions of the Supreme Court of the United States that by the passage of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*), as amended by the Labor Management

Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Sec. 141, *et seq.*), Congress has occupied and closed to the States the field of "regulation of peaceful strikes for higher wages" in industries engaged in interstate commerce. *International Union, etc. v. O'Brien*, 339 U. S. 454, 457, 70 S. Ct. 781, 783, 94 L. Ed. 978; *Amalgamated Ass'n., etc. v. Wisconsin Employment Rel. Bd.*, 340 U. S. 383, 390, 71 S. Ct. 359, 363, 95 L. Ed. 364.

But this is not to say that by the passage of the Act the courts of the several States have been deprived of their [fol. 2224] traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce. The Supreme Court has repeatedly held that an "intention of Congress to exclude states from exerting their police power must be clearly manifested." *Allen-Bradley Local, etc. v. Wisconsin Employment Rel. Bd.*, 315 U. S. 740, 749, 62 S. Ct. 820, 825, 86 L. Ed. 1154, and cases there cited. As was said in *Kelly v. State of Washington*, 302 U. S. 1, 10, 58 S. Ct. 87, 92, 82 L. Ed. 3, " \* \* \* the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

In *Erwin Mills, Inc., v. Textile Workers Union of America*, 234 N. C. 321, 67 S. E. 2d 372, it was held that the federal Act did not deprive the State court of the power by appropriate action to protect persons and property from threatened unlawful acts of violence committed during the course of a strike or labor dispute and injurious to the rights of the State's citizens. To the same effect are, *Williams v. Cedartown Textiles*, 208 Ga. 659, 68 S. E. 2d 705; *International Moulders, etc. v. Texas Foundries*, [fol. 2225] Tex. Civ. App., 241 S. W. 2d. 213; *State v. Thatch*, 361 Mo. 190, 234 S. W. 2d 1; *Rice & Holman v. United Elec. Radio & Mach. Wkrs.* 3 N. J. Super. 258, 65 A. 2d 638.

The determination of the present question is governed by the same principles. While the Act provides a remedy to restrain the commission of acts constituting unfair labor practices, there are no words which indicate that such

remedy is exclusive, or that the Act was designed to deprive an employer or his employees of the common-law rights of action in a State court for acts of violence or intimidation which may constitute unfair labor practices. Nor does the exercise by the State of its jurisdiction in enforcing such cause of action conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected.

Upon substantially this reasoning the Supreme Court of Alabama in *Russell v. International Union, etc.*,—Ala. —, 64. So. 2d 384 (decided March 13, 1953) upheld the right of the State court to entertain an action for damages against a labor union for malicious acts of violence and threats of personal injury by the union's agents which prevented "plaintiff from engaging in his employment," although such conduct on the part of the union's agents constituted an unfair labor practice under the federal Act.

The motion to dismiss was properly overruled. [fol. 2226] The remaining assignments of error raise these basic questions:

(1) Is the finding that Laburnum was entitled to an award of damages against the defendants supported by the law and the evidence?

(2) Is the quantum of the compensatory and punitive damages supported by the law and the evidence?

(3) Did the lower court correctly rule on other matters arising during the course of the trial?

#### Liability of the Defendants

Laburnum Construction Corporation was organized under the laws of Virginia in 1937 and has its principal office in Richmond. Since 1942 its president has been A. Hamilton Bryan. It specializes in industrial construction and during the ten years preceding the events with which we are concerned it had successfully performed contracts amounting to an average of about \$2,000,000 per year.

On April 15, 1947, the plaintiff entered into a contract with Richmond Building & Construction Trades Council, an affiliate of the American Federation of Labor, whereby it agreed to employ, if obtainable, only members of that

union when working in an area over which an affiliate of [fol. 2227] that union had jurisdiction.<sup>1</sup>

During the period from September 6, 1947 to December 1, 1949, the plaintiff performed work in West Virginia and Kentucky for Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiary companies, under twelve separate contracts amounting to more than \$650,000, from which it derived an annual profit slightly over \$25,000. These two coal companies and their subsidiaries, including the Spring Fork Development Company, comprise the third largest commercial coal producing unit in the United States and the largest in the West Virginia and Kentucky coal fields. They usually have considerable construction work in progress on their properties.

The relationship between the plaintiff and these companies was based upon personal friendship as well as upon a record of business integrity and performance. Bryan, the president of Laburnum, was a friend of J. D. Francis and Raymond E. Salvati, president and vice-president in charge of operations, respectively, of both companies. Since June, 1949 Salvati has been president of both companies under a common management.

In October, 1948 the two coal-producing companies determined to open a mine in Breathitt county, Kentucky, and [fol. 2228] Bryan was asked to undertake the building of the preparation plant there. Because of the undeveloped condition of the roads and lack of living accommodations for the laborers, Bryan was told that if Laburnum would undertake the project it would be awarded additional work which would be required for the operation of another mine in Breathitt county, amounting to more than \$600,000, on the basis of cost plus a fee of five per cent.

On October 28, 1948, the Pond Creek Pocahontas Company awarded the plaintiff a contract for construction of the preparation plant on the basis of cost plus a fee of five per cent, the total fee not to exceed the sum of \$12,000. The estimated cost of the project was \$200,000. Work on this project was commenced November 1, 1948, and was approxi-

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<sup>1</sup> This agreement was executed prior to the effective date of the "Right to Work Statute." Acts 1947, Ex. Sess. ch. 2, p. 12; Code of 1950, Sec. 40-68 ff.

mately ninety-five per cent completed when it was interrupted on July 26, 1949. Pursuant to their agreement the coal companies also awarded Laburnum several projects included in the additional work to which reference has been made.

Upon commencing the work in Breathitt county, Laburnum, in compliance with its agreement with Richmond Building & Construction Trades Council, procured skilled laborers through the nearest local affiliates of the American [fol. 2229] Federation of Labor. With the knowledge and consent of these affiliates it employed local unskilled laborers who were not members of any labor organization.

Laburnum proceeded with its work on these several projects without trouble until July 14, 1949, when William O. Hart, speaking from Pikeville, Kentucky, telephoned Bryan who was in Richmond. According to the testimony of Bryan, which was accepted by the jury, Hart identified himself as a "field representative of the United Construction Workers and District 50 of the United Mine Workers of America," working under David Hunter, "Regional Director of Region 58 of United Construction workers and District 50," with headquarters in Pikeville. Hart told Bryan that he was familiar with the work which Laburnum was doing and about to do in Breathitt county, that the plaintiff was "working in United Mine Workers territory," and that he (Hart) would close down this work unless the plaintiff recognized the United Construction Workers in the employment of its workers. Bryan told Hart of Laburnum's agreement with the American Federation of Labor affiliate at Richmond, under which it was to employ members of that union, and that consequently it would not be able to comply with Hart's demand and make an agreement with the United Construction Workers. Hart replied that he was going "to take over" the plaintiff's work, that he intended [fol. 2230] to "organize" all of its workers, "including the carpenters, electricians, pipefitters, ironworkers, millwrights, laborers, and everybody else," and that if the plaintiff failed to make an agreement "recognizing the United Construction Workers, he (Hart) would close down" all of the plaintiff's work in Breathitt county, as had been done in other instances within his (Hart's) territory.

According to Bryan, during this conversation Hart said

nothing as to any of Laburnum's laborers being dissatisfied with their wages or working conditions, but based his statements on the fact that Laburnum was working in United Mine Worker's territory and must recognize the United Construction Workers, the latter's affiliate. Just before concluding this telephone conversation Bryan requested Hart to communicate with him before he took any other steps, and Hart agreed to do so.

Bryan immediately telephoned Cecil M. Delinger, his superintendent at the Kentucky job site, about his conversation with Hart. Delinger told Bryan that he knew nothing of any labor trouble, or any threatened complaints.

On Monday, July 25, about 7:30 p. m., Delinger telephoned Bryan that he had been informed that on the next [fol. 2231] day, at noon, the United Construction Workers were coming to the job site with a large group of men, that they would be armed, and would stop the plaintiff's employees from working on the projects.

It was then too late for Bryan to catch a train for arrival at the job site by noon the next day, so with one of his employees he set out for Kentucky that night in a company truck, reaching Huntington, West Virginia, about 7:00 a. m. on Tuesday July 26. Bryan then undertook to call Hart at Pikeville, Kentucky, and was informed that he was not there but that he might speak to Hart's "boss", David Hunter, regional director of District 50 United Mine Workers of America, and regional director of United Construction Workers. Bryan requested Hunter to direct Hart not to interfere with the plaintiff's workmen before Bryan had an opportunity to talk with Hart at the job site. Hunter stated that he would try to get the message to Hart.

Having been delayed by trouble with his truck Bryan did not reach the job site until about 3:00 p. m. on the same day. When he arrived there he found that all work on the several projects in which his men were engaged had stopped. It developed that about noon on that day Hart had arrived [fol. 2232] at from 40 to 150 men. There is evidence that this was "a very rough, boisterous crowd," that some of the men used abusive language, that some were drunk, and that some carried guns and knives.

There is evidence on behalf of the plaintiff that when

Hart and his men reached the "schoolhouse site" upon which some of the plaintiff's skilled laborers were working. Hart demanded that these workmen join the United Construction Workers. When several of the Laburnum workers informed Hart that they were members of the American Federation of Labor, Hart replied, "God damn you, if you work here you are going to join the United Construction," or else we will kick you out of here."

Hart and his men then went to the coal preparation plant and told the Laburnum workers there that he was taking over the job and that the Laburnum workers would have to "join up with the United Construction Workers." He accosted other employees of the plaintiff at another site where he repeated his threats that he would "take over" the job unless they joined the union which he represented. Some of the plaintiff's employees yielded to these threats and agreed to join Hart's labor organization, while others refused to do so.

[fol. 2233] It is true that Hart's version of these incidents is quite different. He denied that he undertook to coerce the plaintiff's employees into joining his union, or that he told them that they could not work unless they did so. In short, his story is that he went to the job site for the purpose of organizing the unskilled laborers who were unorganized and not members of any union, and to "represent" other employees of the plaintiff who were dissatisfied with their wages and working conditions. He related that some of the plaintiff's employees, including both the skilled and unskilled laborers, voluntarily signed up with the United Construction Workers.

The verdict of the jury has, of course, resolved this conflict in favor of the plaintiff.

When Bryan arrived at the job site and was informed of what had happened, he talked to Hart and reminded him of their telephone conversation of July 14, when Hart had promised to let Bryan hear from him before he undertook to stop the work. Hart denied that he had any such understanding and repeated to Bryan that the latter was in United Mine Workers' territory, that he (Hart) was "taking over" for the United Construction Workers regardless of the fact that the majority of the Laburnum employees were mem-

[fol. 2234] bers of the American Federation of Labor, or had made application to join it.

According to Bryan, Hart further admitted that he had received Bryan's message sent through David Hunter that morning, but asserted that he "had already made all his plans and arrangements and couldn't stop them." He boasted to Bryan, "I bet you \$500 right now that you will never finish your job unless you use United Construction Workers' men," adding, "Nobody has ever been able to buck the United Mine Workers yet, and you can't do it either."

There is ample evidence to support the finding that because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work.

After July 26 Bryan undertook to persuade his employees to resume their work. On the next day some of the workers returned to the job site, but were again confronted by representatives of the opposing labor organization who repeated their abusive threats, and consequently the plaintiff's employees were afraid to go back to work. There is further evidence that Bryan continued his efforts to retrieve the situation. He sought police protection, which was denied him; he attempted to hire new men, but they were afraid to work with him after what had happened.

[fol. 2235] On behalf of the defendants there is evidence that some of the Laburnum employees refused to return to work because Hart had posted picket signs on the job site and these employees refused to pass these signs or cross the so-called "picket lines." But there is ample evidence to support the finding that the plaintiff's employees refused to resume their work because of the threats and conduct of Hart and his associates.

Bryan talked with Hart again at the job site on August 1, and, as he says, Hart "left no doubt in anybody's mind that he was going to have people to stop any men from working who tried." "He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. He said he would do that unless we signed a paper recognizing his organization as the representative of the labor-

ers." Bryan replied that he wouldn't do it and couldn't do it" because of his prior obligation to another labor organization. Moreover, Hart threatened that if the Laburnum men "went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek."

On August 3, 1949, Bryan reported the whole situation to the officials of Pond Creek Pocahontas Company and Island Creek Coal Company. In the meantime these coal producers [fol. 2236] had become alarmed lest the disturbance spread to their own employees who were members of the United Mine Workers and bring on a stoppage of their mining operations. Consequently, on August 4, the coal companies, because of the dispute in which the plaintiff had become involved with representatives of these labor organizations, canceled the construction contracts with Laburnum which were then in progress.

Hoping, nevertheless, to save the situation, on August 5 Bryan talked with David Hunter at the latter's office in Pikeville, Kentucky. But Hunter refused Bryan's plea for help and told him that Hart was working under his (Hunter's) direction and could have brought 6,000 men to the job site, if that had been necessary to stop the Laburnum employees from working.

On May 15, 1950, Bryan called on Hunter at the latter's office at Pikeville and told him that Laburnum was contemplating submitting a bid on other work in Mingo county, West Virginia, and inquired as to Hunter's attitude should Laburnum employ members of the American Federation of Labor on that project. Hunter replied that Laburnum would be expected to use members of the United Construction Workers on the project. Bryan testified that during [fol. 2237] this conversation Hunter admitted that Hart's conduct at the site of the work in which the Laburnum company had been engaged during the preceding July was "pursuant to his (Hunter's) orders."

After the violent events of July, 1949, Pond Creek Pocahontas Company and Island Creek Coal Company abandoned the award of the additional work upon a cost plus five per cent basis which they had promised the Laburnum company. The coal companies invited bids upon this proposed construction, but Laburnum was unsuccessful in all of its bids

for such work. The officials of the coal companies expressed their high regard and sympathy for Bryan, but explained that they could not run the risk of having the defendants unions shut down the mining operations because of the union's differences with Laburnum.

Hence, there is ample evidence to sustain the finding that the acts and conduct of Hart in July, 1949, and ratified by Hunter, disrupted the business relationship between Laburnum, Pond Creek Pocahontas Company and Island Creek Coal Company, and entitled Laburnum to an award of damages against Hart's principals.

United Mine Workers of America is a labor organization with approximately 650,000 members who are primarily engaged in mining and processing coal at the mines.

[fol. 2238] District 50 United Mine Workers of America has a membership of 112,000, which is largely made up of workers who convert coal into chemical constituents, such as dyes, drugs, plastics, etc. A part of its charter fees, initiation fees and dues is paid to the United Mine Workers of America. According to defendant's brief, "its members are part of UMWA, but retain their identity, membership rights and privileges at all times as members of District 50." In other words, District 50 is an arm or branch of the United Mine Workers of America.

United Construction Workers, affiliated with United Mine Workers of America, is a "division" of District 50 United Mine Workers of America, and has approximately 46,000 members who are, according to its "Rules," "employed in and around construction and allied industries, also fabricating plants, motor transportation, and maintenance and service industries." As defendants' brief says, its members "are a part of UMWA, but retain their identity, membership rights and privileges at all times as members of the UCW Division of District 50."

Thus, while the defendants' brief insists that "members of District 50, UCW and UMWA are not members of one organization," a fair deduction from the record is that District 50 is a component part of United Mine Workers of [fol. 2239] America, or at least its agent in organizing workers in businesses other than that of mining coal. Admittedly, Hart was employed by District 50 United Mine Workers of America and assigned to work as "field repre-

sentative" under Hunter, a "regional director." It is also admitted that in "that capacity" Hart served both District 50 United Mine Workers of America and United Construction Workers. As we interpret the brief of the defendants, there is no serious contention that any one of the defendant organizations should be freed of liability, if any liability were found to exist, for the acts of Hart and his associates upon which the plaintiff's cause of action is predicated.

### Damages

With the consent of counsel the court instructed the jury that they should specify separately the amount of compensatory and punitive damages, if any, allowed. By their verdict the jury awarded the plaintiff compensatory damages of \$175,437.19 and punitive damages of \$100,000, or a total of \$275,437.19.

The alleged wrongful acts upon which the verdict is predicated having been committed in Kentucky, the correctness of the award must, of course, be tested by the law of that State.

[fol. 2240] In Kentucky, as in Virginia, damages directly and proximately caused by wrongful conduct chargeable to the defendants are collectible, provided they are not uncertain, speculative, or remote. Loss of future profits by the interruption or destruction of an established business, if capable of reasonable ascertainment may be recovered. *American Bridge Co. v. Glenmore Distilleries Co.*, 32 Ky. L. Rep. 873, 107 S.W. 279; *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 118 S. W. 337, 22 L.R.A., N.S. 588; *E. I. duPont deNemours & Co. v. Universal Moulded Products Corp.*, 191 Va. 525, 568-573, 62 S.E. 2d 233, 253-255.

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### Compensatory Damages

As the result of the acts of the defendants and their agents, Laburnum claimed these items of compensatory damages;

1. Damage from loss of fee on contract for construction of 25 dwellings	\$ 534.19
2. Damage from loss of fee on work in connection with construction of schoolhouse	319.67
3. Damage from loss of fee in connection with work for installation of asbestos shingles on said 25 dwellings	250.00
4. Damage from loss of fee in connection with work for installation of concrete foundation for coal preparation plant for No. 2 mine	1,250.00
5. Damage from loss of fee on other additional work in Breathitt county, Kentucky, amounting to approximately \$542,500, which Pond Creek Pocahontas Company had agreed to have Laburnum Construction Corporation handle on a basis of cost plus a fee of five (5) per cent	27,125.00
[fol. 2241] 6. Damage by reason of the destruction of the business relationship and connection which Laburnum Construction Corporation had built up and developed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies	120,000.00
7. Damage to plaintiff's reputation	100,000.00

Since, as the evidence shows, construction of the coal preparation plant, under the contract of October 28, 1948, was ninety-five per cent complete when the work thereon was interrupted, and Laburnum had been paid the stipulated maximum fee of \$12,000, no damage was claimed with respect to this project.

The first five items of the alleged damages are for profits which the plaintiff claims it would have earned on additional work which was promised to it by the coal companies on a cost plus five per cent fee basis, and which it would have ear-

ried out had the business relationship not been interrupted by the wrongful conduct of the defendants' agents.

Items Nos. 1 and 2 are for the loss of profits on contracts for additional work which was awarded to, and had been partially completed by, Laburnum when the work was interrupted.

Items Nos. 3 and 4 are for the loss of profits for additional work which had been awarded to Laburnum, but work on which was prevented and never commenced because of the alleged acts of the defendants.

[fol. 2242] Item No. 5 is for the loss of profits on the remaining additional work which Laburnum says had been promised but not actually awarded to it by the coal companies, and which work the plaintiff says would have been awarded to and completed by it but for the interruption of the business relationship through the acts of the defendants.

The construction of twenty-five dwellings referred to in Item No. 1, was about eighty-five per cent complete when work thereon was stopped. Up to that time Laburnum had been paid \$1,965.81 of the agreed maximum fee of \$2,500, leaving a balance of \$534.19, which the plaintiff's evidence shows it would have earned by way of profit if it had been permitted to complete the project.

The construction of the schoolhouse, referred to in Item No. 2, was from eighty to eighty-five per cent complete when work thereon was stopped. The project was completed by another contractor at a cost of \$3,338, and the plaintiff's evidence shows that if it had been allowed to complete the work it would have earned the agreed fee of five per cent of this amount, or \$166.90, instead of \$319.67 claimed in its statement of damages.

[fol. 2243] The project referred to in Item No. 3, for the installation of asbestos shingles on twenty-five dwellings was awarded to Laburnum on a cost plus five per cent fee basis and work thereon was to commence in August, 1949. The estimated cost of the project was \$5,000. The plaintiff's evidence shows that but for the interruption of the business relationship it would have performed this work and earned the agreed fee of \$250.

The project for the installation of the concrete foundation for the coal preparation plant, referred to in Item No. 4, was awarded to Laburnum in July, 1949, at an esti-

mated cost of \$25,000, upon a cost plus five per cent fee basis. But Laburnum was unable to proceed with that project because, as Salvati testified, its employees, by reason of the acts of the defendants' agents, were "run off the job there." The evidence on behalf of the plaintiff is that it would have earned the agreed fee of \$1,250 but for the interruption of the work.

Although there is argument to the contrary in defendants' brief, each of the Items Nos. 1, 2, 3 and 4 was within the purview of Instruction No. 9, which submitted to the jury the plaintiff's claim for damages.

[fol. 2244] Item No. 5 embraces the plaintiff's claim for profits on the remaining additional work which had been promised it by the coal companies, although no part of this work had actually been awarded. The evidence on behalf of the plaintiff tends to show that but for the interruption of the business relationship this work would have been awarded to and performed by it at an estimated cost of \$542,500, on a cost plus five per cent fee basis, and that had it been allowed to proceed with the work it would have earned the percentage fee of \$27,125.00.

The defendants contend that the evidence with respect to Item No. 5 fails to support the claim that this work was actually promised Laburnum by the coal companies, or if promised, that the alleged acts of the defendants' agents prevented the commencement of the work. Moreover, the defendants say, the alleged loss of profits from this supposed "promised work" is so speculative and uncertain as to be incapable of reasonable ascertainment.

There is evidence on behalf of the plaintiff that in September, 1948 it had been advised that these coal companies were about to embark on a definite building program of considerable proportions. Bryan testified that at the time of the execution of the contract for the construction of the [fol. 2245] coal preparation plant on October 28, 1948, because of the unusual difficulties in connection with that undertaking, Salvati, who was then vice-president in charge of operations of Pond Creek Pocahontas Company, verbally promised him that Laburnum would be given additional work in Breathitt county, amounting to approximately \$600,000, and that this was to be done on a cost plus five per cent fee basis. Salvati identified the list of work, con-

taining twelve items totaling \$617,500, which had been approved by the board of directors of his company and referred to by Bryan. He likewise corroborated Bryan's testimony that it was agreed Laburnum would be awarded this additional work.

Pursuant to this arrangement Laburnum actually performed a part of the work referred to in the testimony of Bryan and Salvati. It constructed a telephone line at a cost of approximately \$4,600, on the basis of cost plus fee of five per cent. As part of this additional work it undertook and partly completed the projects referred to in Items Nos. 1 and 2 of the plaintiff's list of damages. It was awarded the projects referred to in Items Nos. 3 and 4 of the plaintiff's damages both on a cost plus five per cent fee basis, although, as has been said, work on these latter two projects was never actually commenced because of the trouble which arose.

[fol. 2246] Salvati testified that the balance of the work referred to in the program and amounting to \$542,500, would have been awarded to Laburnum on a cost plus five per cent fee basis if its organization and equipment had still been at the job site "and if the United Mine Workers of America and its branches had not threatened to interfere with the work."

It is true, as is argued by the defendants, that there is evidence which tends to refute the plaintiff's claim that it had been promised or would have been awarded this additional work. They point to the fact that since August 4, 1949 the coal companies have actually awarded contracts for a relatively small portion of this work. There is also evidence that subsequently Laburnum submitted a conditional bid for a portion of this work, which was rejected. But this conflict in the evidence merely presented a question of fact which the Jury's verdict has resolved in favor of the plaintiff. We think there is sufficient evidence to support the finding that but for the disruption of the business relationship by the acts of the defendants' agents the plaintiff would have been awarded and allowed to proceed with this additional work.

[fol. 2247] We are of further opinion that the plaintiff's loss of profits from this promised work has been established with reasonable certainty. This was not a new and unpre-

dictable venture. On the contrary, the work had been approved by the board of directors of Pond Creek Pocahontas Company, the cost plus fee basis had been agreed upon, and the amount of the estimated profits on the proposed construction was, therefore, reasonably ascertainable.

In Item No. 6 the plaintiff claimed \$120,000 damages for the alleged permanent destruction of its business relationship with Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiaries. In support of this item the plaintiff showed that it had been doing business with these companies for a period of approximately two years preceding the disruption of the relationship, at an annual profit of about \$25,000; that because of the disturbance in July, 1949, in which the plaintiff incurred the hostility of the defendant unions, the coal companies which employed in their mining operations members of one of the unions, permanently broke off their business relationship with the plaintiff; and that as a result of this the plaintiff lost profits which it would have earned had the relationship not been disturbed.

[fol. 2248] We may assume without deciding that the evidence supports a finding that the conduct of the defendants' agents was the proximate cause of the permanent disruption of the profitable relationship between the plaintiff and these coal companies. The crucial inquiry is, does the evidence support a finding that the plaintiff is entitled to substantial damages by way of loss of profits as the result of such wrongful acts?

"Where a regular and established business is injured, interrupted, or destroyed, the measure of damages is the diminution in value of the business by reason of the wrongful act," measured by the loss of the usual profits from the business. 25 C. J. S., Damages, Sec. 90-b, p. 633.

In *E. I. duPont de Nemours & Co. v. Universal Moulded Products Corp.*, *supra* (191 Va., at pages 569-573, 62 S. E. 2d, at pages 253-255), there is a full discussion of the principles upon which damages for loss of profits from the interruption of an established business are to be measured. We there stated the generally accepted rule that for such damages to be recoverable they "Must be established with reasonable certainty. If remote, speculative, contingent or

uncertain, they are not recoverable." (191 Va., at page 573, 62 S. E. 2d, at page 255.)

[fol. 2249] The Kentucky court follows this general rule. *American Bridge Co. v. Glenmore Distilleries Co.*, supra (107 S. W., at page 284); *Kentucky Heating Co. v. Hood*, supra (118 S. W., at page 338).

In our opinion the evidence adduced on behalf of the plaintiff with respect to Item No. 6 does not measure up to these requirements. We are not here concerned with the disruption of a business relationship involving numerous transactions with numerous customers, where the volume of future business may be estimated with reasonable certainty. On the contrary, the plaintiff had established a relationship with what was in effect a single customer, involving a relatively small number of transactions. Unlike the preceding five items of the plaintiff's damages, there is no evidence that these coal companies had promised the plaintiff any further work, or that they had definitely decided upon an additional construction program. Whether such construction work would have been undertaken by these companies, and if so, the extent thereof and what part thereof, if any, would have been awarded to the plaintiff and upon what terms, is entirely speculative and conjectural. Evidence that the plaintiff during the past preceding two years had done work for these companies at an annual profit of \$25,000, standing alone, will not, we think, support a finding, as the plaintiff argues, that this situation would have continued over a period of years. In short, [fol. 2250] the plaintiff's evidence fails to establish the amount and extent of its damage under this item with the required reasonable certainty.

In Item No. 7 the plaintiff claimed \$100,000 as damages to its business reputation. The record is devoid of any evidence that the plaintiff's business reputation was in any way damaged by reason of the alleged wrongful acts of the defendants. The argument on behalf of the plaintiff is that "the mere fact, that the defendant unions wrongfully ran Laburnum out of Kentucky," thereby causing these coal-producing companies to cancel their contracts with the plaintiff, "necessarily damaged" the plaintiff's business reputation in the coal fields of West Virginia and Kentucky and throughout the United States. If such were the result of the defendant's wrongful conduct it was easily susceptible

of proof, and yet admittedly there is no evidence in the record to this effect.

The plaintiff relies upon the statement in 15 Am. Jur., Damages, Sec. 135, p. 544, that "In tort actions, injuries to the plaintiff's reputation, injuries to, or the loss of, commercial credit, and injuries to financial or business standing constitute proper elements of damages where they are the natural and proximate results of the defendant's wrongful acts. Thus, where an injury has been done to an [fol. 2251] established business, the damages therefor may include damages resulting from injury to credit and business standing." But this does not mean that proof of such damages is not necessary. Indeed, the text just quoted cites as authority, *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N. W. 930, L. R. A. 1915B, 1179, in which it was said: "Damages for injury to the plaintiff's business, its reputation, standing, and good will, may, upon proper proof, be recovered." (142 N. W., at page 940; emphasis added.) Nor does the holding in *Peshine v. Shepperson*, 17 Gratt. (58 Va.) 472, 94 Am. Dec. 468, dispense with the necessity of proof of such damages.

In 25 C. J. S., Damages, Sec. 144, p. 788, it is said: "As noted in Sec. 6 *supra*, a presumption of at least nominal damages follows from proof of a legal wrong. However, the amount and items of pecuniary damage are not presumed, but must be proved; and if there is no evidence as to the extent of the pecuniary loss there can be no recovery of substantial damages, at least where the elements of damage are such as to be susceptible of pecuniary admeasurement. The burden of proving the fact and amount of pecuniary damage is on the party asserting the damage, particularly in the case of damages which are uncertain [fol. 2252] or have not been admitted; \* \* \*." See also, 15 Am. Jur., Damages, Sec. 356, p. 795.

In the absence of proof of damage to the plaintiff's business reputation there is no basis for the allowance of an award under this item.

We are of opinion, then, that there is ample evidence to sustain an award of \$29,326.09, based on the first five items of plaintiff's claim for compensatory damages, with the allowance of \$166.90 under Item No. 2, instead of \$319.67 as claimed. The evidence does not, in our opinion, sustain

an award on account of Items Nos. 6 and 7 of the plaintiff's claim.

### Punitive Damages

Under the decisions of the Kentucky court, to justify an award of punitive damages for a tort there must be a showing of malice or willfulness, or a wanton disregard of the rights of others from which it may be assumed that the tort-feasor was acting either maliciously or willfully. *W. T. Sistrunk & Co. v. Meisenheimer*, 205 Ky. 254, 265 S. W. 467, 468. As expressed in *Great Atlantic & Pacific Tea Co. v. Smith*, 281 Ky. 583, 136 S. W. 2d. 759, 768, punitive damages "are allowed where the tort is aggravated by evil motive, actual malice, or deliberate violence."

[fol. 2253] In *Engleman v. Caldwell & Jones*, 243 Ky. 23, 47 S.W. 2d 971, an award of punitive damages for the conduct of the defendant in persistently driving away trade from plaintiffs' store by derogatory and offensive remarks was upheld. The court there said: "The appellant's conduct and declarations were an invasion of appellees' rights (citing authorities), and not only aggravating and insulting but were engaged in by him in utter reckless disregard of the rights of the appellees to enjoy the peaceful pursuit of their own business." (47 S. W. 2d, at page 973.)

In *Anchor Co. v. Adams*, 139 Va. 388, 392, 124 S.E. 438, we held that the willful and unauthorized destruction of one's business is the ground for the imposition of punitive damages on the wrongdoer. ■

Tested by these principles we are of opinion that there was ample evidence to support the finding that the acts of the defendant's agents were done willfully and maliciously, and thus entitled the plaintiff to an award of punitive damages. According to the evidence of the plaintiff's witnesses, this was no peaceful labor dispute in which the agents of the defendants were merely attempting to organize or persuade a few unskilled laborers to join the union. On the contrary, there is ample evidence that it was the willful and avowed [fol. 2254] purpose of defendants' agents to prevent the plaintiff's employees from proceeding with their work unless these employees joined the United Construction Workers, one of the defendant unions, and that such purpose was evinced by words and conduct so violent and abusive as to

put these employes in fear for their lives and safety. Yielding to these threats the plaintiff's employees refrained from continuing with their work, with the result that plaintiff's business relationship with its customers was disrupted and destroyed, to its considerable damage.

At the request of plaintiff the jury were instructed that they might allow punitive damages if they believed from the evidence that the alleged wrongful acts of the defendants' agents were "committed in a manner so wanton or reckless as to manifest a willful disregard for the rights of others." At the request of the defendants the jury were told that if "Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages" could be awarded. The jury's finding on the issue is, of course, binding on us.

[fol. 2255] We are not impressed with the argument that the award of \$100,000, by way of punitive damages, was excessive. In Kentucky punitive damages "are given as compensation to the plaintiff and not solely as a punishment of the defendant." They must bear some relation to the "injury and cause thereof" rather than to the amount of compensatory damages allowed.<sup>2</sup> *Louisville & N. R. Co. v. Ritchel*, 148 Ky. 701, 147 S.W. 411, 414, 41 L.R.A., N.S. 958, Anno. Cas. 1913E, 517.

The general rule is that there is no fixed standard for the measurement of exemplary or punitive damages, and the amount of the award is largely a matter within the discretion of the jury. 25 C.J.S., Damages, Sec. 126, p. 737. In *Engleman v. Caldwell & Jones*, *supra*, the Kentucky court held that the jury may award punitive damages according to their conclusions from the entire evidence respecting the conduct and motives of the person inflicting the wanton injury. The award "may not be considered excessive" merely because in the estimation of the adverse party the amount is large. (47 S.W. 2d at page 973.)

Under these principles the amount of punitive damages was, we think, within the discretion of the jury.

<sup>2</sup> Compare *Stubbs v. Cowden*, 179 Va. 190, 18 S.E. 2d 275.

[fol. 2256]

## Procedural Matters

By more than one hundred assignments of error the defendants challenge various rulings of the lower court during the progress of the trial. Some of these assignments are trivial and others are so vague and indefinite as not to merit discussion. Within the limits of an opinion of reasonable length, we may deal only with those assignments which relate to the rulings of the trial court on crucial matters.

A number of the assignments challenge the rulings of the trial court on the admissibility of hearsay testimony. First, it is said, the court erred in permitting Bryan and others to testify as to declarations made by Laburnum employees that they would not return to work because the declarants were in fear of violence at the hands of defendants' agents.

It is well settled that evidence of such utterances is admissible to show the state of mind of the declarants. Wigmore on Evidence, 3d Ed., Vol. 6, Sections 1789, 1790, pp. 235-239; *Karnes v. Commonwealth*, 125 Va. 758, 764-765, 99 S.E. 562, 4 A.L.R. 1509; *Parsons v. Commonwealth*, 138 Va. 764, 777-782, 121 S.E. 68; *Goodloe v. Smith*, 158 Va. 571, 582-584, 164 S.E. 379. Such evidence was relevant to [fol. 2257] show that fear of the consequences was the compelling reason why plaintiff's employees quit their work.

Secondly, the defendants complain of the admission of evidence of the declaration of certain representatives of the American Federation of Labor, which tended to show that the representatives of the rival union were cognizant of the situation which had been brought about by the acts of the defendants' agents and that it was dangerous for the Laburnum employees who were members of the declarants' union to return to work.

While the evidence of the mental attitude of these representatives was somewhat remote, it tended to corroborate the plaintiff's other evidence of the tense situation which pervaded the neighborhood and had caused the Laburnum employees to refuse to return to work. As is indicated in *Karnes v. Commonwealth*, *supra*, the modern trend is toward liberalization of the rules of evidence in order that the jury may be fully enlightened as to all the surrounding facts and circumstances.

Moreover, each of the declarants took the stand and testi-

fied as to the incidents. Consequently, admitting evidence of their declarations with respect to these incidents, if error, was harmless.

[fol. 2258] The admissibility of the evidence of the reputation of Breathitt county, Kentucky, the site of the plaintiff's work and of the disturbance, for unrestrained lawlessness is governed by the same principle. It was corroborative of evidence on behalf of the plaintiff that there was real cause for its employees being afraid to return to their work.

Error is assigned to the action of the trial court in permitting Frank Dixon, a representative of the Carpenters and Joiners Union, an affiliate of the American Federation of Labor, to testify that he received "in a round-about way" a message from Thomas E. Raney, a representative of the United Mine Workers of America, after the present case was set for trial, that Raney wanted to meet him and work out a settlement to keep the members of the American Federation of Labor affiliate from testifying. Upon being asked by the court what he meant by "round-about way," Dixon replied that he was refraining from disclosing the name of his informant because he (Dixon) feared that his doing so might bring bodily harm to that person.

In the absence of the jury counsel for the defendants were given the privilege of asking Dixon to name his informant and they declined to do so. In this situation they are hardly [fol. 2259] in a position to complain that the name of the informant should have been developed by counsel for the plaintiff rather than by themselves.

Moreover, later Raney took the stand and flatly denied that he had sent such message to Dixon, or that he had ever heard "of such person." We find no prejudicial error in the ruling of the trial court with respect to this incident.

In preparation of its case the plaintiff propounded to the defendants a number of interrogatories, the main purpose of which was to show the relation between the three union defendants. At the trial the plaintiff offered in evidence all of the interrogatories and answers with the exhibits thereto attached, and was allowed to read to the jury such questions, answers and exhibits as counsel deemed pertinent and the court ruled to be admissible. The defendants were then given the privilege of reading to the jury any remain-

ing questions and answers which their counsel deemed pertinent.

The defendants objected to this procedure, claiming that under a proper interpretation of the statute (Code, Sec. [fol. 2260] 8-322)<sup>3</sup> all of the questions, answers and exhibits should have been read *in extenso* to the jury by counsel for the plaintiff when they were offered in evidence. In support of this contention they cite *M'Farland v. Hunter*, 8 Leigh (35 Va.) 489, 497, which holds that under the statute the whole of the answers to interrogatories, like the answer to a bill of discovery, must be read. Properly interpreted, this holding means nothing more than that the opponent whose answer is introduced in evidence has the right "to have the whole, or none, laid before the court." Wigmore on Evidence, 3rd Ed., Vol. 7, Sec. 2121, p. 542. That was done when the whole of the interrogatories and answers were put in evidence. When the court permitted counsel for the plaintiff to read to the jury such portion of the lengthy interrogatories and answers as they deemed pertinent, and offered counsel for the defendants the same opportunity, obviously the rights of the defendants were fully protected.

On February 13, 1951, the Richmond News Leader, a newspaper published in the city of Richmond, where the trial was then in progress, published an editorial entitled "Enemies of the Miner." The purport of this editorial was that John L. Lewis, the head of the United Mine Workers of America, one of the defendant unions, in notifying the members of the union of an increase in their daily wages, had [fol. 2261] told them that each would be assessed the sum of \$20 a year to create a fund to defend "expensive litigation" which the "enemies of the union" had instituted or were contemplating instituting against it. The editorial deplored the fact that although "Mr. Lewis' language has the ring of a Politburo voice denouncing the 'enemies of democracy,'" no one had been "heard to protest" against it.

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<sup>3</sup> "Sec. 8-322. *Use of such answers.* Answers to such interrogatories may be used as evidence at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery."

On the day following publication of the editorial, and while the court was considering the instructions, counsel for the defendants moved for a mistrial because of the editorial, claiming that it was inflammatory and highly prejudicial to the interests of the defendants. The attention of the court was directed to the fact that the publisher of the newspaper was a relative of A. Hamilton Bryan, the president of Laburnum. While Bryan admitted his relationship with the publisher of the paper, and the fact that he owned "a small minority stock interest" in the corporation which published the paper, he testified that he was in no way responsible for the editorial and had nothing whatsoever to do with its publication. This testimony is uncontradicted.

Inasmuch as the court had instructed the jury not to read "any newspaper articles about this case during the trial," it [fol. 2262] overruled the motion for a mistrial. However, it then and there offered to poll the jury to ascertain whether or not any of them had read the editorial and whether they might be influenced thereby. This offer was declined by counsel for the defendants. Immediately after the verdict was announced the defendants requested the court's permission to poll the jury to determine whether any of them had read the editorial. The motion was overruled.

Error is now assigned to the action of the trial court in declining to grant a mistrial before the verdict and in overruling the defendants' request after the verdict that they be allowed to poll the jury.

Assuming that those responsible for the publication of the editorial knew that the present case was being tried and the issues it involved, the publication was reprehensible, for it might have prejudiced the rights of the United Mine Workers of America, one of the defendants, and necessitated a new trial at great expense to the parties. But in the absence of a showing that any of the members of the jury read the article, or were influenced thereby, and in view of the fact that counsel for the defendants were afforded and declined the opportunity extended them by the court before the verdict to ascertain whether this was so, there was no error in overruling the motion for a mistrial.

[fol. 2263] Having declined and waived the privilege of having the jury polled before the verdict, the defendants

cannot now be heard to complain of the court's action in not permitting a poll after the verdict.

We cannot undertake to review in detail the numerous assignments of error leveled at the rulings of the trial court on granting and refusing the instructions. Suffice it to say, that after a careful consideration of these rulings we find no prejudicial error in any of them, save the submission to the jury of the issue of the plaintiff's right to an award based on Items Nos. 6 and 7 of its claim for damages. There was, as we have said, insufficient evidence to go to the jury on either of these issues.

It is, of course, unnecessary that we discuss the assignments of error with respect to the admissibility of evidence relating to Items Nos. 6 and 7 of the plaintiffs claim for damages.

We find no reversible error in any of the remaining assignments of error.

On the whole our conclusion is that the award of compensatory damages of \$29,326.09, and punitive damages of \$100,000, or a total of \$129,326.09, is fully supported [fol. 2264] by the law and the evidence. The additional award of \$146,111.10<sup>4</sup> for compensatory damages is not supported by the evidence.

Section 90 of the Constitution, as amended in 1928, provides in part that this court "may, but need not, remand a case for a new trial. In any civil case, it may enter final judgment, except that judgment for unliquidated damages shall not be increased or diminished."

The plain purpose of the provision is to leave to the fact-finding tribunal—the jury or the trial court sitting as a jury—the function of fixing the amount of unliquidated damages. It does not deprive this court of the authority to remand the case to the lower court with direction that the plaintiff be put upon terms to remit a portion of an award for unliquidated damages or else submit to a new trial. *Bishop v. Webster*, 154 Va. 771, 787, 153 S. E.

<sup>4</sup> Allowable compensatory damages	\$ 29,326.09
Allowable punitive damages	100,000.00
Excess not allowable	146,111.10
<hr/>	
Total award under the verdict	\$275,437.19

832, 155 S. E. 828. Nor does it, in our opinion, divest this court of the well-recognized power to modify a judgment of the lower court in an action for unliquidated damages [fol. 2265] by eliminating such excess as is clearly attributable to the consideration of improper items, provided this court can determine and segregate the excess from the allowable portion of the award. 3 Am. Jur., Appeal and Error, Sec. 1174, pp. 683-684; *id.*, Sec. 1177, pp. 686-687; *Clinchfield Coal Corp. v. Couch*, 127 Va. 634, 639, 104 S. E. 802, 13 A. L. R. 398 (decided prior to the adoption of the amendment). Here the excess in the amount of compensatory damages is clearly attributable to the improper consideration of Items Nos. 6 and 7 of the plaintiff's claim.

Accordingly, under the authority of Code, Sec. 8-493, we shall modify the judgment under review by striking therefrom the sum of \$146,111.10 and affirm the balance of the judgment for the sum of \$129,326.09, with interest thereon from February 16, 1951, the date of the verdict. Having substantially prevailed on this appeal the plaintiff will recover its costs here.

Modified and affirmed. \_\_\_\_\_

[fol. 2266]

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday the 20th day of April, 1953.

Record No. 3989

UNITED CONSTRUCTION WORKERS, affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, Plaintiffs in error,

against

LABURNUM CONSTRUCTION CORPORATION, Defendant  
in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the city of Richmond on the 5th day of July, 1951.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the

record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in the judgment complained of. It is therefore adjudged and ordered that the judgment under review be modified by striking therefrom the sum of one hundred forty-six thousand, one hundred eleven dollars and ten cents; and that the balance of the judgment for the sum of one hundred twenty-nine thousand, three hundred and twenty-six dollars and nine cents, with interest thereon to be computed after the rate of six per centum per annum from February 16th, 1951, until paid, and for its costs by it expended about the prosecution of its notice of motion for judgment in the said circuit court, be and the same is affirmed.

And it is further adjudged and ordered that the defendant in error recover of the plaintiffs in error its costs by it expended about the prosecution of the writ of error and supersedeas aforesaid here.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

\_\_\_\_\_, Clerk.

Writ tax . . . , \$\_\_\_\_.  
 Printing . . . , \$\_\_\_\_.  
 Attorney's fee . . . , \$\_\_\_\_.  
 Small fees . . . , \$\_\_\_\_.  
 Transcript . . . , \$\_\_\_\_.  
 Printing brief . . . , \$\_\_\_\_.  
 Total . . . , \$\_\_\_\_.

Teste:

\_\_\_\_\_ C. C.

1975

[fol. 2267] IN THE SUPREME COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

Record No. 3989

UNITED CONSTRUCTION WORKERS, Affiliated with the United  
Mine Workers of America; District 50, United Mine  
Workers of America, and United Mine Workers of  
America, Plaintiffs in error,

v.

LABURNUM CONSTRUCTION CORPORATION, Defendant  
in error

Motion and Petition to Stay Proceedings

To the Honorables, the Chief Justice and the Justices of  
the Supreme Court of Appeals of Virginia:

Plaintiffs in Error, United Construction Workers, Affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, and each of them, by their attorneys, respectfully move that the mandate of this Court upon its judgment entered herein on April 20, 1953, against said plaintiffs in error and in favor of defendant in error, Laburnum Construction Corporation, and the execution and enforcement of said judgment, may be stayed until and including July 18, 1953, to enable the plaintiffs in error, and each of them, being the parties aggrieved, to apply to the Supreme Court of the United States for review of said judgment by writ of certiorari, and until the final de- [fol. 2268] termination of the case by the Supreme Court of the United States.

Respectfully submitted this 5th day of May, 1953.  
(S.) Walter E. Rogers, M. E. Boiarsky, Attorneys  
for Plaintiffs in Error.

Williams, Mullen, Pollard & Rogers, American Building,  
Richmond, Virginia.

I hereby certify that I have today mailed a copy of the within motion and petition to each of the following attorneys for Laburnum Construction Company:

1. George E. Allen, Esq., Attorney at Law, Mutual Building, Richmond, Virginia.

1976

2. Archibald G. Robertson, Esq., Attorney at Law, 1002  
Electric Bldg., Richmond 12, Va.

(S.) Walter E. Rogers.

Dated May 5, 1953.

[fol. 2269]

VIRGINIA :

In the Supreme Court of Appeals held at the Supreme  
Court of Appeals Building in the City of Richmond on  
Monday the 11th day of May, 1953.

UNITED CONSTRUCTION WORKERS, affiliated with the United  
Mine Workers of America; District 50, United Mine  
Workers of America, and United Mine Workers of  
America, *Plaintiffs in Error,*

against

LABURNUM CONSTRUCTION CORPORATION,  
*Defendant in Error.*

Order Staying Mandate and Execution of Judgment.

On consideration of the motion and petition of counsel for  
plaintiffs in error for stay of mandate of this Court upon its  
judgment entered in the above-captioned case on April 20,  
1953, and the execution and enforcement thereof, in order  
that plaintiffs in error may have reasonable time and oppor-  
tunity to present to the Supreme Court of the United States  
a petition for writ of certiorari to review the said judgment  
of this Court.

It is now ordered that the mandate of this Court upon its  
judgment entered herein on April 20, 1953, against said  
plaintiffs in error and in favor of defendant in error, La-  
burnum Construction Corporation, and the execution and  
enforcement of said judgment, be and the same are hereby  
stayed until and including July 18, 1953, on the expiration  
of which time the same may be enforced, unless application  
for a writ of certiorari is filed in the Supreme Court of the  
United States on or before said date, in which event said  
mandate and the execution and enforcement of said judg-  
ment shall be stayed until the final determination of the case  
by that court.

The above stay of mandate and execution and enforcement of said judgment, however, shall not become effective until plaintiffs in error, or some one for them, enter into bond with sufficient surety approved by the clerk of this Court in the penalty of one hundred fifty thousand and no/100 dollars (\$150,000.00) upon condition that if plaintiffs in error fail to make application to the Supreme Court of the United States for a writ of certiorari in said case within the time allotted therefor, or fail to obtain an order granting their application, or fail to make their plea good in said Supreme Court of the United States, they shall perform and satisfy [fols. 2270-2278] said judgment and answer for all damages and costs which the defendant in error may sustain by reason of the stay, or in lieu thereof, by appropriate instrument to be filed with and approved by the clerk of this Court, continue in full force and effect the supersedeas bond given in the Circuit Court of the City of Richmond staying the execution of its judgment in this case pending the application to this court for a writ of error and supersedeas and make the said bond subject to the added conditions hereinabove specified, and which instrument shall be joined in by the surety on said supersedeas bond.

(S.) Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

[fol. 2279] IN THE SUPREME COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

Record No. 3989

UNITED CONSTRUCTION WORKERS, affiliated with the United  
Mine Workers of America ; District 50, United Mine Work-  
ers of America, and United Mine Workers of America,  
*Plaintiffs in Error,*

*v.*

LABURNUM CONSTRUCTION CORPORATION,  
*Defendant in Error.*

Designation of the Record on Behalf of Plaintiffs in Error.

To the Clerk of the Supreme Court of Appeals of Virginia:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States in the above-entitled cause and the above-named Plaintiffs in Error designate the following parts of the record which said Plaintiffs in Error, and each of them, desire to have included in the transcript:

1. A certified copy of the printed record.
2. A certified copy of petition of plaintiffs in error for a writ of error and a supersedeas to the judgment of the Circuit Court of the City of Richmond.
3. A certified copy of the order, dated January 24, 1952, awarding to plaintiffs in error a writ of error and supersedeas.
- [fol. 2280] 4. A certified copy of the certificate of E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond, received in the office of the Clerk of the Supreme Court of Appeals of Virginia on January 23, 1952.
5. Proceedings in the Supreme Court of Appeals of Virginia:
  - a. Order of February 2, 1953, showing submission of the above-entitled cause to the Supreme Court of Appeals of Virginia.
  - b. Opinion of the Supreme Court of Appeals of Virginia filed on April 20, 1953.

c. Judgment of Supreme Court of Appeals of Virginia entered on April 20, 1953.

d. Motion of Plaintiffs in Error to Stay Mandate.

e. Order granting stay of mandate.

f. Bond agreement filed by plaintiffs in error.

g. This designation.

h. Certificate of the Clerk of the Supreme Court of Appeals of Virginia.

(S.) Walter E. Rogers, (S.) M. E. Boiarsky, Attorneys for Plaintiffs in Error.

[fol. 2281] Certificate of Service

Copy of the attached Designation of the Record was mailed, postage prepaid, to each of the following attorneys for defendant in error (Laburnum Construction Corporation, a corporation) at the addresses indicated below:

1. Archibald G. Robertson, Esq., 1003 Electric Building, Richmond 12, Virginia.

2. George E. Allen, Esq., Mutual Building, Richmond 13, Virginia.

3. Francis V. Lowden, Jr., Esq., 1003 Electric Building, Richmond 12, Virginia.

4. T. Justin Moore, Jr., Esq., 1003 Electric Building, Richmond 12, Virginia.

5. Hunton, Williams, Anderson, Gay & Moore, 1003 Electric Building, Richmond 12, Virginia.

(S.) Walter E. Rogers, Attorney for Plaintiffs in Error.

June 25th, 1953.

[fol. 2282]

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Thursday the 25th day of June, 1953

I, H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing is a true and accurate copy of the printed record, pages 1 to 1926 (Volumes I to IV), inclusive, petition of plaintiffs in error

for a writ of error and supersedeas, certificate of E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond, order of February 2nd, 1953, of the Supreme Court of Appeals of Virginia, the opinion of this Court delivered by Justice John W. Eggleston on April 20th, 1953, mandate of the Supreme Court of Appeals of Virginia dated April 20, 1953, motion of plaintiffs in error to stay mandate, order granting stay of mandate, bond agreement filed by plaintiffs in error, designation of the record on behalf of the plaintiffs in error in the case styled United Construction Workers and others against Laburnum Construction Corporation.

Witness my hand and seal of said court this 25th day of June, 1953.

H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia.

I, Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia, hereby certify that H. G. Turner, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing thereof clerk of the said court, and that the said attestation is in due form.

Witness my hand this 26th day of June, 1953.

Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

I, H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia, hereby certify that Edward W. Hudgins, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing thereof Chief Justice of said court duly commissioned and qualified.

Witness my hand and the seal of said court this 29th day of June, 1953.

H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia. (SEAL)

(9114)

[fol. 1981] IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1953

No. —

UNITED CONSTRUCTION WORKERS, AFFILIATED WITH THE  
UNITED MINE WORKERS OF AMERICA; District 50, United  
Mine Workers of America, and United Mine Workers of  
America, Petitioners,  
v.

LABURNUM CONSTRUCTION CORPORATION

STIPULATION—Filed July 6, 1953

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for writ of certiorari the printed record shall consist of the certified transcript of the record as set forth in Petitioners' Designation of the Record and as certified by the Clerk of the Supreme Court of Appeals of Virginia and heretofore filed in the Supreme Court of the United States, except for

a. Certified copy of the petition for writ of error and supersedeas to the judgment of the Circuit Court of the City of Richmond (listed as Item 2 in said Designation and appearing in said certified transcript at pages 1943 to 2213, both inclusive), and

b. Bond agreement (listed as Item 5(f) in said Designation and appearing in said certified transcript at pages 2271 to 2278, both inclusive),

which exceptions need not be printed.

2. Any of the parties may refer in the petition for writ of certiorari and brief in support thereof and in the brief in [fol. 1982] opposition thereto to said transcript of the record filed in the Supreme Court of the United States, including any part or parts thereof which have not been printed.

M. E. Boiarsky, Winard Owens Counsel for Petitioners. Archibald G. Robertson, Geo. E. Allen Counsel for Laburnum Construction Corporation.

July 3, 1953.

1982

[fols. 1983-1984] [File endorsement omitted.]

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[fol. 1985] IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1953

No. 188

[Title omitted]

STIPULATION—Filed February 24, 1954

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of hearing and determining said cause on the merits and the matters arising upon the petition for writ of certiorari therein, heretofore granted by this Court, the printed record shall be the same as that used and agreed upon for the purpose of said petition, except there shall be added thereto

- a. Order granting certiorari;
- b. Stipulation of said counsel regarding the printed record for purpose of said petition heretofore filed;
- c. This stipulation.

2. Any of the parties may refer in their printed briefs to the transcript of the record filed in the Supreme Court of the United States, including any part or parts not included [fol. 1986] in the printed record.

Kelly K. Hopkins, Harrison Combs, Willard Owens,  
M. E. Boiarsky Counsel for Petitioners. Archibald  
G. Robertson, Geo. E. Allen Counsel for Laburnum  
Construction Corporation.

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[fols. 1987-1988] [File endorsement omitted.]

1983

[fol. 1989] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1953

No. 188

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 18, 1954

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted limited to the following question:

“In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State court from hearing and determining the issues in a common law tort action based upon this conduct.”

The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in § 10(a), 61 Stat. 146, 29 U. S. C. (Supp. 111) § 160(a), and (2) other cases, apart from those in § 10(a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case by case method.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3559)

FILE COPY

Office - Supreme Court, U.

FILED

JUL 1 1953

HAROLD B. WILLEY, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 188

UNITED CONSTRUCTION WORKERS, affiliated with the UNITED  
MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE  
WORKERS OF AMERICA, and UNITED MINE WORKERS OF  
AMERICA,

*Petitioners,*

v.

LADURNUM CONSTRUCTION CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF APPEALS OF VIRGINIA

✓ WELLY K. HOPKINS,  
✓ HARRISON COMBS,  
he WILLARD P. OWENS,  
✓ M. E. BOIARSKY,  
*Counsel for Petitioners.*

**BLEED THROUGH**

**BLURRED COPY**

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# Supreme Court of the United States

OCTOBER TERM, 1953

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No.

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UNITED CONSTRUCTION WORKERS, affiliated with the UNITED  
MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE  
WORKERS OF AMERICA, and UNITED MINE WORKERS OF  
AMERICA,

*Petitioners,*

v.

LABURNUM CONSTRUCTION CORPORATION.

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

Petitioners, United Construction Workers, Affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, (herein sometimes referred to as "UCW", "District 50" and "UMWA", respectively) and each of them, pray that a writ of certiorari issue to review the final judgment of the Supreme Court of Appeals of Virginia entered in the above-entitled case on April 20, 1953, wherein said Supreme Court modified the judgment of the Circuit Court

of the City of Richmond, Virginia, of July 5, 1951, against petitioners and in favor of Laburnum Construction Corporation, a corporation (hereinafter referred to as "Laburnum"), in the amount of \$275,437.19, "by striking therefrom the sum of one hundred forty-six thousand, one hundred eleven dollars and ten cents" but affirming the balance of said judgment for the sum of one hundred twenty-nine thousand, three hundred twenty-six dollars and nine cents, with interest thereon at 6% per annum from February 16, 1951, until paid, and costs, and ordering petitioners to pay Laburnum its costs in the prosecution of the writ of error and supersedeas in the Supreme Court of Appeals of Virginia. (R. 1974) <sup>1</sup>

A transcript of the record in said case, including the proceedings in the Supreme Court of Appeals of Virginia <sup>2</sup> is furnished herewith, in accordance with the Rules of this Court.

#### OPINION BELOW

The opinion of the Virginia Supreme Court appears at page 1945 of the printed record. It is reported in 75 S. E. 2d 694 (Advance Sheet, June 4, 1953).

#### JURISDICTION

The judgment of the Virginia Supreme Court was entered on April 20, 1953. (R. 1973) No petition for rehearing was filed either by petitioners or by Laburnum. The jurisdiction of this Court is invoked under 28 U. S. C., section 1257 (3).

By notice of motion for judgment Laburnum instituted against petitioners in the Circuit Court of the City of Richmond, Virginia (hereinafter called "trial court"), a *tort* action for recovery of compensatory and punitive damages of \$500,000. (R. 2-19) Petitioners filed pleas of not guilty

<sup>1</sup> Herein the abbreviation "R" refers to the printed record. A stipulation has been filed regarding the printed record for purposes of the petition for writ of certiorari.

<sup>2</sup> The Supreme Court of Appeals of Virginia is referred to as "Virginia Supreme Court" or the "Virginia appellate court".

(R. 19) and grounds of defense, denying the material allegations of said notice (R. 74-81, 102-104); in a jury trial petitioners were found "jointly and severally liable" and damages were assessed at \$275,437.19, representing \$175,437.19 compensatory damages and \$100,000 punitive damages. (R. 147, 1887-1888) Petitioners moved to set the verdict aside as contrary to the law and the evidence and to grant petitioners a new trial. (R. 147-150) Pending such motion, petitioners filed their motion to dismiss plaintiff's notice of motion for judgment and to enter judgment for petitioners on the ground that the court was without power, authority and jurisdiction to hear and determine the issues in the action because of the provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, c. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8 of the Constitution of the United States. (R. 151) The trial court overruled both motions (R. 152) and on July 5, 1951, entered judgment in favor of Laburnum and against petitioners, jointly and severally, for \$275,437.19, with interest at 6% per annum from date of the verdict until paid, and costs. (R. 152-153) Petitioners' exceptions are noted. (R. 152-153)

Thereafter petitioners duly filed their Notice of Appeal and Assignments of Error. (R. 154-179)<sup>3</sup> Upon petitioners' petition for writ of error and supersedeas,<sup>4</sup> the Virginia Supreme Court on January 24, 1952, awarded a writ and supersedeas. (R. 1943) In the Notice of Appeal and Assignments of Error (R. 154-179) and in said petition, petitioners asserted (R. 154, Tr. 1985):<sup>5</sup>

"1. The Trial Court erred in refusing to sustain and in overruling the defendants' motion to dismiss the plaintiff's notice of motion for judgment and to enter final judgment for the defendants on the ground

<sup>3</sup> Pursuant to Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia. The notice stated, *inter alia*, petitioners' intention to apply for a writ of error and supersedeas. (R. 154)

<sup>4</sup> By stipulation of counsel, the petition "need not be printed".

<sup>5</sup> "Tr." refers to the certified transcript of the record filed in the Supreme Court of the United States.

that the Court was without power, authority and jurisdiction to hear and determine the issues in this action because of the provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, C. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8, of the Constitution of the United States. The Trial Court's action was repugnant to, and in violation of, said statutory and constitutional provisions.

"2. The Trial Court erred in entering the judgment of July 5, 1951, on the verdict of the jury, that the plaintiff recover of the defendants, jointly and severally, the sum of \$275,437.19, with interest and costs, because the Trial Court was without power, authority and jurisdiction to enter said judgment because of the provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, C. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8 of the Constitution of the United States, and said judgment is void because it is repugnant to, and in violation of, said statutory and constitutional provisions."

In its opinion filed April 20, 1953 (R. 1945) the Virginia Supreme Court, dealing with the issue of the trial court's power, authority and jurisdiction to hear and determine the issues involved in the action for the reasons aforesaid, held the "motion to dismiss was properly overruled" and rejected petitioners' contention that because Laburnum's notice of motion and the jury's verdict of petitioners' liability were grounded upon conduct which constituted an unfair labor practice within the meaning of Section 8 (b)(1)(A) of the Labor Management Relations Act, 1947 (herein called "Act"), for which the Act provided exclusive remedies and procedures, superseding a common-law tort action for damages in a state court, the trial court was deprived of jurisdiction to hear and determine the instant action for damages based upon such conduct and to enter its said judgment of July 5, 1951, against petitioners, and each of them. It declared (R. 1948):

"We may assume, without deciding, that the acts of the defendants so affected interstate commerce as to come within the purview of the Act and, at the in-

stance of the plaintiff, could have been dealt with in the manner there prescribed. But it does not follow that that was the only redress open to the plaintiff. It did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law *tort* for which admittedly the Act affords no redress";

that state courts have not "been deprived of their traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce" (R. 1949), and that (R. 1949-1950):

"While the Act<sup>6</sup> provides a remedy to restrain the commission of acts constituting unfair labor practices, there are no words which indicate that such remedy is exclusive, or that the Act was designed to deprive an employer or his employees of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices. Nor does the exercise by the State of its jurisdiction in enforcing such cause of action conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected."

Having so concluded and held, the Virginia Supreme Court, upon a consideration of the issues of petitioners' liability and the amount thereof, approved the jury's verdict of petitioners' liability (R. 1957) but, holding that the jury's award of certain elements of damages was not warranted under the evidence (R. 1963-1965, 1972) and that Laburnum was entitled to recover compensatory damages of \$29,326.09 and punitive damages of \$100,000, the Virginia appellate court concluded that "there is error in the judgment complained of", modified the trial court's judgment "by striking therefrom the sum of one hundred forty-six thousand, one hundred eleven dollars and ten cents" but affirmed "the balance of the judgment for the sum of" \$129,326.09,

<sup>6</sup> Labor Management Relations Act, 1947.

with interest and costs, and ordered petitioners to pay the costs in said appellate court and its judgment certified to the trial court.<sup>7</sup> (R. 1973-1974)

### QUESTION PRESENTED

Whether the Labor Management Relations Act, 1947, provides exclusive remedies and procedures for the commission of acts defined in Section 8(b)(1)(A) thereof as unfair labor practices by labor organizations and their agents so as to foreclose the jurisdiction, power and authority of a state court to hear and determine the issues in a common law *tort* action instituted by an employer against labor organizations for the recovery of damages based upon the alleged commission of acts for which a state-court jury by verdict, approved by both the state trial and appellate courts, has found the labor organizations liable, and which acts fall within the ambit of conduct defined in said Section as unfair labor practices, and to enter a money judgment against the labor organizations therefor.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provisions involved consist of the commerce clause of Article I, Section 8 of the Constitution of the United States. The pertinent statutory provisions involved are Section 1, Section 101 amending Sections 1, 2, 3, 7, 8, subsection (b)(1)(A), 10, subsections (a), (b), (c), (e), (f), (j) (1), and 14 (b) of the

<sup>7</sup> In its opinion (R. 1973) the Virginia Supreme Court cites Virginia Code, Section 8-493 as its authority to modify the judgment under review by striking a portion of the money judgment and affirming as to the balance. Such statutory authority is as follows:

*"Decision of Supreme Court of Appeals.*—The Supreme Court of Appeals shall affirm the judgment, decree or order if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial *de novo* except when the ends of justice require it, but the Supreme Court of Appeals shall, in the order remanding the case, if it be remanded, designate upon what questions, or points a new trial is to be had." (Emphasis supplied)

National Labor Relations Act, and Section 301, 303 and 501, all of the Labor Management Relations Act, 1947. These constitutional and statutory provisions are set forth in Appendix A hereto.

### STATEMENT

On November 16, 1949, Laburnum instituted in the Circuit Court of the City of Richmond, Virginia, its notice of motion for judgment (R. 2) seeking against petitioners "damages both actual and punitive" in the sum of \$500,000.00. (R. 12) Laburnum's theory of liability, manifest from the notice's allegations and Laburnum's requested instructions approved and read to the jury by the trial judge<sup>8</sup> is that Laburnum's work as a contractor in Breathitt County, Kentucky, was stopped, its contracts cancelled, its property and reputation damaged, and other contracts for work lost because W. O. Hart, a field representative of UCW, had sought, and Laburnum had refused, to have Laburnum recognize UCW as the sole bargaining agent for its employees in said Breathitt County, and Hart in an effort to organize Laburnum's employees, had then taken "a mob of men variously estimated at between 75 and 100 men," to Laburnum's job site during July, 1949,

<sup>8</sup> Laburnum offered, and the trial court read to the jury, Instruction No. 5-A in which petitioners' liability was premised upon jury belief that W. O. Hart

"\* \* \* while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and, that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, . . . (R. 132-133)

Instruction No. 7, offered by Laburnum and approved by the trial court (R. 133), is substantially the same as Instruction 5-A above.

Instruction No. 8, offered by Laburnum and read to the jury (R. 134), instructed the jury that both compensatory and punitive damages were warranted if, *inter alia*, the jury believed that for the purpose of "organizing the unorganized"

"\* \* \* Hart led men to plaintiff's job site in Breathitt County, for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees' wishes, and . . . Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to 'sign up' with one of the defendant unions, and forced others to quit work. . . ."

and "in violent language" told Laburnum's employees they would not be permitted to work unless they joined UCW, and that Hart and the men with him were prepared to use force to hold a picket line, which Hart established, to prevent the employees from working, and because of such threats Laburnum's employees ceased their work and refused to return thereto. Petitioners' pleadings, the jury trial and verdict and subsequent proceedings have already been related, *infra*, pp. 2-6, to which reference is now made.

The factual situation, pertinent to the instant issue herein presented, is as follows:

Laburnum, a Virginia corporation with its home office in Richmond, Virginia (R. 455), specializes in industrial construction work (excepting roads and bridges). (R. 456) From May, 1942 to December, 1949, according to Laburnum, construction work, performed in nine different states (R. 457), aggregated \$20,253,965.49. (R. 566, 656, 658) Its annual volume of business averages \$2,000,000.00. (R. 458)

A "closed shop contract", dated April 15, 1947, between Laburnum and Richmond Building and Construction Trades Council, provided that Laburnum would employ only members of local unions associated with Council and that where no such locals had jurisdiction, Laburnum would request affiliated members of the AFL National Building Trades Department to furnish qualified workers and give to members thereof employment preference. (R. 12-17; 739-740).<sup>9</sup>

From September 6, 1947 until the end of 1949, Laburnum performed work in Kentucky and West Virginia, costing in excess of \$650,000, for Pond Creek Pocahontas Company and Island Creek Coal Company<sup>10</sup> and subsidiaries (R. 487-488), third largest coal producers in the United States and the largest in West Virginia in 1948 and 1949. (R. 1002). Pond Creek began to mine coal at its No. 1 Mine, Evanston, Kentucky, during June, 1949, and a substantial

<sup>9</sup> This agreement, without definitive terminal date, could be terminated on April 15, 1949, and on April 15 of each year thereafter, by three months' written notice. (R. 16) No effective termination notice was given by either Laburnum or Council. (R. 739)

<sup>10</sup> These two companies are hereinafter referred to as "Pond Creek" and "Island Creek", respectively.

part of such coal was shipped by the Chesapeake & Ohio Railway Company from the place it was mined at Evanston, Kentucky, to points outside of Kentucky during June and July, 1949. (R. 1818)

On October 28, 1948, Laburnum and Pond Creek entered into a written agreement for the construction of a coal preparation plant at Pond Creek's No. 1 Mine in Breathitt County, Kentucky. In procuring carpenters and millwrights for this work Laburnum contracted with an AFL affiliate "for the duration of this job". (R. 748) Laburnum procured other craftsmen from other AFL affiliated local unions; but no AFL union furnished laborers to Laburnum, who hired "local labor near the job site". (R. 513) Admittedly (R. 744-747), the carpenter-millwright contract did not cover Laburnum's laborers, and Paintsville Local Union No. 646 had not been certified by National Labor Relations Board as collective bargaining agent for Laburnum's employees.

Subsequent to the October 28, 1948, agreement for the coal preparation plant, Laburnum procured other contracts with Pond Creek, Island Creek and "various associated companies", including \$542,500 of additional work which Laburnum contended (R. 636-637, 1529), the jury found and the Virginia Supreme Court agreed (R. 1962), it would have been awarded "but for the disruption of the business relationship by the acts of the defendants' [petitioners] agents".

In July, 1949, Laburnum had 64 employees at the Breathitt County project, of which number 16 were employed as laborers. (R. 666, 667) Laburnum's laborers were unorganized (R. 1414), wanted to be organized (R. 1416) and there was a movement among them to seek membership in some union. (R. 1396) On July 8, 1949, four

<sup>11</sup> Paintsville Carpenter Local Union No. 646, United Brotherhood of Carpenters and Joiners of America. A question arose whether the local at Paintsville or an AFL local at Prestonsburg, Kentucky, had jurisdiction, and subsequent to the above-mentioned contract with Paintsville Local Union No. 646, jurisdictional friction developed also with an AFL affiliate local union at Salyersville, Kentucky. (R. 741-742)

laborers "signed up" with Hart (R. 1255-1256, 1304) who, being advised on July 12 that the laborers wanted to see him, left word for them to attend a meeting on July 24.

On July 13 or 14 <sup>11a</sup> Hart 'phoned from Pikeville, Kentucky, to Laburnum's president (A. Hamilton Bryan) in Richmond, Virginia. Bryan's version, denied by Hart (R. 1257-1258), is that Hart told him "Laburnum was working in United Mine Workers' territory", that he (Hart) intended "to organize all of" Laburnum's employees; and that if Laburnum did not "recognize his organization", he "would close the job down" (R. 532) and that it would be necessary to increase laborers' pay from 90¢ (R. 1393) to \$1.36 an hour and carpenters' pay to \$1.86 an hour. (R. 561). Bryan immediately undertook to have Laburnum's laborers join AFL unions as carpenter helpers (R. 539, 753-754)—a plan which Bryan had previously employed at another plant which District 50 sought to organize (R. 1363, 1365-1372)<sup>12</sup>—and instructed that one of Laburnum's employees, an official of the carpenters' local union at Salyersville, be "allowed time to go and talk" to the laborers and "sign them up". (R. 755) His instructions were carried out. (R. 755).<sup>13</sup> The applications were never returned to the local. (R. 1390) Several witnesses, testifying that they signed such applications, related that they heard nothing further concerning them. (R. 1403, 1410, 1416-17)

On July 24, nine of Laburnum's sixteen laborers, who already were or became UCW members, (together with employees of two other contractors doing work at Pond Creek's No. 1 Mine) met with Hart and, upon Hart's informing them that Laburnum had had sufficient time "to answer our call by letter" and "it was up to them to take whatever action they deemed necessary", elected a negoti-

<sup>11a</sup> Unless indicated otherwise, the dates refer to 1949.

<sup>12</sup> Bryan admitted that on this occasion he contacted an AFL representative and told him that "if these men were not in his union he had better get busy". (R. 728)

<sup>13</sup> Indicating his determination to control representation of Laburnum's employees, Bryan proclaimed to the jury, "I have tried to say repeatedly that we are lined up with the A. F. of L." (R. 759)

ating committee (R. 1420), unanimously voted to strike (R. 1258-1261, 1420), planned strike procedures (R. 1420) for "union recognition and union contract, in the way of more wages and other conditions of employment". (R. 1261)

On the night of July 25, Bryan left Richmond for the Breathitt County job site pursuant to a telephone conversation from Laburnum's superintendent who reported that the next day UCW "were coming to the job . . . to stop our employees from working and to close down the job". (R. 543) En route, Bryan attempted to call Hart but in his absence had a telephone conversation with David Hunter, Regional Director for District 50 and for UCW, requesting Hunter to direct Hart not to interfere with Laburnum's work before Bryan had an opportunity to talk with Hart at the job site. (R. 544) According to Bryan, Hunter stated he would try to get the message to Hart (R. 544) but when Bryan reached the job site between 2:30 and 3 P. M. on July 26, work had stopped. (R. 545-546)

In both the trial court and in the Virginia Supreme Court petitioners contended that cessation of work occurred and continued because of Laburnum's employees' refusal to cross a peaceful picket line, while Laburnum contended that the employees' refusal to work resulted from threats of violence and intimidating conduct for which petitioners are legally responsible.

While petitioners' version is that Hart (UCW representative) was seeking UCW members among the unskilled laborers and carpenter helpers only and sought the support of all workmen by inviting them to join the strike "if they wanted to" and that the unskilled laborers quit work, joined the strike and of the total of sixteen, twelve signed UCW membership cards and three signed District 50 cards (R. 665-667, 1270-1273) voluntarily (R. 1264, 1267, 1349, 1386, 1387, 1398, 1406-1407, 1410-1412, 1423), Laburnum relied upon testimony—denied by petitioners (R. 1264, 1282-1284, 1338, 1411)—that Hart with a group of

men (estimated variantly from 20 to 150), which admittedly included some of Laburnum's laborers (R. 927-928), came to Laburnum's job site on July 26 and insisted that the job belonged to UCW and he was taking over the job and that all employees join UCW, under threat that if they did not do so "you are going to have to quit work" or "we will kick you out of here" (R. 861, 902, 912-913, 931, 949); and two witnesses related that two unidentified laborers were forced to sign with UCW. (R. 853, 979-980) The Virginia appellate court declared that the jury verdict "resolved this conflict in favor of the plaintiff." (R. 1954) Witnesses for Laburnum smelled whiskey on the group of men with Hart and two of them had "guns sticking under their belts" and "saw prints of guns under their belts" (R. 844, 902) and they had knives "whittling around on sticks." (R. 917, 961) Other witnesses, both for Laburnum (R. 878, 887, 934) and for petitioners (R. 1345, 1351, 1392-1393, 1397, 1405, 1422) saw no drinking or smelled any whiskey and saw no guns, and Bryan's report of the July 26 incident stated that "nobody saw any guns." (R. 790) The Virginia appellate court found (R. 1953) that "There is evidence that this 'was a very rough, boisterous crowd', that some of the men used abusive language, that some were drunk, and some carried knives and guns."

Witnesses for both petitioners (R. 1268, 1349) and Laburnum (R. 949-950, 964) agreed that the AFL representative told Hart that his membership would continue to work if "you don't put on a picket" (R. 949, 964) but agreed that they would honor a picket line (R. 869, 879, 936, 984-985, 994) and so instructed Laburnum's employees. (R. 888) Hart then wrote and caused to be posted a picket sign reading "UMWA Pickett Line. Contractors—Laburnum" (R. 567) and picket signs reading "District 50, UMWA, Local 778-A—Picket Line" and

"On Strike  
Local Union No. 778-A  
Carpenters Helpers and Laborers  
District 50, UMW of A"

were at Laburnum's job sites on July 31. (R. 586-587) Although the AFL representative agreed "it is just ingrained with a union man to honor a picket line" (R. 874), and witnesses for petitioners and Laburnum agree that a statement by Hart that he would bring a large number of men (estimated at 300 to 500 and admitted by Hart as 500) from Beaver Creek was made after the AFL representative had agreed to honor the picket line (R. 949-950, 1276), and some skilled workers declared they were not afraid to return to work (R. 1321, 1330, 1340-1341, 1347, 1349-1350) and that they honored the picket line (R. 973, 1340-1341, 1399), the trial court permitted, and the Virginia Supreme Court approved (R. 1968), the AFL representative to testify (R. 878) that his reason for telling Hart he would honor the picket line was, "It was my only way out" and witnesses, when asked "why" they had not gone to work, to answer that "we were afraid to" (R. 846), or "There were too many fellows there talking too big for me" (R. 932), or "they said not to" (R. 950) or "I didn't feel it was safe" (R. 975, 982), or "I was scared" (R. 952), or "I didn't think it was a healthy thing to do" (R. 974), or "I felt there was danger there" (R. 992) and other witnesses to give substantially similar answers. (R. 906, 913, 925, 947) The Virginia appellate court (R. 1955), conceding that

"... some of the Laburnum employees refused to return to work because Hart had posted picket signs on the job site and these employees refused to pass these signs or cross the so-called 'picket lines'",

declared that

"... there is ample evidence to support the finding that the plaintiff's employees refused to resume their work because of the threats and conduct of Hart and his associates".

On July 27 twenty-five or thirty skilled workers with Bryan, pursuant to their determination at a local union meeting on the previous night, drove their automobiles, in

caravan fashion, to Laburnum's job site. There Bryan and the employees found a picket sign; the men halted; Bryan "tore the picket sign down" and threw it away (R. 1320, 572); and a group of seven or eight employees, at Bryan's invitation, and led by him, returned to work. (R. 572-573) Hart was not there (R. 1304) but another UCW representative was, and he explained to Bryan that he was there to "bring about a settlement if I possibly can", that UCW had no intention of getting the carpenters to join and that the carpenters were at liberty to cross the picket line if they felt like so doing, when Bryan said, "All right let's go to work". The men ceased work when Laburnum's superintendent and an AFL steward "decided we would cease for a day or two and see if it wouldn't die down". (R. 968) Bryan conceded that the UCW representative made no threats (R. 793) but several witnesses for Laburnum testified that two unidentified men, sitting on a lumber pile, said, "If you men works, there will be plenty of men here in a little bit and they will come rough" (R. 963) and that "they will fish you out of that pond". (R. 851) The Virginia Supreme Court declared that some of the workers on July 27 "were again confronted by representatives of the opposing labor organization who repeated their abusive threats, and consequently were afraid to go back to work". (R. 1955)

Admitting that on August 1 Hart stated he represented and sought recognition for the laborers only, Bryan proposed, and Hart rejected (R. 796), a plan that Laburnum could get along without laborers and that their work be done by carpenters. (R. 796) The Virginia Supreme Court also adopted Bryan's version—denied by Hart (R. 1280)—that on August 1 Hart "left no doubt in anybody's mind that he was going to have people to stop any men from working who tried" and "continually threatened to bring a large crowd of people from Beaver Creek and other places to stop us from working . . . unless we signed a paper recognizing his organization as the representative of the

laborers' " and that if the Laburnum men " 'went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek' ". (R. 1955-1956) Bryan admitted that no one shot "or made a pass" at him, or prevented his going about, that no one got "a mauling"; and that he heard of no one being "shot at" or of any property being destroyed. (R. 803-804)

Although Bryan acknowledged that Laburnum had worked in plants where employees were represented by District 50 and by United Mine workers, and Laburnum's employees were AFL members (R. 725), when Hart suggested to Bryan that "we work together", and that "we are doing it in other places", Bryan answered, "Well, it just won't work." (R. 1281) Bryan refused to recognize UCW because, as he stated, of the agreement with the AFL local unions and the Richmond Building and Trades Council (R. 531) and AFL would withdraw its members from other jobs. (R. 1424)

On August 4 Pond Creek cancelled its contract for the coal preparation plant which was 95% completed (R. 523-524) and its subsidiary (Spring Fork Development Company) terminated its contract for 25 dwellings. (R. 600-602) The next day Bryan conferred with Hunter who expressed the view that the parties should be able to make an agreement "for the laborers" and that UCW people would work peacefully alongside of AFL men. Bryan replied that he "just didn't think that would work out"; that the "wage rate of \$1.36 was preposterous". The Virginia appellate court found, as Bryan claimed (R. 575), that he sought, but was denied, police protection (R. 1955), but Bryan did not claim that he undertook to process any unfair labor practice charge with the National Labor Relations Board (herein called "Board" or "NLRB") against petitioners. He advised Hunter that he "expected to hold him and the United Mine Workers responsible for what had happened." (R. 609, 611, 612)

Laburnum continued to do work for Island Creek. (R. 664-665) During September, 1949, through December, 1949, it submitted bids on projects at Pond Creek's invitation. (R. 669-672) Pond Creek would have awarded the work to Laburnum if it had been the low bidder. (R. 999) Meanwhile, on November 16 Laburnum instituted its instant action against petitioners (R. 2) and contended at the trial that "the business relationship was destroyed on July 26." (R. 1633)

In the Spring of 1950, Island Creek invited Laburnum to submit a bid on proposed construction in West Virginia. Bryan inquired of Hunter if he would expect Laburnum to use UCW members and to make an agreement with UCW. Receiving an affirmative answer, Bryan reported to Island Creek that Hunter had stated that without a UCW contract, he "would absolutely do everything in his power to see that we do not build those buildings". Bryan's memorandum of Hunter's statement, not in accord with his report to Island Creek, declared, in part, that Hunter stated (R. 801):

"\* \* \* he would attempt to organize our laborers and our other workers, and that if he was successful he would expect us to make a contract with UCW granting recognition to it."

On May 18, 1950, Island Creek wrote to Bryan stating that it "had about four or five other reputable and well-qualified concerns, which have contracts with the United Mine Workers, that are going to bid" and because "of the facts outlined to me" Laburnum was requested to refrain from bidding. (R. 673-674) The Virginia appellate court concluded (R. 1957):

"Hence, there is ample evidence to sustain the finding that the acts and conduct of Hart in July, 1949, ratified by Hunter, disrupted the business relationship between Laburnum, Pond Creek Pocahontas Company and Island Creek Coal Company, and entitled Laburnum to an award of damages against Hart's principals."

Under instructions of the trial court, there was presented to the jury the issue whether Laburnum's alleged damages had resulted from the wrongful conduct of Hart and the men with him, as submitted by Laburnum's instructions 5-A, 7 and 8 (*infra*, p. 7) or whether, as petitioners contended in their instruction "E" (R. 139), such damages followed because Laburnum's employees "refused to work solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line." The jury having found against petitioners, the Virginia appellate court agreed that "because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work" and that the "employees refused to resume their work because of the threats and conduct of Hart and his associates". (R. 1955) Petitioners urged in the Virginia appellate court, as in the trial court, that, under declarations of the National Labor Relations Board, such conduct involved unfair labor practices within the purview of Section 8(b)(1)(A) of the Act, and that by adoption of the Act Congress had preempted the field of labor relations and had provided an exclusive federal remedy in Section 10 thereof and thereby foreclosed to the state courts jurisdiction to entertain any action for damages based upon such conduct. "Assuming without deciding, that the acts of the defendants (petitioners) so affected interstate commerce as to come within the purview of the Act" and, at Laburnum's instance, could have been dealt with in the manner therein provided, the Virginia Supreme Court held that "there are no words which indicate that the remedy" provided for in the Act to restrain the commission of unfair labor practices "is exclusive", or that the Act "was designed to deprive an employer or his employees of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices" and that the exercise by the

State of its jurisdiction in enforcing such cause of action did not "conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected." (R. 1949-1950) These pronouncements, and others, by the Virginia appellate court to sustain the state court's jurisdiction, appear herein at pages 5 and 6, to which reference is made.

The Virginia appellate court, having concluded that the trial court had jurisdiction and that petitioners' motion to dismiss was properly overruled, and that the evidence supported the jury's verdict of petitioners' liability, found that there was error in the amount of the jury verdict, modified the trial court's judgment in Laburnum's favor against petitioners and affirmed the balance as herein shown (*infra*, pp. 5-6).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Supreme Court of Appeals of Virginia erred:

1. In holding that petitioners' motion to dismiss Laburnum's notice of motion for judgment and to enter a final judgment for petitioners on the ground that the trial court was without power, authority and jurisdiction to hear and determine the issues in said action "was properly overruled" and in failing and refusing to hold that said motion should have been sustained.
2. In holding that the Act did not provide an exclusive remedy for "the acts of defendants", that the remedy provided for in the Act was not "the only redress open to the plaintiff" and that Laburnum "did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law tort for which admittedly the Act affords no redress."
3. In holding that the Act did not deprive state courts "of their traditional power and jurisdiction to deal

with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce."

4. In holding that "there are no words" in the Act which indicate that the remedy provided in the Act "is exclusive, or that the Act was designed to deprive an employer or his employees of the common law right of action in a State court for acts of violence and intimidation which may constitute unfair labor practices."
5. In holding that "the exercise by the State of its jurisdiction in enforcing" a cause of action by an employer for damages for acts of violence or intimidation which may constitute unfair labor practices does not "conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected."
6. In affirming the judgment of the Circuit Court of the City of Richmond, Virginia, to the extent of \$129,326.09, with interest at 6% per annum from February 16, 1951, until paid, and for costs expended by Laburnum "about the prosecution of its notice of motion for judgment in said circuit court" and ordering that Laburnum recover of petitioners its costs by it expended "about the prosecution of the writ of error and supersedeas" in said Virginia Supreme Court.
7. In failing and refusing to reverse, set aside and hold void the judgment of said Circuit Court of July 5, 1951, for \$275,437.19, with interest and costs, in its entirety, and to set aside the jury verdict and enter judgment for petitioners, and each of them.
8. In failing and refusing to find and hold that the provisions of the Act were applicable to the facts of the instant case.
9. In failing and refusing to hold and conclude (1) that the Act provides exclusive remedies and procedures for conduct proscribed by Section 8(b)(1)(A) thereof:

(2) that the Act deprives an employer of his common-law right of action in a state court for damages based upon such conduct; (3) that by reason of the provisions of said Act, the Circuit Court of the City of Richmond, Virginia, was without power, authority and jurisdiction to hear and determine the issues in the instant case and to enter its said judgment of July 5, 1951, against petitioners, and each of them, and such judgment is void; and (4) that judgment should have been entered for petitioners, and each of them, and Laburnum's notice of motion dismissed.

#### REASONS FOR GRANTING THE WRIT.

1. The Virginia Supreme Court's decision and judgment in the instant case conflict with those of the Connecticut Supreme Court of Errors in *McNish v. American Brass Company et al*, Conn. , 89 A. 2d 566 [1952; cert. denied, U. S. , 97 L. ed. (Adv. op., p. 247)] wherein plaintiff sought damages for lost wages from an employer and a labor union for conspiracy to oust him from employment and an injunction to compel the performance of a collective bargaining agreement, but the Connecticut court, first finding that unfair labor practices under the Act were involved, concluded that plaintiff's remedy "lies within the exclusive jurisdiction of the" Board. (89 A. 2d 570).

Contrary to the Virginia Supreme Court's construction of the Act, other state courts have given judicial imprimatur to the principle that where the Act is applicable it controls to the exclusion of state law. See *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N. W. 2d 94 (1950), wherein the court declared that in "cases involving labor disputes in the field of interstate" commerce covered by the Act, the "Board has exclusive jurisdiction and the state courts have none"; also *Garner v. Teamsters, etc. Local Union No. 776, AFL*, 373 Pa. 19, 94 A. 2d 893, (cert. granted June 15, 1953, 73 S. Ct. 1136) where the Pennsylvania Supreme Court, one Justice dissenting, held the state court to be

without injunctive jurisdiction over conduct, unlawful under state law, but constituting an unfair labor practice under the federal Act. In *Costaro v. Simons*, 302 N. Y. 318, 98 N. E. 2d 454, (motion for reargument denied, 100 N. E. 2d 39), the Court of Appeals "read the complaint (to enjoin defendants from discharging plaintiffs under a collective bargaining agreement) as alleging that the controversy involves unfair labor practices" within the purview of the Act and dismissed the complaint for lack of jurisdiction of the subject matter. *Ryan v. Simons*, 100 N. Y. S. 2d 18 (1950), affirmed 98 N. E. 2d 707, cert. denied, 342 U. S. 897, involved an action to restrain a labor union and an employer from discriminating against plaintiff employees because of their non-membership in the union, brought upon the theory that the union had breached the common-law duty of agent to principal by entering into a union-shop agreement with the employer. The state courts (including the Court of Appeals) concluded the controversy concerned a federal unfair labor practice within the Board's exclusive jurisdiction. Likewise, the California court rejected the assertion of state jurisdiction in *Gerry of California v. Superior Court*, 32 Calif. 2d 119, 194 P. 2d 689, 696, "in the field of the jurisdiction vested in" NLRB, "except to the extent that it has been expressly conferred or ceded." Compare, however, *Goodwin's Inc. v. Hagedorn*, 303 N. Y. 300, 101 N. E. 2d 697; *Sommer v. Metal Trades Council*, 32 LRRM 2004 (Supreme Court of Calif., 1953), three Justices dissenting (32 LRRM 2010-2014); and cases cited in the Virginia Supreme Court's opinion (R. 1949-1950).

The decision and judgment likewise conflict with those in *Born v. Cease*, 101 F. Supp. 473 (USDC, Alaska, 1951) wherein the federal district court dismissed an action for damages brought by an employee-union member against a labor organization seeking reinstatement in the union and damages for exclusion upon its conclusion that "Courts have not by the Act of 1947 been given concurrent jurisdiction" with the Board "but only that jurisdiction explicitly provided" therein.

Where plaintiffs instituted injunction proceedings in state courts to enjoin picketing alleged to be illegal under state law, federal district courts professed the supremacy of the Act and the inapplicability of state law. *Pocahontas Terminal Corp. v. Portland Bldg., etc. Council*, 93 F. Supp. 217 (USDC, D. Maine); *Nash-Kelvinator Corp. v. Grand Rapids Bldg., etc. Council*, 30 LRRM 2466 (USDC, W.D., Mich., 1952, unreported in F. Supp.)

The conclusion and reasoning of the Virginia Supreme Court collides with those of Courts of Appeals in the Sixth, Seventh and Ninth Circuits. In an action for damages for contract violations instituted under the Act by an employer against a labor organization, the Sixth Circuit proclaimed that "Kentucky law does not control, for Congress has occupied the field and closed it to state regulation." *International Union of Operating Engineers v. Dahlem Construction Co.*, 6 Cir., 193 F. 2d 470, 475. The Ninth Circuit rejected an action for damages based upon alleged violation of Section 8 (b)(1) of the Act upon its profession that exclusive remedy therefor was in Board proceedings "except in so far as the district courts are given jurisdiction over certain suits for injunctions brought by the Government and over suits brought by private parties under Sections 301 and 303" of the Act. *Schatte v. International Alliance, etc.*, 9 Cir., 182 F. 2d 158. The Ninth Circuit likewise enjoined the enforcement of a state court injunction upon request of NLRB because the state-enjoined conduct fell within the exclusive control of federal tribunals as provided in Section 10(a) of the Act. *Capital Service, Inc. v. NLRB*, 9 Cir., F. 2d , 31 LRRM 2326 (January, 1953). The Seventh Circuit rejected a union's contention that a Wisconsin Employment Relations Board's order precluded the NLRB from finding it guilty of unfair labor practices and declared that NLRB had exclusive jurisdiction under said Section 10(a) and that its "exclusive function in this field may not be displaced by action before state agencies or by arbitration." *NLRB v. International Union, UAW*, 7 Cir., 194 F. 2d 698, 702.

In support of its conclusion, the Virginia Supreme Court cited *Russell v. International Union, etc.*, 64 So. 2d 384, 31 LRRM 2568, 2574, wherein the Alabama Supreme Court, upholding the state court's jurisdiction in a damage action for conduct violative of said Section 8(b)(1)(A), noted that there is "no authoritative holding from the Supreme Court of the United States on the matter now before us."

Resolution of the foregoing conflict in the construction of a federal statute can be resolved only by this Court's determination of the question. See *Fischer v. Pauline Oil and Gas Co.*, 309 U. S. 294, 296.

2. The question presented is of importance in the construction and administration of the Act: Reliance of the Virginia Supreme Court upon *Erwin Mills, Inc. v. Textile Workers Union of America*, 234 N. C. 321, 67 S. E. 2d 372, and kindred cases cited (R. 1949)<sup>14</sup> to support its holding that the remedy provided by the Act for committing unfair labor practices is not exclusive and its reasoning challenges the Board's position and the Court of Appeals' holding in *Capital Service, Inc. v. NLRB*, 9 Cir. F.

2d, 31 LRRM 2326, 2329, that "the control by the federal tribunals is exclusive" and that Section 10(a) of the Act gives to the state "a right of enforcement only by an agreement reached by it with the Board", as well as the NLRB's declaration of its exclusive jurisdiction in *H. N. Thayer Co.*, 30 LRRM 1184, 1185, that the Act vests the Board with "exclusive primary jurisdiction over all phases of the administration of the Act" including "regulatory power over the area of nonpeaceful means employed in labor controversies", and that a Massachusetts state court "had no power" to enjoin a strike which the state court had found to be illegal both in purpose and conduct under state law. See, however, *Texas Foundries, Inc.*, 31 LRRM 1224,

<sup>14</sup> *Williams v. Cedartown Textiles*, 208 Ga. 659, 68 S. E. 2d 705; *International Moulders, etc. v. Texas Foundries*, Tex. Civ. App., 241 S. W. 2d 213; *State ex rel Allai v. Hatch*, 361 Mo. 190, 234 S. W. 2d 1; *Rice and Holman v. United Elec. Radio & Mach. Workers*, 3 N. J. Super. 258, 65 A. 2d 638.

1226. The Virginia Supreme Court's construction of the federal Act would be invitatory to employers to ignore the remedies and procedures provided in the Act by Congress and to circumvent such remedies and procedures, as well as the federal tribunals specified in the Act by Congress, and to seek instead a money judgment for alleged damages, a procedure which would frustrate, rather than effectuate, the specifically declared congressional policy of **promoting the full flow of interstate commerce**. Moreover, such construction flouts the clear intent of Congress of limiting damage actions for acts allegedly in violation of the Act to those instances which Congress specifically delineated in Sections 301 and 303 of the Act and *in such courts* as Congress therein vested jurisdiction. It is in the public interest that this Court review and resolve this important and unsettled question concerning the construction of the Act.

3. The decision of the Virginia Supreme Court is believed to be erroneous. Facts relating to Laburnum's business activities and the volume thereof have been related herein (pp. 8-9). It is clear that Laburnum's business is subject to the Board's jurisdiction and that the activities upon which Laburnum based its notice of motion and those upon which the jury found petitioners liable affect interstate commerce within the meaning of the Act. *NLRB v. Denver Bldg. and Construction Trades Council*, 341 U. S. 675, 683; *International Bro. of Electrical Workers v. NLRB*, 341 U. S. 694, 699; *Arthur G. McKee & Co.*, 94 NLRB No. 69, 28 LRRM 1054 (1951). Article 1, Section 8, Constitution of the United States grants unto Congress the power "To regulate Commerce . . . among the several states." This Court stamped as constitutional the congressional enactment of the Wagner Act (49 Stat. 449 et seq) in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, and therein recognized that acts growing out of labor disputes directly burdening or obstructing interstate commerce, or its free

flow, are within the congressional reach. Prior to Congress' enactment of the Act in 1947, this Court juridically recognized that conduct, not the subject of federal legislation, was subject to state regulation. In *Allen-Bradley Local v. Board*, 315 U. S. 740 (1942) it approved state condemnation of a labor organization's coercion and intimidation of employees because of the lack of federal regulation. "This conduct is governable by the State or it is entirely ungoverned," stated the Court in *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 254. However, the 1947 Act supplied federal regulation for union conduct: the Act "is a comprehensive code which governs the entire field of labor-management relations." Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, New York University, Conference on Labor, Fifth Annual, 77, 86. As Section 1 relates, the Act's policy is "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare . . ." In amending Section 1 of the Wagner Act, Congress found that the elimination of certain practices by labor organizations "is a necessary condition to the assurance of the rights herein guaranteed". To effectuate that policy, Congress, in Section 7 of the Act, provided that employees shall have the right

"to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities \* \* \*";

and in Section 8(b)(1)(A) Congress provided that "It shall be an unfair labor practice for a labor organization or its agents—

to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 . . .”

In Section 10(a) Congress empowered the Board to prevent labor organizations from engaging in unfair labor practices, a power not affected “by any other means of adjustment or prevention that has been established by agreement, law, or otherwise” but Congress expressly empowers the Board to cede jurisdiction to any State agency over cases in any industry (excepting mining and three others) where the state law is consistent with the Act. In Section 10, it provided remedies for the Act’s violation through exclusive procedures before NLRB and in federal courts, calling for cease and desist orders and injunctions. Section 10(b) of the Act authorizes the filing of unfair labor practices charges with the Board and issuance of a Board complaint, while Section 10(j) and (l) empowers the Board—but not a charging party—to seek injunctive relief in a federal district court. Under Section 10(c), the Board may issue its order requiring the charged party to cease and desist from the alleged unfair labor practice and to take such affirmative action as will effectuate the Act’s policies, and, pursuant to Section 10(e), may petition a federal court of appeals for a decree enforcing the Board’s order. Also, under Section 10(e), if the Board finds that no unfair labor practice has been committed, it dismisses the complaint; and under Section 10(f), “Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals. . .”

The cases cited in points 1 and 2 hereof to support petitioners’ position that the Act has preempted the field of labor relations and thereby foreclosed to the states jurisdiction to deal with conduct proscribed by Section 8(b)(1)(A) correctly interpret the federal Act. The Fourth Circuit, in the *Amazon Cotton Mill* case (167 F. 2d 183, 187), indicated that

"a remedy in the courts not expressly given is not to be inferred; and especially is this true where Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships  
\* \* \*."

Congress was not silent concerning damage actions by private parties it deemed permissible for violation of the Act's provisions. It was specific in its designation of the courts in which such actions could be prosecuted. It provided, in Section 301, for suits for violation of contracts between employers and labor organizations and authorized such suits in federal district courts. In Section 303(a) it declared unlawful boycotts and other unlawful combinations and in subsection (b) it sanctioned actions for injury to business or property "by reason of any violation of subsection (a)" in any federal district court or "in any other court having jurisdiction of the parties." These sections bespeak the congressional intent to limit an employer's right to sue for damages to those situations made actionable by Sections 301 and 303 and to limit jurisdiction therefor to those courts which Congress specifically designated therein. "*Expressio unius est exclusio alterius*" is especially applicable in the construction of statutes. *United States v. Barnes*, 222 U.S. 513.

These statutory provisions challenge the Virginia Supreme Court's denial that the remedy afforded by Section 10 of the Act "was the only redress open to the plaintiff" (R. 1948) and challenge as well its determination and argument that "there are no words which indicate that such remedy is exclusive, or that the Act was designed to deprive an employer or his employees of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices." (R. 1949-1950) Moreover, such denial, determination and argument are likewise discordant with this Court's pronouncement in *Amalgamated Assn. of Street, etc. Em-*

*ployees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, that Congress was "well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised", knew how to cede jurisdiction to the states and "knew full well that its labor legislation 'preempts the field that the Act covers in so far as commerce within the meaning of the Act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." Therein (footnote 25, p. 398) this Court noted other examples "of congressional direction that states were to play in the area of labor regulation covered by the Federal Act", citing Sections "8(d), 14(b), 202(c) and 203(b), 29 USC (Supp. III) Sections 158(d), 164(b), 172(e) and 173(b)."

The federal Act preempted the field as to the conduct involved in the instant case; it expressly covers the subject matter; it prescribes the rights of the parties; and it provides for the promulgation of all procedures requisite to the enforcement of an adequate remedy for the proscribed conduct. Because of such legislation, the proceeding in the state court is superseded by federal law. Article VI of the Constitution of the United States provides, in part, that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Virginia Supreme Court notes that Laburnum "did not seek relief because the acts of petitioners' agents were unfair labor practices, nor is its present case predicated upon the Act". (R. 1948) While the acts of which Laburnum complained were not described in the notice of motion as unfair labor practices *eo nomine*, such omission did not prevent the court in *Born v. Cease* and *Ryan v. Simons*, both *supra*, from judicially declaring them to be such.

Moreover, the Virginia Supreme Court assumed, without deciding, that they were unfair labor practices. State court jurisdiction is not to be determined upon whether the claim is predicated upon state law or the Act, but the test is whether the matter involved lies within the "field" covered by the Act. If it does so lie, then the federal Act supersedes all substantive rights and remedies flowing from state authority. *Pocahontas Terminal Corp. v. Building Trades Council*, *supra*. The allegations of the notice of motion and the trial court's instructions to the jury (*infra*, p. 7) upon which the jury based its verdict that petitioners were liable to Laburnum, which verdict petitioners challenged in the Virginia appellate court but which that court approved, related to conduct which both NLRB and a federal court have said is interdicted by Section 8(b)(1)(A). *Sunset Line and Twine Co.*, 23 LRRM 1001; *Conway's Express*, 87 NLRB 972; National Labor Relations Board, Fifteenth Annual Report, p. 127; *Progressive Mine Workers of America v. NLRB*, 7 Cir. 187 F. 2d 298 (1951).

Nor is it material, as the Virginia appellate court observed, that Laburnum's action for damages was "for a completed common-law tort for which admittedly the Act affords no redress", for the matters involved in the instant case are in the field of labor relations and covered by the Act so that substantive rights and procedures derived under state law are superseded. Heretofore where Congress has undertaken regulation of commerce this Court has said that where a federal statute condemns an act as unlawful, the legal consequences are federal questions, the answers to which are derivatives from the federal statute and policy and conflicting state law and policy must yield. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173. Where Congress has preempted the field, the states may not act concurrently (*Houston v. Moore*, 5 Wheat. 1; *Bethlehem Steel Co. v. N. Y. Labor Relations Board*,

330 U. S. 767), nor may state laws "be applied in coincidence with, as complementary to or as in opposition to, federal enactments." *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341, 346. Where Congress has provided the liability for infractions, this Court has declared that whatever "Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority." *Sherlock v. Alling*, 93 U. S. 99, 104; see also *Frazier v. Hines*, 260 F. 874, 880: "The rule is that, if the facts appear to bring the case under the act, the statute is exclusive . . . and no recovery can be had as in common law"; *N. Y. C. & Hudson R. R. Co. v. Tonsellito*, 244 U. S. 360; *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569, where this Court declared that "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them."

The Virginia Supreme Court relies, in part, upon its assertion that "there are no words which indicate that such remedy is exclusive." (R. 1949-1950) Though no words expressly assert that the Act's remedies exclude state court action, "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting". *Bethlehem Steel Co. v. N.L.S.L.R.B.*, *supra*, p. 772; also *Houston v. Moore*, *supra*. In addition to the discussion (*infra*, p. 27) showing that Congress sanctioned damage actions by private parties only in designated instances, the legislative history of the 1947 Act demonstrates that, except as otherwise expressly provided for in the Act, Congress intended to exclude remedies by private parties for violations of the Act. The cases cited and discussed in points 1 and 2 in support of petitioners' position have recognized that the Board's primary jurisdiction is exclusive. In *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir., 167 F. 2d 183, the

Fourth Circuit, reviewing the legislative history of Section 10(a) of the Act, concluded that the Board's jurisdiction is exclusive and forbids both injunctive and damage actions by private parties. Moreover, the Hartley Bill (H.R. 3020, 80th Cong., 1st Session), as introduced, authorized suits in federal courts by private parties for damages and injunctive relief for unlawfully preventing or attempting to prevent individuals in continuing employment by use of force or violence or threats thereof, but the Act rejected such proposal. NLRB, Legislative History of the Labor Management Act, 1947, p. 77-79. The House Report on H. R. 3020 noted that "by the Labor Act Congress preempts the field that the Act covers insofar as commerce within the meaning of the act is concerned." N.L.R.B., Legislative History of the Labor Management Relations Act, 1947, p. 335.

Heretofore this Court has recognized that the Act has preempted the field in respect to jurisdiction to enforce the unfair labor practices specified in the Act to the exclusion of state tribunals. *Bethlehem Steel Co. case, supra*; *International Union, UAW v. O'Brien*, 339 U.S. 454; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U. S. 953; *Amal. Assn. v. Board, supra*. The decision of the Virginia appellate court and the reasoning thereof are not consonant with the rationale of the foregoing decisions of this Court.

The Virginia Supreme Court points to *Russell v. International Union, supra*, wherein the Alabama court upheld the State court's right to entertain an employee's action for damages against a labor union for conduct constituting "an unfair labor practice under the federal Act." The *Russell case* must be considered in the light of preference, as expressed in the opinion, "that the Supreme Court of the United States express its judgment on the question before committing the Supreme Court of Alabama to a profound change in law from what has been regarded as established law in Alabama." It is noteworthy that the

Alabama court "realize(s) that there is a difference between the action of a state in providing a judicial remedy for the redress of wrongs which fall under the exercise of the police powers of the state and of providing redress to persons for a civil tort as for instance violation of rights by unlawful picketing, for the recovery of damages to which they may be entitled" (31 LRRM 2572), although it concludes the Act "does not deprive the state of its judicial power."

The foregoing discussion sustains petitioners' contention of federal preemption in the instant case and the exclusion of the power, authority and jurisdiction of state courts and demonstrates that the Virginia appellate court erred in holding that petitioners' motion to dismiss "was properly overruled."

The erroneous construction placed upon the federal Act by the Virginia appellate court has resulted in that Court's erroneous affirmance of the trial court's judgment to the extent of \$129,326.09, and interest and costs, as well as the imposition of costs in the state appellate court.

4. On June 15, 1953, this Court granted certiorari in *Garner v. Teamsters, etc. Union No. 776, AFL, supra*, wherein the Pennsylvania Supreme Court dismissed an injunction proceeding for lack of jurisdiction because an activity unlawful under state law also constituted an unfair labor practice under the Act, and heretofore certiorari was granted where an Alabama state court issued an injunction, at the instance of an employer, restraining labor unions from peaceful picketing. *Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., Inc.*, 343 U. S. 962 (dismissed because injunction was temporary, .... U. S. ...., 73 S. Ct. 196). The instant petition for review presents a related question of state court jurisdiction to entertain a common-law tort action of an employer against labor organizations awarding damages for acts which fall within the ambit of conduct interdicted

by Section 8(b)(1)(A) of the Act and for which a state court jury has found petitioners responsible—a verdict which the Virginia Supreme Court has approved upon petitioners' protest thereof. The precise question presented herein has not, but in the public interest, should be determined by this Court.

### CONCLUSION

For the foregoing reasons, petitioners, and each of them, pray that this Petition for Writ of Certiorari should be granted, and that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Appeals of Virginia entered as aforesaid on April 20, 1953.

Respectfully submitted,

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July 18, 1953

**APPENDIX A**

Constitution of the United States Article 1, Section 8:

The Congress shall have power \* \* \*

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

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Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136 et seq.):

*SEC. 1. Short title: Congressional declaration of purpose and policy.*

(a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public

in connection with labor disputes affecting commerce. (61 Stat. 136; 29 USCA, Section 141).

### **Title I**

#### **Amendment of National Labor Relations Act**

SEC. 101. The National Labor Relations Act is hereby amended as follows:

#### **FINDINGS AND POLICIES**

##### **Section 1. \* \* \***

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. \* \* \*

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of rep-

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. \* \* \* (61 Stat. 136; 29 USCA, Section 151).

### DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations \* \* \*

\* \* \* \* \*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. (61 Stat. 137; 29 USCA, Section 152).

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### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). (29 USCA, Section 157; 661 Stat. 140).

### UNFAIR LABOR PRACTICES

#### SECTION 8.

\* \* \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; \* \* \* (61 Stat. 140, USCA, Section 158(b))

#### SEC. 10. *Prevention of unfair labor practices—Powers of Board generally*

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: \* \* \*

(c) The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: \* \* \*

\* . . . .

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which applications may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of

the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. \* \* \* The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification \* \* \*

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.\* \* \* Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

. . . . .

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158 (b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect

to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: \* \* \*

(29 USCA, Sec. 160(a), (b), (c), (e), (f), (j), (l); 61 Stat 146; June 25, 1948, c. 648, Sec. 32, 62 Stat. 991, eff. Sept. 1, 1948.)

\* . . . .

#### SEC. 14(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. (29 U.S.C.A., Sec. 164 (b), 61 Stat. 151 (b))

### Title III

#### SEC. 301. *Suits by and against labor organizations— Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (61 Stat. 156; 29 USCA, Sec. 185).

#### SEC. 303. *Boycotts and other unlawful combinations right to sue; jurisdiction; limitation; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their em-

ployment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom

such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (61 Stat. 158; 29 USCA, Sec. 187).

## **Title V**

### **Definitions**

SEC. 501. When used in this chapter—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce. (61 Stat. 161; 29 USCA, Section 142).

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OCT 2 1953

HAROLD B. WILLEY

IN THE  
**Supreme Court of the United States**

October Term, 1953

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No. 188

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UNITED CONSTRUCTION WORKERS, affiliated with the UNITED  
MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE  
WORKERS OF AMERICA, and UNITED MINE WORKERS OF  
AMERICA, *Petitioners*

v.

LABURNUM CONSTRUCTION CORPORATION

---

**PETITIONERS' REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI.**

---

✓ WELLY K. HOPKINS,  
✓ HARRISON COMBS,  
WILLARD P. OWENS,  
✓ M. E. BOIARSKY,  
*Counsel for Petitioners*



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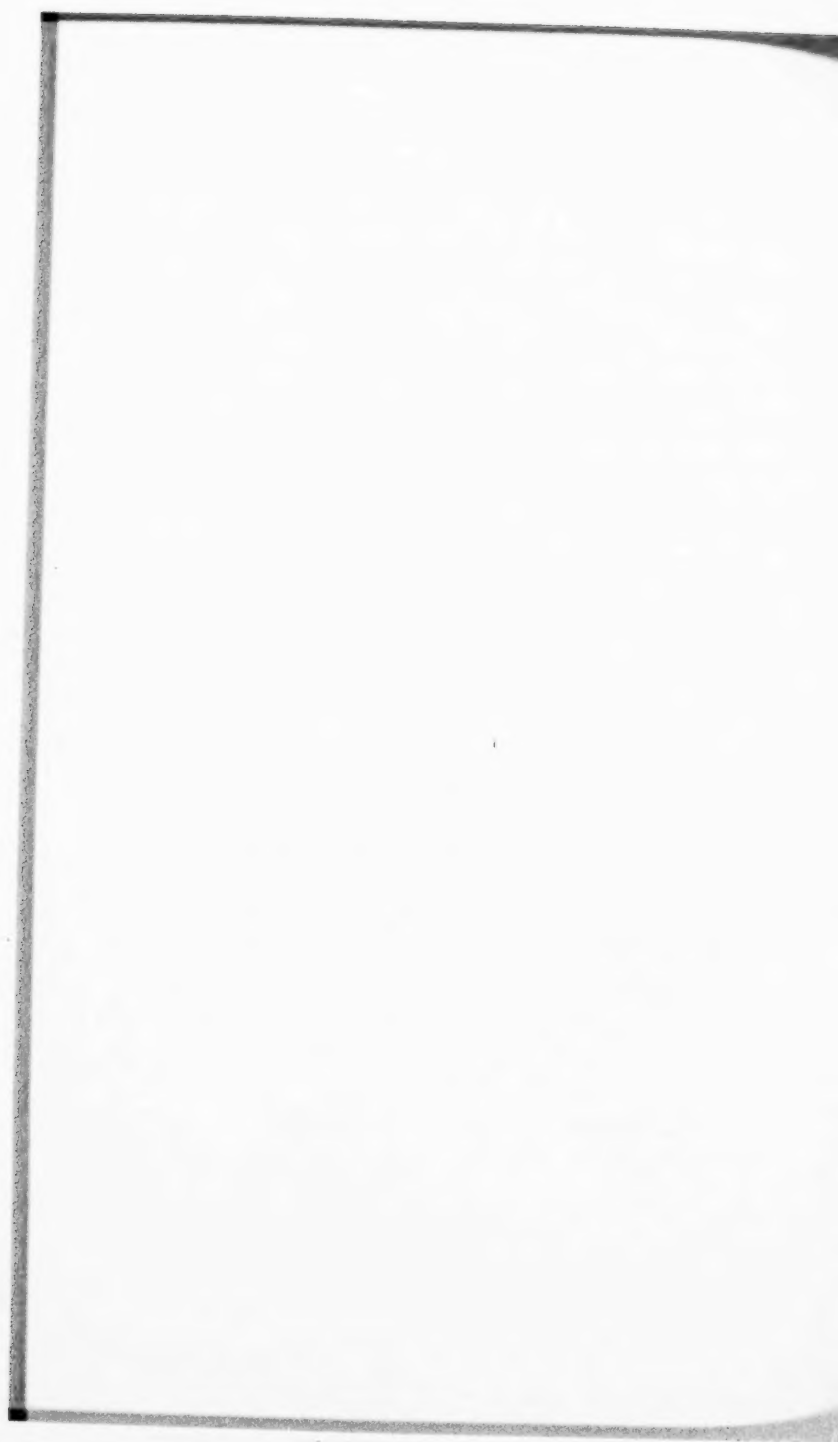
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I.

Laburnum's use of such words as "brute force"<sup>1</sup> and "violence"<sup>2</sup> and "violent coercion"<sup>3</sup> is unwarranted. Laburnum's evidence (R. 803-804) admits that no employee was hurt, no property destroyed, no automobile overturned and no one mauled. The Supreme Court of Appeals of Virginia, in its opinion under the heading "Liability of the Defendants" (R. 1950-1958), made no finding of violence, but agreed that "because of the insolent and abusive lan-

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<sup>1</sup> Brief, p. 4, under heading "STATEMENT".

<sup>2</sup> Brief, p. 4, under heading "QUESTION PRESENTED".

<sup>3</sup> Brief, p. 6, under heading "ARGUMENT".

guage and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work" and that the "employees refused to resume their work because of the threats and conduct of Hart and his associates." (R. 1955)

## II.

The thesis of Laburnum's brief is that the Congressional grant of *exclusive* jurisdiction to N.L.R.B. under the Labor Management Relations Act, 1947, is restricted to *peaceful* labor activities. Such thesis, petitioners submit, is fallacious as to the instant case. While in *International Union v. O'Brien*, 339 U.S. 454, 457 (1950), this Court declared that the Act did not permit State regulation of "peaceful strikes for higher wages", the textual use of the term "peaceful" merely denotes a factual situation and not, as Laburnum urges, a limitation upon the federal Board's exclusive authority. Rather, the *O'Brien* case juridically determined the supremacy of the Federal Act over State law.

Nor does *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, sustain Laburnum's contention. The Court's holding therein is bottomed upon its conclusion that the Act does not forbid the conduct involved in that case. In salient language, which Laburnum significantly omitted in quoting from the case (Brief pp. 4-5), the Court stated:

*"Nevertheless, the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner."* (Emphasis supplied)

Further emphasizing the rationale of that case, the Court declared (p. 254):

*"... the Federal Board has no authority either to investigate, approve or forbid the union conduct in ques-*

tion. *This conduct is governable by the State or it is entirely ungoverned.*" (Emphasis supplied)<sup>4</sup>

*N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, was not concerned with the issue of the conflict of federal-state jurisdiction, and the Court's suggestion therein (p. 672; Laburnum Brief p. 5) that a complaint concerning violence "would have addressed itself to local authorities" unquestionably referred to a prosecution by a sovereign state for an offense against the public and not to the instant situation where an employer sought and obtained a money judgment based upon acts which a state court jury has found to have been committed and which are unfair labor practices under Section 8 (b)(1)(A) of the Act.

Contrary to Laburnum's position that the Board's exclusive jurisdiction is limited to peaceful activities, the test employed by state courts,<sup>5</sup> federal courts<sup>6</sup> and NLRB,<sup>7</sup> in

<sup>4</sup> Of the cases cited by Laburnum (Brief, pp. 5-7): *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), antedates enactment of the Act regulation union conduct. In *Art Steel Co. v. Velazquez*, 280 App. Div. 76, 111 N.Y.S. 2d 198, in approving State Court jurisdiction, the Court observed (p. 201) that "The Taft-Hartley Law contains no reference to violence as a ground for action by the National Labor Relations Board." Furthermore, it directed (p. 202) that "steps should be taken to ascertain whether the National Labor Relations Board desires to act with the respect" to the basic dispute involved. In *Grist v. Textile Workers Union*, — R. I. —, 82 A. 2d 402 (1951), there was no issue of the conflict of federal and state jurisdiction.

<sup>5</sup> Cases are cited in the petition filed herein (pp. 20-21). Illustrative: "The actions . . . constitute unfair labor practices under the Act. The Plaintiff's remedy, therefore, lies within the exclusive jurisdiction of the" NLRB. *McNish v. American Brass Co.* Conn., —, 89 A. 2d 566 [1952; cert. denied, 97 L. ed. (Adv. op., p. 247)].

<sup>6</sup> Illustrative: Where an employer charged that a labor union's picketing "seeks to coerce the employees . . . to become" union members, which was violative of Section 8(b)(1)(A) of the Act and illegal under Maine law, the federal district court rejected the applicability of state law "because all of the activities alleged . . . to be illegal are within . . . union unfair labor practices provisions of the Taft-Hartley Act". *Pocahontas Terminal Corp. v. Portland Bldg., etc. Council*, 93 F. Supp. 217. (USDC, D. Maine). See also federal court cases cited in the petition filed herein, pp. 21-22.

<sup>7</sup> In *H. N. Thayer Company*, 30 LRRM 1184, 1185 the NLRB stated in part: ". . . [the] Board was given regulatory power over the area of non-peaceful means employed in labor controversies . . .

"Plainly the Board is not bound by a decision as to the objectives of the strike which the state court had no power to make. Nor is it bound by that court's ruling respecting the character of the means. The Act vests the Board with 'exclusive primary jurisdiction over all phases of the administration of the Act' . . ." (Emphasis supplied) In the *Thayer* case (cited in petition, p. 23), the Board found that Section 8(b)(1)(A) of the Act was violated by a union through its agent's conduct of kicking two nonstrikers.

declaring that the federal Act supersedes state law, is whether the challenged action is prohibited conduct within the ambit of activity declared by the Act to be an unfair labor practice.

Furthermore, all of the cases cited by Laburnum in support of its assertion that "State law may provide a remedy when violent coercion is employed", except *Russell v. United Auto Workers*, 64 So. 2d. 384 (Ala. 1953), are instances where state courts have awarded injunctive relief, as distinguished from the instant case where an award of damages is involved. The *Russell* case alone involved a common law tort action. The Alabama court gave no consideration to the fact that the Act specifies the instances in which damage actions may be brought for violations of the Act and the courts in which such actions are to be prosecuted (see Petition, p. 27); and that court, noting there is "no authoritative holding from the Supreme Court on the matter now before us", also observed that it "would prefer that the Supreme Court of the United States express its judgment on the question before committing the Supreme Court of Alabama to a profound change in law . . ."

#### Conclusion

The petition should be granted.

Respectfully submitted,

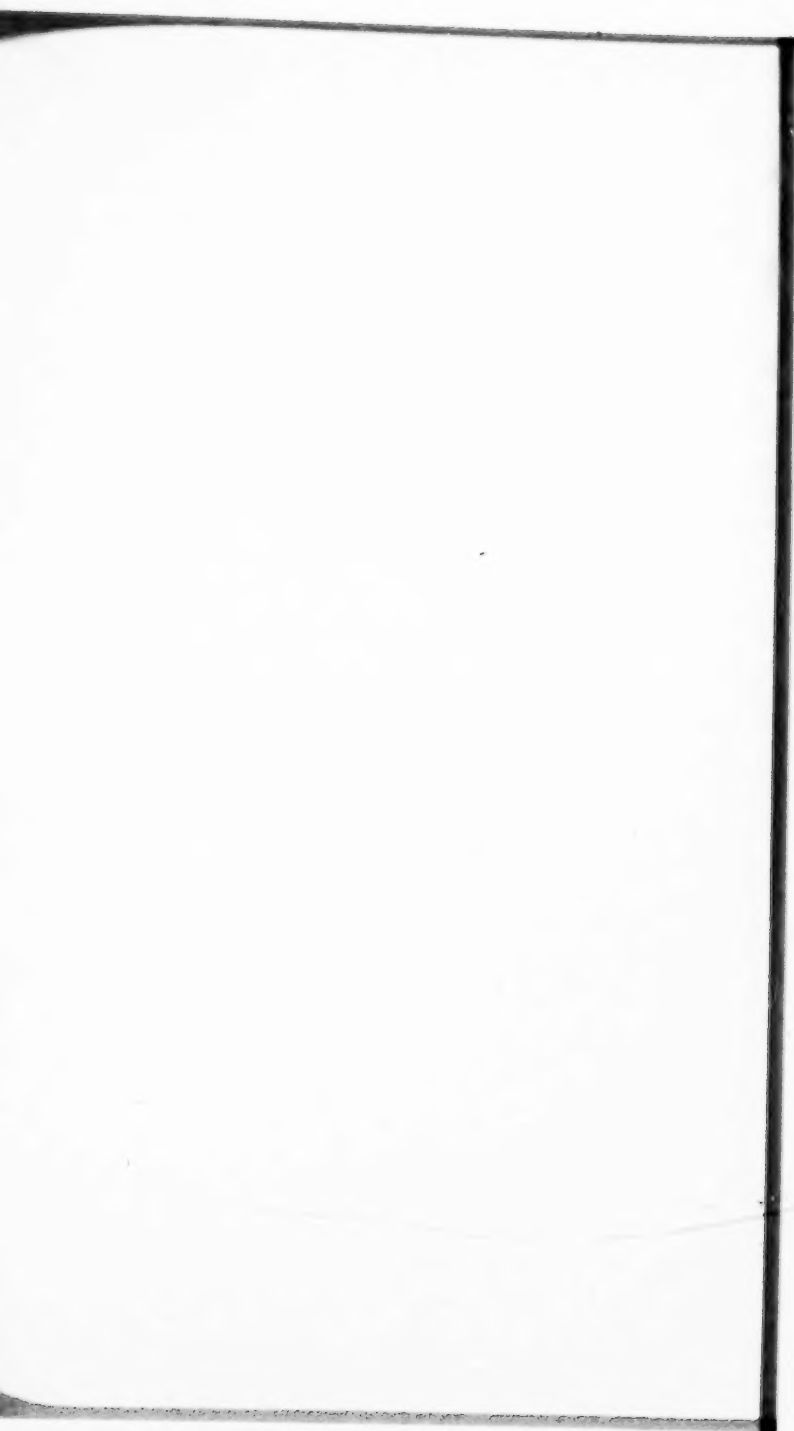
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# Supreme Court of the United States

OCTOBER TERM, 1953

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No. 188

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*Petitioners,*

v.

LABURNUM CONSTRUCTION CORPORATION.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
APPEALS OF VIRGINIA<sup>1</sup>

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## PETITIONERS' BRIEF

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I.

### OPINION BELOW

The opinion of the Virginia Supreme Court is reported in 194 Va. 872, and in 75 S.E. 2d 694. It also appears in the printed record at pages 1945 et seq.<sup>2</sup>

<sup>1</sup> Herein sometimes referred to as "Virginia Supreme Court" or "Virginia Appellate Court".

<sup>2</sup> Herein the abbreviation "R" refers to the printed record. A stipulation has been filed regarding the printed record in this case (R. 1981-1982).

## II.

## JURISDICTION

The Virginia Supreme Court's judgment was entered on April 20, 1953 (R. 1973). Petition for writ of certiorari was filed in this Court on July 18, 1953. Jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3). This Court granted certiorari on January 18, 1954 (R. 1983), — U. S. —, 98 L. ed. (Adv. op., p. 236).

## III.

## QUESTION PRESENTED

In its order granting certiorari, this Court limited the review herein to the following question:

"In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State court from hearing and determining the issues in a common law tort action based upon this conduct."<sup>3</sup>

## IV.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional provisions involved consist of the commerce clause of Article I, Section 8 of the Constitution of the United States. The pertinent statutory provisions involved are Section 1, Section 101 amending Sections 1, 2, 3, 7, 8, subsection (b)(1)(A), 10, subsections (a), (b), (c), (e), (f), (j), (l), and 14(b) of the National Labor Relations Act, and Sections 202(c), 203(b), 301, 303

<sup>3</sup> The Court's order granting the writ of certiorari likewise provided:

"The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in Sec. 10(a), 61 Stat. 146, 29 U.S.C. (Supp. 111) Sec. 160(a), and (2) other cases apart from those in Sec. 10(a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case by case method."

and 501, all of the Labor Management Relations Act, 1947. These constitutional and statutory provisions are set forth in Appendix A hereto.

## V.

### STATEMENT

By notice of motion for judgment, Laburnum Construction Corporation (herein called "Laburnum") instituted against petitioners, United Construction Workers, affiliated with the United Mine Workers of America, District 50, United Mine Workers of America, and United Mine Workers of America (herein sometimes called "UCW", "District 50" and "UMWA", respectively) in the Circuit Court of the City of Richmond, Virginia (herein called "trial court") a tort action for recovery of compensatory and punitive damages of \$500,000.00 (R. 2-19). Petitioners filed pleas of not guilty (R. 19) and grounds of defense, denying the material allegations of the notice (R. 74-81, 102-104); in a jury trial petitioners were found "jointly and severally liable" and damages were assessed at \$275,437.19, representing \$175,437.19 compensatory damages and \$100,000.00 punitive damages (R. 147, 1887-1888). Petitioners moved to set the verdict aside as contrary to the law and the evidence and to grant them a new trial (R. 147-150). Pending such motion, petitioners filed their motion to dismiss Laburnum's notice of motion for judgment and to enter judgment for petitioners on the ground that the trial court was without power, authority and jurisdiction to hear and determine the issues in the action because of the provisions of the Labor Management Relations Act, 1947<sup>4</sup> (herein called "Act"), and Article I, Section 8 of the Constitution of the United States (R. 151). The trial court overruled both motions (R. 152) and on July 5, 1951, entered judgment in favor of Laburnum and against petitioners, jointly and severally, for \$275,437.19,

<sup>4</sup> 61 Stat. 136, c. 120, Sections 1 et seq., Public Law 101.

with interest at 6% per annum from date of verdict until paid, and costs (R. 152-153). Petitioners excepted (R. 152-153).

Thereafter, petitioners duly filed their Notice of Appeal and Assignments of Error (R. 154-179).<sup>5</sup> Upon petition for writ of error and supersedeas,<sup>6</sup> the Virginia Supreme Court on January 24, 1952 awarded a writ and supersedeas (R. 1943). In the Notice of Appeal and Assignments of Error (R. 154-179) and in said petition, petitioners asserted (R. 154, Tr. 1985):<sup>7</sup>

"1. The Trial Court erred in refusing to sustain and in overruling the defendants' motion to dismiss the plaintiff's notice of motion for judgment and to enter final judgment for the defendants on the ground that the Court was without power, authority and jurisdiction to hear and determine the issues in this action because of the provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, c. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8, of the Constitution of the United States. The Trial Court's action was repugnant to, and in violation of, said statutory and constitutional provisions.

"2. The Trial Court erred in entering the judgment of July 5, 1951, on the verdict of the jury, that the plaintiff recover of the defendants, jointly and severally, the sum of \$275,437.19, with interest and costs, because the Trial Court was without power, authority and jurisdiction to enter said judgment because of the provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, c. 120, Sections 1, *et seq.*, Public Law 101) and Article I, Section 8, of the Constitution of the United States, and said judgment is void because it is repugnant to, and in violation of, said statutory and constitutional provisions."

<sup>5</sup> Pursuant to Rule 5:1, Section 4 of the Rules of the Supreme Court of Appeals of Virginia. The notice stated, *inter alia*, petitioners' intention to apply for a writ of error and supersedeas (R. 154).

<sup>6</sup> By stipulation of counsel, the petition "need not be printed" (R. 1981).

<sup>7</sup> "Tr." refers to the certified transcript of the record filed in the Supreme Court of the United States.

In its opinion filed April 20, 1953 (R. 1945), the Virginia Supreme Court, dealing with the issue of the trial court's power, authority and jurisdiction to hear and determine the issues involved in the action for the reasons aforesaid, held the "motion to dismiss was properly overruled" and rejected petitioners' contention that because Laburnum's notice of motion and the jury's verdict of petitioners' liability were grounded upon conduct which constituted an unfair labor practice within the meaning of Section 8(b) (1)(A) of the Labor Management Relations Act, 1947 (herein called "Act"), for which the Act provided exclusive remedies and procedures, superseding a common-law tort action for damages in a state court, the trial court was deprived of jurisdiction to hear and determine the instant action for damages based upon such conduct and to enter its said judgment of July 5, 1951, against petitioners, and each of them. It declared (R. 1948):

"We may assume, without deciding, that the acts of the defendants so affected interstate commerce as to come within the purview of the Act and, at the instance of the plaintiff, could have been dealt with in the manner there prescribed. But it does not follow that that was the only redress open to the plaintiff. It did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law *tort* for which admittedly the Act affords no redress";

that state courts have not "been deprived of their traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce" (R. 1949), and that (R. 1949-1950):

"While the Act<sup>8</sup> provides a remedy to restrain the commission of acts constituting unfair labor practices, there are no words which indicate that such remedy

<sup>8</sup> Labor Management Relations Act, 1947.

is exclusive, or that the Act was designed to deprive an employer or his employees of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices. Nor does the exercise by the State of its jurisdiction in enforcing such cause of action conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected."

Having so concluded and held, the Virginia Supreme Court, upon a consideration of the issues of petitioners' liability and the amount thereof, approved the jury's verdict of petitioners' liability (R. 1957) but, holding that the jury's award of certain elements of damages was not warranted under the evidence (R. 1963-1965, 1972) and that Laburnum was entitled to recover compensatory damages of \$29,326.09 and punitive damages of \$100,000, the Virginia appellate court concluded that "there is error in the judgment complained of", modified the trial court's judgment "by striking therefrom the sum of one hundred forty-six thousand, one hundred eleven dollars and ten cents" but affirmed "the balance of the judgment for the sum of" \$129,326.09, with interest and costs, and ordered petitioners to pay the costs in said appellate court and its judgment certified to the trial court.<sup>9</sup> (R. 1973-1974)

Laburnum's theory of liability, manifest from the notice's allegations and Laburnum's requested instructions ap-

<sup>9</sup> In its opinion (R. 1973) the Virginia Supreme Court cites Virginia Code, Section 8-493 as authority to modify the judgment under review by striking a portion of the money judgment and affirming as to the balance. Such statutory authority is as follows:

*"Decision of Supreme Court of Appeals.—The Supreme Court of Appeals shall affirm the judgment, decree or order if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment, decree or order as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for a trial de novo except when the ends of justice require it, but the Supreme Court of Appeals shall, in the order remanding the case, if it be remanded, designate upon what questions, or points a new trial is to be had."* (Italics supplied)

proved and read to the jury by the trial judge,<sup>10</sup> is that Laburnum's work as a contractor in Breathitt County, Kentucky, was stopped, its contracts cancelled, its property and reputation damaged, and other contracts for work lost because W. O. Hart, a field representative of UCW, had sought, and Laburnum had refused, to have Laburnum recognize UCW as the sole bargaining agent for its employees in said Breathitt County, and Hart, in an effort to organize Laburnum's employees, had then taken "a mob of men variously estimated at between 75 and 100 men" to Laburnum's job site during July, 1949, and "in violent language" told Laburnum's employees they would not be permitted to work unless they joined UCW, and that Hart and the men with him were prepared to use force to hold a picket line, which Hart established, to prevent the employees from working, and because of such threats Laburnum's employees ceased their work and refused to return thereto.

<sup>10</sup> Laburnum offered, and the trial court read to the jury, Instruction No. 5-A in which petitioners' liability was premised upon jury belief that W. O. Hart,

" . . . while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and, that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, . . ." (R. 132-133).

Instruction No. 7, offered by Laburnum and approved by the trial court (R. 133), is substantially the same as Instruction No. 5-A above.

Instruction No. 8, offered by Laburnum and read to the jury (R. 134), instructed the jury that both compensatory and punitive damages were warranted if, *inter alia*, the jury believed that for the purpose of "organizing the unorganized",

" . . . Hart led men to plaintiff's job site in Breathitt County, for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees' wishes, and . . . Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to 'sign up' with one of the defendant unions, and forced others to quit work. . . ."

### **Laburnum's Operations**

Laburnum's operations, pertinent to the instant issue, are as follows:

Laburnum, a Virginia corporation with its home office in Richmond, Virginia (R. 455), specializes in industrial construction work, which includes "work of almost all crafts and trades"—electrical, piping, millwright, carpentry, heavy rigging "and work of that nature" (R. 456). Laburnum performs its work in nine different states (R. 457). According to Laburnum, from May, 1942, to December, 1949, its construction work aggregated \$20,253,965.49 (R. 566, 656, 658). Its annual volume of business averages \$2,000,000.00 (R. 458). From September 6, 1947, until the end of 1949, Laburnum did business amounting to more than \$600,000 with Island Creek Coal Company, Pond Creek Pocahontas Company and subsidiaries (described as the third highest in coal production in the United States in 1948 and 1949 and the largest coal producers in West Virginia). Such work for Island Creek and Pond Creek and subsidiaries was performed in West Virginia and Kentucky. In 1949, at the time of the occurrence of the conduct upon which Laburnum based its complaint, Laburnum was engaged in work for such companies in Kentucky and West Virginia. The work in Kentucky was being performed at Pond Creek's No. 1 Mine, at Evanston, Kentucky, at which Pond Creek began to mine coal during June, 1949, and a substantial part of such coal was shipped by the Chesapeake & Ohio Railway Company from the place of mining to points outside Kentucky (R. 1818).

### **Narrative of the Facts and the Virginia Supreme Court's Decision and Judgment**

By a "closed shop contract", dated April 15, 1947, Laburnum agreed with Richmond Building and Trades Council—an AFL affiliate—that Laburnum would employ only members of local unions associated with Council and

that where no such local unions had jurisdiction, Laburnum would request affiliated members of the AFL National Building Trades Department to furnish qualified workers and give to members thereof employment preference (R. 12-17; 739-740).<sup>11</sup>

On October 28, 1948, Laburnum and Pond Creek entered into a written agreement for the construction of a coal preparation plant at Pond Creek's No. 1 Mine in Breathitt County, Kentucky. In procuring carpenters and millwrights for this work Laburnum contracted with an AFL affiliate<sup>12</sup> "for the duration of this job". (R. 748) Laburnum procured other craftsmen from other AFL affiliated local unions; but no AFL union furnished laborers to Laburnum, who hired "local labor near the job site". (R. 513) Admittedly (R. 744-747), the carpenter-millwright contract did not cover Laburnum's laborers, and Paintsville Local Union No. 646 had not been certified by National Labor Relations Board as collective bargaining agent for Laburnum's employees.

Subsequent to the October 28, 1948, agreement for the coal preparation plant, Laburnum procured other contracts with Pond Creek, Island Creek and "various associated companies", including \$542,500 of additional work which Laburnum contended (R. 636-637, 1529), the jury found and the Virginia Supreme Court agreed (R. 1962), it would have been awarded "but for the disruption of the business relationship by the acts of the defendants' [petitioners'] agents".

In July, 1949, Laburnum had 64 employees at the Breathitt County project, of which number 16 were employed as

<sup>11</sup> This agreement, without definitive terminal date, could be terminated on April 15, 1949, and on April 15 of each year thereafter, by three months' written notice (R. 16). No effective termination notice was given by either Laburnum or Council (R. 739).

<sup>12</sup> Paintsville Carpenter Local Union No. 646, United Brotherhood of Carpenters and Joiners of America. A question arose whether the local at Paintsville or an AFL local at Prestonsburg, Kentucky, had jurisdiction, and subsequent to the above-mentioned contract with Paintsville Local Union No. 646, jurisdictional friction developed also with an AFL affiliate local union at Salyersville, Kentucky. (R. 741-742).

laborers. (R. 666, 667) Laburnum's laborers were unorganized (R. 1414), wanted to be organized (R. 1416) and there was a movement among them to seek membership in some union. (R. 1396) On July 8, 1949, four laborers "signed up" with Hart (R. 1255-1256, 1304) who, being advised on July 12 that the laborers wanted to see him, left word for them to attend a meeting on July 24.

On July 13 or 14<sup>13</sup> Hart 'phoned from Pikeville, Kentucky, to Laburnum's president (A. Hamilton Bryan) in Richmond, Virginia. Bryan's version, denied by Hart (R. 1257-1258), is that Hart told him "Laburnum was working in United Mine Workers' territory", that he (Hart) intended "to organize all of" Laburnum's employees; and that if Laburnum did not "recognize his organization", he "would close the job down" (R. 532) and that it would be necessary to increase laborers' pay from 90¢ (R. 1393) to \$1.36 an hour and carpenters' pay to \$1.86 an hour. (R. 561). Bryan immediately undertook to have Laburnum's laborers join AFL unions as carpenter helpers (R. 539, 753-754)—a plan which Bryan had previously employed at another plant which District 50 sought to organize (R. 1363, 1365-1372)<sup>14</sup>—and instructed that one of Laburnum's employees, an official of the carpenters' local union at Salyersville, be "allowed time to go and talk" to the laborers and "sign them up". (R. 755) His instructions were carried out (R. 755).<sup>15</sup> The applications were never returned to the local. (R. 1390) Several witnesses, testifying that they signed such applications, related that they heard nothing further concerning them. (R. 1403, 1410, 1416-17).

On July 24, nine of Laburnum's sixteen laborers, who already were or became UCW members, (together with

<sup>13</sup> Unless indicated otherwise, the dates refer to 1949.

<sup>14</sup> Bryan admitted that on this occasion he contacted an AFL representative and told him that "if these men were not in his union he had better get busy". (R. 728)

<sup>15</sup> Indicating his determination to control representation of Laburnum's employees, Bryan proclaimed to the jury, "I have tried to say repeatedly that we are lined up with the A. F. of L." (R. 759)

employees of two other contractors doing work at Pond Creek's No. 1 Mine) met with Hart and, upon Hart's informing them that Laburnum had had sufficient time "to answer our call by letter" and "it was up to them to take whatever action they deemed necessary", elected a negotiating committee (R. 1420), unanimously voted to strike (R. 1258-1261, 1420), planned strike procedures (R. 1420) for "union recognition and union contract, in the way of more wages and other conditions of employment". (R. 1261)

On the night of July 25, Bryan left Richmond for the Breathitt County job site pursuant to a telephone conversation from Laburnum's superintendent who reported that the next day UCW "were coming to the job . . . to stop our employees from working and to close down the job". (R. 542) En route, Bryan attempted to call Hart but in his absence had a telephone conversation with David Hunter, Regional Director for District 50 and for UCW, requesting Hunter to direct Hart not to interfere with Laburnum's work before Bryan had an opportunity to talk with Hart at the job site. (R. 544) According to Bryan, Hunter stated he would try to get the message to Hart (R. 544) but when Bryan reached the job site between 2:30 and 3 P. M. on July 26, work had stopped. (R. 545-546)

In both the trial court and in the Virginia Supreme Court petitioners contended that cessation of work occurred and continued because of Laburnum's employees' refusal to cross a peaceful picket line, while Laburnum contended that the employees' refusal to work resulted from threats of violence and intimidating conduct for which petitioners are legally responsible.

While petitioners' version is that Hart (UCW representative) was seeking UCW members among the unskilled laborers and carpenter helpers only and sought the support of all workmen by inviting them to join the strike "if they wanted to" and that the unskilled laborers quit work, joined the strike and of the total of sixteen, twelve signed

UCW membership cards and three signed District 50 cards (R. 665-667, 1270-1273) voluntarily (R. 1264, 1267, 1349, 1386, 1387, 1398, 1406-1407, 1410-1412, 1423), Laburnum relied upon testimony—denied by petitioners (R. 1264, 1282-1284, 1338, 1411)—that Hart with a group of men (estimated variantly from 20 to 150), which admittedly included some of Laburnum's laborers (R. 927-928), came to Laburnum's job site on July 26 and insisted that the job belonged to UCW and he was taking over the job and that all employees join UCW, under threat that if they did not do so "you are going to have to quit work" or "we will kick you out of here" (R. 861, 902, 912-913, 931, 949); and two witnesses related that two unidentified laborers were forced to sign with UCW. (R. 853, 979-980) The Virginia appellate court declared that the jury verdict "resolved this conflict in favor of the plaintiff." (R. 1954) Witnesses for Laburnum smelled whiskey on the group of men with Hart and two of them had "guns sticking under their belts" and "saw prints of guns under their belts" (R. 844, 902) and they had knives "whittling around on sticks." (R. 917, 961) Other witnesses, both for Laburnum (R. 878, 887, 934) and for petitioners (R. 1345, 1351, 1392-1393, 1397, 1405, 1422) saw no drinking or smelled any whiskey and saw no guns, and Bryan's report of the July 26 incident stated that "nobody saw any guns." (R. 790) The Virginia appellate court found (R. 1953) that "There is evidence that this 'was a very rough, boisterous crowd', that some of the men used abusive language, that some were drunk, and some carried knives and guns."

Witnesses for both petitioners (R. 1268, 1349) and Laburnum (R. 949-950, 964) agreed that the AFL representative told Hart that his membership would continue to work if "you don't put on a picket" (R. 949, 964) but agreed that they would honor a picket line (R. 869, 879, 936, 984-985, 994) and so instructed Laburnum's employees. (R. 888) Hart then wrote and caused to be posted a picket sign reading "UMWA Pickett Line. Contractors—

Laburnum" (R. 567) and picket signs reading "District 50, UMWA, Local 778-A—Picket Line" and

"On Strike

Local Union No. 778-A

Carpenters Helpers and Laborers

District 50, UMW of A"

were at Laburnum's job sites on July 31. (R. 586-587) Although the AFL representative agreed "it is just ingrained with a union man to honor a picket line" (R. 874), and witnesses for petitioners and Laburnum agree that a statement by Hart that he would bring a large number of men (estimated at 300 to 500 and admitted by Hart as 500) from Beaver Creek was made after the AFL representative had agreed to honor the picket line (R. 949-950, 1276), and some skilled workers declared they were not afraid to return to work (R. 1321, 1330, 1340-1341, 1347, 1349-1350) and that they honored the picket line (R. 973, 1340-1341, 1399), the trial court permitted, and the Virginia Supreme Court approved (R. 1968), the AFL representative to testify (R. 878) that his reason for telling Hart he would honor the picket line was, "It was my only way out" and witnesses, when asked "why" they had not gone to work, to answer that "we were afraid to" (R. 846), or "There were too many fellows there talking too big for me" (R. 932), or "they said not to" (R. 950) or "I didn't feel it was safe" (R. 975, 982), or "I was scared" (R. 952), or "I didn't think it was a healthy thing to do" (R. 974), or "I felt there was danger there" (R. 992) and other witnesses to give substantially similar answers. (R. 906, 913, 925, 947). The Virginia appellate court (R. 1955), conceding that

"... some of the Laburnum employees refused to return to work because Hart had posted picket signs on the job site and these employees refused to pass these signs or cross the so-called 'picket lines'",

declared that

“... there is ample evidence to support the finding that the plaintiff's employees refused to resume their work because of the threats and conduct of Hart and his associates”.

On July 27 twenty-five or thirty skilled workers with Bryan, pursuant to their determination at a local union meeting on the previous night, drove their automobiles, in caravan fashion, to Laburnum's job site. There Bryan and the employees found a picket sign; the men halted; Bryan “tore the picket sign down” and threw it away (R. 1320, 572); and a group of seven or eight employees, at Bryan's invitation, and led by him, returned to work. (R. 572-573) Hart was not there (R. 1304) but another UCW representative was, and he explained to Bryan that he was there to “bring about a settlement if I possibly can”, that UCW had no intention of getting the carpenters to join and that the carpenters were at liberty to cross the picket line if they felt like so doing, when Bryan said “All right let's go to work”. The men ceased work when Laburnum's superintendent and an AFL steward “decided we would cease for a day or two and see if it wouldn't die down”. (R. 968) Bryan conceded that the UCW representative made no threats (R. 793) but several witnesses for Laburnum testified that two unidentified men, sitting on a lumber pile, said, “If you men works, there will be plenty of men here in a little bit and they will come rough” (R. 963) and that “they will fish you out of that pond”. (R. 851) The Virginia Supreme Court declared that some of the workers on July 27 “were again confronted by representatives of the opposing labor organization who repeated their abusive threats, and consequently were afraid to go back to work”. (R. 1955)

Admitting that on August 1 Hart stated he represented and sought recognition for the laborers only, Bryan proposed, and Hart rejected (R. 796), a plan that Laburnum

could get along without laborers and that their work be done by carpenters (R. 796). The Virginia Supreme Court also adopted Bryan's version—denied by Hart (R. 1280)—that on August 1 Hart “‘left no doubt in anybody’s mind that he was going to have people to stop any men from working who tried’” and “‘continually threatened to bring a large crowd of people from Beaver Creek and other places to stop us from working . . . unless we signed a paper recognizing his organization as the representative of the laborers’” and that if the Laburnum men “‘went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek’”. (R. 1955-1956) Bryan admitted that no one shot “or made a pass” at him, or prevented his going about, that no one got “a mauling”; and that he heard of no one being “shot at” or of any property being destroyed. (R. 803-804).

Although Bryan acknowledged that Laburnum had worked in plants where employees were represented by District 50 and by United Mine Workers, and Laburnum’s employees were AFL members (R. 725), when Hart suggested to Bryan that “we work together”, and that “we are doing it in other places”, Bryan answered, “Well, it just won’t work.” (R. 1281) Bryan refused to recognize UMW, as he stated, because of the agreement with the AFL, local unions and the Richmond Building and Trades Council (R. 531) and also because AFL would withdraw its members from other jobs. (R. 1424).

On August 4 Pond Creek cancelled its contract for the coal preparation plant which was 95% completed (R. 523-524) and its subsidiary (Spring Fork Development Company) terminated its contract for 25 dwellings. (R. 600-602) The next day Bryan conferred with Hunter who expressed the view that the parties should be able to make an agreement “for the laborers” and that UMW people would work peacefully alongside of AFL men. Bryan replied that he “just didn’t think that would work

out"; that the "wage rate of \$1.36 was preposterous". The Virginia appellate court found, as Bryan claimed (R. 575), that he sought, but was denied, police protection (R. 1955), but Bryan did not claim that he undertook to process any unfair labor practice charge with the National Labor Relations Board (herein called "Board" or "NLRB") against petitioners or Hart. He advised Hunter that he "expected to hold him and the United Mine Workers responsible for what had happened." (R. 609, 611, 612).

Laburnum continued to do work for Island Creek. (R. 664-665) During September, 1949, through December, 1949, it submitted bids on projects at Pond Creek's invitation. (R. 669-672) Pond Creek would have awarded the work to Laburnum if it had been the low bidder. (R. 999) Meanwhile, on November 16 Laburnum instituted its instant action against petitioners (R. 2) and contended at the trial that "the business relationship was destroyed on July 26." (R. 1633)

In the Spring of 1950, Island Creek invited Laburnum to submit a bid on proposed construction in West Virginia. Bryan inquired of Hunter if he would expect Laburnum to use UCW members and to make an agreement with UCW. Receiving an affirmative answer, Bryan reported to Island Creek that Hunter had stated that without a UCW contract, he "would absolutely do everything in his power to see that we do not build those buildings". Bryan's memorandum of Hunter's statement, not in accord with his report to Island Creek, declared, in part, that Hunter stated (R. 801):

" . . . he would attempt to organize our laborers and our other workers, and that if he was successful he would expect us to make a contract with UCW granting recognition to it."

On May 18, 1950, Island Creek wrote to Bryan stating that it "had about four or five other reputable and well-

qualified concerns, which have contracts with the United Mine Workers, that are going to bid" and because "of the facts outlined to me" Laburnum was requested to refrain from bidding. (R. 673-674) The Virginia appellate court concluded (R. 1957):

"Hence, there is ample evidence to sustain the finding that the acts and conduct of Hart in July, 1949, ratified by Hunter, disrupted the business relationship between Laburnum, Pond Creek Pocahontas Company and Island Creek Coal Company, and entitled Laburnum to an award of damages against Hart's principals."

Under instructions of the trial court, there was presented to the jury the issue whether Laburnum's alleged damages had resulted from the wrongful conduct of Hart and the men with him, as submitted by Laburnum's instructions 5-A, 7 and 8 (*infra*, p. 7) or whether, as petitioners contended in their instruction "E" (R. 139), such damages followed because Laburnum's employees "refused to work solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line." The jury having found against petitioners, the Virginia appellate court agreed that "because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work" and that the "employees refused to resume their work because of the threats and conduct of Hart and his associates". (R. 1955) Petitioners urged in the Virginia appellate court, as in the trial court, that, under declarations of the National Labor Relations Board, such conduct involved unfair labor practices within the purview of Section 8(b)(1)(A) of the Act, and that by adoption of the Act Congress had preempted the field of labor relations and had provided an exclusive federal remedy in Section 10 thereof and thereby foreclosed to the state courts jurisdiction to entertain any action for

damages based upon such conduct. "Assuming without deciding, that the acts of the defendants (petitioners) so affected interstate commerce as to come within the purview of the Act" and, at Laburnum's instance, could have been dealt with in the manner therein provided, the Virginia Supreme Court held that "there are no words which indicate that the remedy" provided for in the Act to restrain the commission of unfair labor practices "is exclusive", or that the Act "was designed to deprive an employer or his employees of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices" and that the exercise by the State of its jurisdiction in enforcing such cause of action did not "conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected." (R. 1949-1950) These pronouncements, and others, by the Virginia appellate court to sustain the state court's jurisdiction, appear herein at pages 5-6, 13 to 17, to which reference is made.

The Virginia appellate court, having concluded that the trial court had jurisdiction and that petitioners' motion to dismiss was properly overruled, and that the evidence supported the jury's verdict of petitioners' liability, found that there was error in the amount of the jury verdict, modified the trial court's judgment in Laburnum's favor against petitioners and affirmed the balance as herein shown (*infra*, p. 6).

## VI.

### SPECIFICATION OF ERRORS

The Supreme Court of Appeals of Virginia erred:

1. In holding that petitioners' motion to dismiss Laburnum's notice of motion for judgment and to enter a final judgment for petitioners on the ground that the trial court was without power, authority and jurisdiction to hear and determine the issues in said action "was properly

overruled" and in failing and refusing to hold that said motion should have been sustained.

2. In holding that the Act did not provide an exclusive remedy for "the acts of defendants", that the remedy provided for in the Act was not "the only redress open to the plaintiff" and that Laburnum "did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law tort for which admittedly the Act affords no redress."

3. In holding that the Act did not deprive state courts "of their traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce."

4. In holding that "there are no words" in the Act which indicate that the remedy provided in the Act "is exclusive, or that the Act was designed to deprive an employer or his employees of the common law right of action in a State court for acts of violence and intimidation which may constitute unfair labor practices."

5. In holding that "the exercise by the State of its jurisdiction in enforcing" a cause of action by an employer for damages for acts of violence or intimidation which may constitute unfair labor practices does not "conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected."

6. In affirming the judgment of the Circuit Court of the City of Richmond, Virginia, to the extent of \$129,326.09, with interest at 6% per annum from February 16, 1951, until paid, and for costs expended by Laburnum "about the prosecution of its notice of motion for judgment in said circuit court" and ordering that Laburnum recover of petitioners its costs by it expended "about the prosecution

of the writ of error and supersedeas" in said Virginia Supreme Court.

7. In failing and refusing to reverse, set aside and hold void the judgment of said Circuit Court of July 5, 1951, for \$275,437.19, with interest and costs, in its entirety, and to set aside the jury verdict and enter judgment for petitioners, and each of them.

8. In failing and refusing to find and hold that the provisions of the Act were applicable to the facts of the instant case.

9. In failing and refusing to hold and conclude (1) that the Act provides exclusive remedies and procedures for conduct proscribed by Section 8(b)(1)(A) thereof; (2) that the Act deprives an employer of his common-law right of action in a state court for damages based upon such conduct; (3) that by reason of the provisions of said Act, the Circuit Court of the City of Richmond, Virginia, was without power, authority and jurisdiction to hear and determine the issues in the instant case and to enter its said judgment of July 5, 1951, against petitioners, and each of them, and such judgment is void; and (4) that judgment should have been entered for petitioners, and each of them, and Laburnum's notice of motion dismissed.

## VII.

### SUMMARY OF ARGUMENT

#### A.

Laburnum, a Virginia corporation with its home office in Richmond, Virginia, specializes in industrial construction work and operates in nine states. For the period from May, 1942, to December, 1949, its work aggregated more than \$20,000,000. Its annual business volume averages \$2,000,000. From September 6, 1947, until the end of 1949, Laburnum did work amounting in excess of \$650,000

with two coal producing companies and subsidiaries whose coal production in 1948 and 1949 was the third highest in the United States and the largest in West Virginia. This work Laburnum performed in West Virginia and Kentucky. The mine in Kentucky at which Laburnum performed work began to mine coal during June, 1949, and a substantial part of such coal was shipped by the Chesapeake & Ohio Railway Company from the place of mining to points outside Kentucky.

Laburnum's multistate industrial construction operation is subject to the Board's jurisdiction. The Board has asserted jurisdiction over construction enterprises whose annual dollar volume equals or exceeds \$25,000 in interstate sale of services. This court has approved Board's assertion of jurisdiction over a multistate construction operation, saying such "facts emphasize the interstate movement of the services and material."

### B.

The type of conduct found by the Virginia Supreme Court to have been carried out by petitioners falls within activity interdicted by Section 8(b)(1)(A) of the Act and the Board has exercised its jurisdiction and power thereover.

To effect the Act's purpose and policy of prescribing the rights of both employees and employers in their relation affecting commerce as defined in the Act and to define and proscribe practices by both labor and management, Congress, in Section 8(b)(1)(A), made it an unfair labor practice to restrain or coerce employees in the exercise of rights guaranteed in the Act's Section 7. Laburnum's notice of motion, the trial court's instructions and the Virginia Supreme Court's findings were to the effect that Laburnum's employees refused to return to work because of "insolent and abusive language and threats of Hart and those accompanying him." Such conduct has been found by both the Board and federal courts of appeals to be

within the purview of conduct proscribed by said Section 8(b)(1)(A).

### C.

Petitioners submit that the National Labor Relations Board has exclusive jurisdiction over the type of conduct found by the Virginia Supreme Court to have been carried out by petitioners so as to preclude the state court from hearing and determining the issues in the common law action based upon such conduct.

To eliminate disruptions to commerce in the field of labor-management relations, Congress adopted the administrative approach and granted the National Labor Relations Board exclusive power "to prevent any persons from engaging in any unfair labor practices (listed in Section 8) affecting commerce". Section 10(a). Under Section 10(j) the Board, but not a private party, may, upon issuance of a complaint, seek injunctive relief in a federal court but redress by a private party against proscribed activity is through the administrative process of filing a charge with the Board which "sets in motion the machinery of an inquiry." As stated in *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir., 167 F. 2d 183, 187: "Congress has worked out elaborate machinery for dealing with the whole field of labor relationships . . . and has provided for the handling of unfair labor practices by an administrative agency equipped for the task." Recently, this Court in *Garner v. Teamsters, etc. Union*, — U.S. —, 98 L. ed. (Adv. op., p. 161) rejected an employer's assertion of its right to resort to a state court for injunctive relief on its theory that it was an enforcement of state or local law where the subject was covered by the Act.

1. The lack of federal interest which grounded the Court's recognition of state regulation in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, and *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, was supplied by Congress'

enacting Section 8(b)(1)(A). In *Plankinton Packing Co. v. Board*, 338 U.S. 953, *United Auto Workers v. O'Brien*, 339 U.S. 454, and *Amalgamated Association v. Board*, 340 U.S. 383, the Court declared the supremacy of the federal Act over state law. In *O'Brien*, it rejected state law because of a conflict between state and federal regulations and because "Congress occupied this field and closed it to state regulation." In this action, as in *Garner v. Local Union*, — U.S. —, 98 L. ed. (Adv. Op., p. 161) state court action must be rejected over "matters expressly placed within the competence of the federal Board."

2. Herein, as in *Garner*, the Act became the "supreme law of the land" as to the type of conduct involved in this case and "cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private rights." *Garner v. Teamsters', etc., Union*, *supra*, p. 170. Neither *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, nor *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, are apposite, for in neither was there federal regulation of the subject activity involved in those respective cases. But Congress was not indifferent to the conduct in the instant case. "This is not an instance of injurious conduct which the National Labor Relations Board is without express authority to prevent and which is 'governable by the State or it is entirely ungoverned.'" *Garner v. Teamsters' Union*, *supra*, p. 164. By "the Labor Act Congress preempts the field that the act covers in so far as commerce within the meaning of the Act is concerned." House Rep. No. 245 on H.R. 3020, Legis. History of the LRMA, 1947, p. 335.

Contrary to the Virginia appellate court that the Act afforded Laburnum no redress (R. 1948), the Act did accord it the Act's procedures and remedies.

If the procedures and remedies afforded Laburnum are inadequate, the remedy lies with Congress.

3. Both the legislative history of Section 8(b)(1)(A) and other provisions of the Act show congressional intent to foreclose state authority over a common-law tort action instituted by a private party for the instant conduct.

a. Provisions in the Hartley Bill (H.R. 3020), making the type of conduct involved herein "unlawful concerted activities" and providing for damage actions in federal district courts by private persons injured thereby, were deleted in the Senate and such deletions agreed to by the Managers on the Part of the House. It is unreasonable to assume Congress would have rejected damage actions in federal tribunals and yet have intended that violators under Section 8(b)(1)(A) would be subjected to state court action for damages. There are no recorded indicants of such congressional intent.

In the House debates, the suggestion was made that the Act provide, "Nothing in this Act shall be construed to invalidate any state law or constitutional provision" but rejected by Congressman Case's reply that such a provision would "establish State rights to deal with all phases of industrial relations in spite of any provisions whatsoever in the Act." 93 Cong. Record, p. 3559.

Both proponents of and opponents to Section 8(b)(1)(A) argued that acts proscribed under that section are subject to state criminal process, but no suggestion appears in the debates that infringement of those statutory provisions could serve as a basis for a common-law tort action in a state court instituted, as in this case, by a private party.

These debates emphasize Congressional intent to make exclusive Board jurisdiction of the matters within the purview of said section.

b. Under Sections 301 and 303 of the Act, Congress provided for damage actions it deemed permissible for violation of the Act's provisions. These provisions bespeak congressional intent to limit an employer's right to sue and to limit court jurisdiction therefor to those courts which Congress specifically indicated. *Expressio unius est exclusio alterius* is applicable.

e. Congress itself in the Act denoted the limited area reserved for state authority. This Court, in *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 397-398, stated that Congress "demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." The Court observed that "congressional direction as to the role that states were to play in the area of labor regulation covered by the federal Act" was to be found in Section 10(a) permitting the Board to cede its jurisdiction to a state agency, in Section 14(b) subordinating the federal Act to state law concerning union-security agreements where such agreements were forbidden by state law, and in Sections 202(c) and 203(b) which concern the federal mediation and conciliation service.

These express reservations of state power in the field of labor relations establish congressional limitations on state authority and congressional intention and determination that Congress went as far as it deemed it should in reserving such limited power, authority and jurisdiction to the states. As stated in *Garner* (p. 170): "On the basis of the allegations," and upon the conduct found by the Virginia Supreme Court to have been carried out by petitioners, "[Laburnum] could have presented this grievance to the National Labor Relations Board. The [petitioners] were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

The Act's provisions concerning damage actions and congressional limitations of state power demonstrate that the Virginia Supreme Court erred in holding (R. 1949-1950) "there are no words" in the Act indicating that the remedy in the Act "is exclusive, or that the Act was deprived an employer or his employees of the common law rights of action in a state court for violence and intimidation which may constitute unfair labor practices. That court erred in concluding, as to this case, that the Act "was not the only redress open to" Laburnum. (R. 1948)

## D.

The Virginia Supreme Court erroneously reasoned that Laburnum "did not seek relief because the acts of defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common law tort for which admittedly the Act affords no redress" (R. 1948). The test of state authority is not the characterization or appellation which Laburnum or the Virginia appellate court gives to its action, but rather whether the condemned activity lies within the "field" occupied by Congress, in which event the doctrine of federal preemption applies and the federal Act supersedes all substantive rights and remedies flowing from state authority. Failure or omission to denominate activity as unfair labor practices *eo nomine* in common-law actions has not deterred courts from so characterizing them. Thus the Virginia Supreme Court misconceived the basis of Laburnum's action.

Laburnum's contention that a state court could determine whether an employer's private right had been infringed and the Virginia appellate court's reasoning and conclusions that the Act did not deprive state courts "of their traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce," as concerns this case, and that Laburnum sought damages "for a completed common law tort" (R. 1948, 1949) based on a violation of a private right were rendered untenable by this Court in *Garner*.

Fallacious is the conclusion (R. 1950) of the Virginia Supreme Court that exercise of jurisdiction by the State of Laburnum's cause of action neither conflicted with the Act's provisions nor impinged upon rights thereby protected. Under the Court's test in *Garner* that "The conflict lies in remedies, not rights" and "when two separate remedies are brought to bear on the same activity, a conflict is imminent", a state court judgment for conduct forbidden by the Act, based upon a jury verdict, totally varies

with the remedies provided by the Act and "conflict is imminent."

The exercise of state jurisdiction did impinge upon rights protected by the Act. The activity for which petitioners were found responsible was obtaining from Laburnum for its unorganized laborer employees union recognition and higher wages, a protected activity both under Kentucky law, where the activity occurred, and under the Act. On the issue whether the men refused to return to work solely because of a peaceful picket line or because of the wrongful conduct of Hart and the men with him, the jury found against petitioner. This factual determination was one which Congress had entrusted to the Board as an administrative agency possessing skill and experience under Section 8(b)(1)(A) since it involved the question if the *means* employed fell within the ambit of conduct barred by that section. Petitioners had the right to have this disputed issue determined by the federal Board and courts pursuant to the Act's remedies and procedures. It is immaterial whether the Board would have agreed with the Virginia jury and courts. "There is no indication that the statute left it open for such conflicts to arise." *Garner v. Teamsters', etc., Union, supra*, p. 170. The Board itself has asserted "that its jurisdiction is inclusive in all matters which the Act entrusts to it." Seventeenth Annual Report of the NLRB (1952), p. 21.

### E.

Laburnum made no effort to process its complaint with the federal Board. Its president had threatened that he expected to hold the "United Mine Workers responsible." Ignoring the "peaceful procedures" provided by Congress in the Act's Section 10 "for preventing" any interference by petitioners "with the legitimate rights" of Laburnum "in order to promote the full flow of commerce", Laburnum permitted the potentialities of a jury damage award to be the paramount factor rather than the avoidance of a disruption to commerce through the procedures made available

by Congress. If the Virginia appellate court's decision is permitted to stand, then "the elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience" (*Amazon Cotton Mill Co. v. Textile Workers Union, supra*) would be made abortive and the federal statutory scheme supplanted by jury determinations and, contrary to *Garner*, the congressional purpose of vindicating public rights would be subordinated to private rights and the congressional intent "to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American Law regarding collective bargaining" would be rejected. Senate Report No. 573, 74th Cong., 1st session, p. 15, quoted in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 267. Such result would violate pronouncements in *Garner* (p. 165) that Congress' substantive rule of law was not "to be enforced by any tribunal competent to apply law generally" but by the Board for "centralized administration of specially designed procedures" for uniform application and "to avoid . . . diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

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The Virginia Supreme Court was in error in sustaining the State trial court's jurisdiction. Judgments of both the Virginia Supreme Court and the trial court should be reversed, set aside and held for naught, Laburnum's notice of motion dismissed and judgment entered for petitioners and each of them.

### VIII.

#### ARGUMENT.

##### **A. The Board Has Asserted Jurisdiction of Construction Companies Operating On a Multistate Basis.**

Factual data regarding Laburnum's multistate operations has been discussed (*infra*, p. 8). While Laburnum is a Virginia corporation with its home office in Richmond,

Virginia, it performs its work in nine states; and from September 6, 1947 until the end of 1949, it performed construction work for Island Creek, Pond Creek and subsidiaries in Kentucky and West Virginia, amounting to more than \$650,000 (R. 487-489).<sup>16</sup>

The Board has heretofore asserted jurisdiction over construction enterprises whose annual dollar volume of business equals or exceeds \$25,000 in interstate sale of services. In *Arthur G. McKee and Company*, 94 NLRB 399, 400 (1951), in asserting jurisdiction over such an enterprise, the Board declared that

"As the Respondent operates on a multistate basis, and performs services in excess of \$25,000 per year in each of several states, we find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this case."

<sup>16</sup> Plaintiff's Exhibit 34, received in evidence (R. 638), shows that this amount consisted of the following contracts, the dates and amounts thereof, and places of performance:

Sept. 6, 1947	Prefabricated dwellings, Delbarton, West Virginia	\$95,631.00	* (P. Ex. 35) (R. 639)
June 29, 1948	Stores at Delbarton and Holden, West Virginia	66,486.05	(P. Ex. 36) (R. 640)
Sept. 19, 1948	Warehouse, Holden, West Virginia	40,895.89	(P. Ex. 38) (R. 661)
Oct. 21, 1948	Store No. 15, Holden, West Virginia	34,313.31	(P. Ex. 39) (R. 662)
Dec. 9, 1948	Colored Lunch Room, Holden, West Virginia	9,550.39	(P. Ex. 40) (R. 662)
Dec. 13, 1948	Heating plant at tipple, Delbarton, West Virginia	21,236.05	(P. Ex. 41) (R. 662)
June 4, 1949	Addition to store, Holden, West Virginia	4,041.06	(R. 662-3)
Oct. 28, 1948	Coal preparation plant, Breathitt County, Kentucky	265,370.09	(R. 663)
Dec. 15, 1948	Dwellings, Breathitt County, Kentucky	41,282.05	(R. 663)
Dec. 8, 1948	Telephone Line, Breathitt County, Kentucky	4,591.59	(R. 663)
July —, 1949	Schoolhouse, Breathitt County, Kentucky	637.16	(R. 664)
June 28, 1949	Boiler Plant, Bartley, West Virginia	67,158.20	(R. 664)
TOTAL		\$651,192.84	

\* References are to Exhibits as they were designated in the trial court.  
"P. Ex." refers to Laburnum's exhibits.

See Seventeenth Annual Report of the NLRB (1952), Topic, "Jurisdiction of Board" (p. 9) and subheading "Multistate Enterprises" (pp. 13-15), and also *Foley Brothers, Inc.*, 97 NLRB 1482 (1952). Likewise, where a contractor had its principal place of business in one state and performed its contractual obligations in another state, this Court approved the Board's assertion of jurisdiction, saying that such facts "emphasize(s) the interstate movement of the services and materials". *International Bro. of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, 699 (1950).

While the Virginia Supreme Court "assume(d), without deciding that the acts of [petitioners] so affected interstate commerce as to come within the purview of the Act" (R. 1948), it is thus evident that Laburnum's business is subject to the Board's jurisdiction.

**B. The Type of Conduct Found by the Virginia Supreme Court To Have Been Carried Out by Petitioners Falls Within Activity Interdicted by Section 8(b)(1)(A) of the Act.**

The Act's purpose and policy, recited in Section 1 of the Act, are to prescribe the legitimate rights of both employees and employers in their relation affecting commerce and to provide orderly and peaceful procedures for preventing interference by either with the legitimate rights of the other, and to protect individual employee rights in their relations with labor organizations and to define and proscribe practices on the part of both labor and management which affect commerce.<sup>17</sup> To effectuate that policy, Congress provided, in Section 7, that employees shall have the right

"... to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities to refrain from any or all of such activities..."  
 "ties for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right

<sup>17</sup> 61 Stat. 136, 29 USCA, Sec. 141.

To safeguard such rights, Congress interdicted certain employer and union conduct and, in Section 8, legislatively defined such prohibited conduct as unfair labor practices. Specifically, in Section 8(b)(1)(A) of the Act, Congress declared that

“It shall be an unfair labor practice for a labor organization or its agent—

“(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 . . .”<sup>18</sup>

In the instant case, Laburnum premised its notice of motion upon allegations that defendants would not permit Laburnum’s employees to work unless they became UCW members (R. 2-12); and under the trial court’s instructions to the jury, petitioners’ liability was premised upon Hart’s going to Laburnum’s job site, while acting within the scope of his authority, with a disorderly crowd of men, for the purpose of organizing such employees and

“... by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff’s workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter.”<sup>19</sup>

The Virginia Supreme Court, in its opinion (R. 1955; 75 S. E. 2d 702-703), stated that “There is ample evidence to support the finding that because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work” and that “... there is ample evidence to support the finding that the plaintiff’s employees refused to resume their work because of the threats and conduct of Hart and his associates.”

<sup>18</sup> 61 Stat. 140, amended 65 Stat. 601, 29 USCA, Section 158.

<sup>19</sup> Instruction 5-A (R. 132-133); see also Instructions 7 and 8 (R. 133-134) and footnote 10 herein.

In interpreting Section 8(b)(1)(A) of the Act, threats of violence have been found by the Board to be violative of such statutory provisions.<sup>20</sup> Concurrence therein by the federal judiciary appears in *Progressive Mine Workers of America v. National Labor Relations Board*, 7 Cir., 187 F. 2d 298 (1951); *N. L. R. B. v. United Construction Workers et al*, 4 Cir., 198 F. 2d 391, cert. den. 344 U.S. 876. The Board, in *H. N. Thayer Co.*, 30 LRRM 1184, 1185, proclaimed its "exclusive primary jurisdiction over all phases of the administration of the Act" including "regulatory power over the area of nonpeaceful means employed in labor controversies."

It is thus clear that the type of conduct found by the Virginia Supreme Court to have been carried out by petitioners is of the type over which the Board has exercised its jurisdiction because such conduct collided with the interdictions of Section 8(b)(1)(A).

**C. Remedies and Procedures In The Act For The Prevention of Unfair Labor Practices Exclude State Court Jurisdiction To Hear and Determine The Issues in a Common Law Tort Action Based Upon Conduct Which Is Proscribed by Section 8(b)(1)(A). The Trial Court Was Without Power, Authority and Jurisdiction To Hear And Determine the Issues in This Action.**

Petitioners submit that the National Labor Relations Board has exclusive jurisdiction over the type of conduct found by the Virginia Supreme Court to have been carried out by petitioners so as to preclude the State Court from hearing and determining the issues in the common law action in this case based upon such conduct.

<sup>20</sup> *Conway's Express*, 87 NLRB 972; *Sunset Line and Twine Company*, 23 LRRM 1001. The National Labor Relations Board, in its Fifteenth Annual Report (1950), states (p. 127):

"The question whether conduct amounts to unlawful restraint or coercion frequently arises in connection with strike activities. The types of conduct which were found to violate Sec. 8(b)(1)(A) included assaults and batteries on non-striking employees, stoning, clubbing, and attempting to overturn automobiles of non-strikers, threats of physical violence, and erecting barriers to plant entrances during picketing."

Article I, Section 8, Constitution of the United States, grants unto the federal Congress the power "To regulate Commerce . . . among the several states . . ." In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, the United States Supreme Court stamped as constitutional the congressional enactment of what was commonly known as the Wagner Act (Act, July 5, 1935, c. 372, 49 Stat. 449 et seq.). In that case, the Court declared that acts which directly burden or obstruct interstate commerce, or its free flow, are within the reach of the congressional power; and this includes acts, having that effect, which grow out of labor disputes. In 1947, Congress enacted the Labor Management Relations Act, 1947.

To eliminate disruptions to commerce in the field of labor relations, Congress empowered the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce". Section 10(a). Redress by a private party against proscribed activity is by filing a charge with the Board which "sets in motion the machinery of an inquiry". *National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18. In adopting the Act, Congress empowered the Board, in Section 10(j), upon issuance of a complaint, to seek injunctive relief in a federal district court. Under Section 10(c), the Board may issue its order requiring the charged party to cease and desist from the alleged unfair labor practice and to take such action as will effectuate the Act's policies, and, pursuant to Section 10(e), may petition a federal appellate court for a decree enforcing the Board's order. Under Section 10(f) "any person aggrieved by a Board's final order may effect appellate proceedings. That such authority for injunctive relief in federal district courts is exclusively for the Board, and not for private parties, has heretofore been judicially declared. *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir., 167 F. 2d 183. And only recently this court rejected an employer's assertion of

its right to resort to a state court for injunctive relief upon the employer's theory that it was an enforcement of state or local law. *Garner v. Teamsters, etc. Local Union*, U.S. , 98 L. ed. (Adv. Op., p. 161). As aptly stated by the Fourth Circuit in *Amazon Cotton Mill Co. v. Textile Workers Union*, *supra*, at 187:

"Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task."

**1. Congress Has Occupied The Field of The Type of Conduct Herein Involved and Foreclosed State Court Jurisdiction to Entertain a Common Law Tort Action for Damages Based Thereon.**

Although the Court had proclaimed supremacy of federal legislation in the field of labor relations over a state regulatory agency prior to the enactment of the present Act (*Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U.S. 767), it approved state condemnation by an administrative agency of a labor union's coercion and intimidation of employees as an unfair labor practice, because the state statute was not inconsistent with the then effective statute, referred to generally as the Wagner Act. In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, the Court sustained state authority and reasoned that (p. 749)

"Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board."<sup>21</sup>

Again, in *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, exertion of state authority was justified because

"There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards,

<sup>21</sup> Also, at p. 750 the Court stated: ". . . the federal Act does not govern employee or union activity of the type here enjoined."

*because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned.*" (Emphasis supplied.)

But the lack of federal interest, which the Court utilized in grounding state jurisdiction in *Allen-Bradley* and *International Union* was supplied in the current Act and, as it relates to the instant case, in Section 8(b)(1)(A) thereof.

Since the Act's adoption in 1947, this Court has declared the supremacy of the federal Act over state law. *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953; *United Auto Workers v. O'Brien*, 339 U.S. 454; *Amalgamated Association v. Wisconsin Employment Board*, 340 U.S. 383. In *O'Brien* (at p. 457), state authority was rejected because of a conflict between the federal and state legislation and because "*Congress occupied this field and closed it to state regulation.*" (Emphasis supplied.) In *Amalgamated Association*, in explaining both *Plankinton* and *O'Brien*, the Court said (p. 390, footnote 12):

"*Plankinton and O'Brien both show that states may not regulate in respect to rights guaranteed by Congress in Section 7.*"

While these cases dealt with the authority of state regulatory agencies, in *Garner* this Court agreed that the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action".<sup>22</sup> In the case at bar, as in *Garner* and

<sup>22</sup> While some state courts have reached conclusions at variance with this latest expression of this Court, the decisions of *McNish v. American Brass Company et al*, 139 Conn. 44, 89 A. 2d 566, cert. denied, 344 U.S. 913; *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W. 2d 94 (1950); *Garner v. Teamsters*, 98 L. ed. (Adv. Op., p. 161); *Gerry of California v. Superior Court*, 32 Calif. 2d 119, 194 P. 2d 689, 696; *Ryan v. Simons*, 100 N.Y.S. 2d 18, affirmed 98 N.E. 2d 707, cert. denied, 342 U.S. 897; *Costaro v. Simons*, 302 N.Y. 318, 93 N.E. 2d 454 (motion for reargument denied, 100 N.E. 2d 39) are in accord. Federal courts, too, have professed the supremacy of the Act and the inapplicability of state law. *Pocahontas Terminal Corp. v. Portland Bldg., etc. Council*, 93 F. Supp. 217 (USDC, D. Maine); *Nash-Kelvinator Corp. v. Grand*

O'Brien, Congress has occupied the field of labor relations as to the conduct concerned herein "and closed it to state regulation".

**2. Application of the Doctrine of Presumptive Exclusion, Required in This Case, Demonstrates That the State Court Was Without Power, Authority and Jurisdiction to Entertain the Instant Common-Law Tort Action. The Virginia Appellate Court Has Misinterpreted the Doctrine.**

Heretofore where Congress has undertaken the regulation of interstate commerce and the federal statute has prohibited certain conduct, the consequences for infringements thereof have been regarded as federal questions, the answers to which are derivatives from the federal statute and policy, requiring that conflicting state law and policy must yield. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, wherein (at p. 176) the Court stated that "the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules". This principle of presumptive exclusion was first enunciated in *Houston v. Moore*, 5 Wheat. 1,<sup>23</sup>

*Rapids Bldg., etc. Council*, 30 LRRM 2466 (USDC, W. D., Mich., 1952, unreported in F. Supp.); *International Union of Operating Engineers v. Dahlem Construction Co.*, 6 Cir., 193 F. 2d 470, 475; *Schutte v. International Alliance, etc.*, 9 Cir., 182 F. 2d 158; *Capital Service, Inc. v. NLRB*, 9 Cir., 204 F. 2d 848, cert. granted, January 18, 1954; *NLRB v. International Union, UAW*, 7 Cir., 194 F. 2d 698, 702. Also, see *Born v. Cease*, 101 F. Supp. 473 (USDC, Alaska, 1951), wherein the federal district court dismissed an action for damages instituted by an employee-union member against a labor organization, seeking reinstatement in the union and damages for exclusion, because "Courts have not by the Act of 1947 been given concurrent jurisdiction" with the Board.

<sup>23</sup> See *Houston v. Moore*, 5 Wheat. 1, 23, where Mr. Justice Washington, discussing the concurrency of federal and state law, observed that if the two "... correspond in every respect, then the latter is idle and inoperative; if they differ they must, in the nature of things oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together."

And, in *Charleston & W.C.R.R. v. Varnville Furniture Co.*, 237 U.S. 597, 604, Mr. Justice Holmes stated:

"When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

See also *Missouri Pacific R. Co. v. Porter*, 273 U.S. 341, 346; *Oregon, etc. Co. v. Washington*, 270 U.S. 87, 101.

and since applied and reiterated in numerous cases, including the recent *Garner* case, *supra*, wherein (p. 170) Mr. Justice Jackson expresses the doctrine thus:

"... when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. . . ."

Petitioners submit that application of this doctrine to the instant case, which is required under the foregoing citations, demonstrates conclusively that the state court was without power, authority and jurisdiction to entertain the instant common-law tort action, because Congress has given exclusive ~~primary~~ <sup>primary</sup> authority concerning the subject matter thereof to the Board and has preempted the "field" as to the conduct concerned herein.

In rejecting petitioners' contentions against state jurisdiction in the instant case, the Virginia Supreme Court quoted from *Allen-Bradley* and *Kelly v. State of Washington*, 302 U.S. 1, 10 (R. 1949). These cases are inapposite, since in neither was there federal regulation of the subject matter involved in the respective cases. The quotation from *Allen-Bradley* (315 U.S. 749) that congressional intent must be clearly manifested must be read in full context with the succeeding sentence that "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board". But Congress was not indifferent to the phase of labor relations covered by Section 8(b)(1)(A). As the Court professed in *Garner* (p. 164): "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned' "; for, not only has such union conduct as this case concerns been made "subject to regulation by the fed-

eral Board" but there is express congressional recognition that "by the Labor Act Congress preempts the field that the act covers in so far as commerce within the meaning of the Act is concerned". House Report No. 245 on H. R. 3020; Legis. History of the LMRA, 1947, p. 335.

When it is considered that the "Act is a comprehensive code which governs the entire field of labor-management relations",<sup>24</sup> that the type of conduct upon which petitioners' liability is based has been made the subject of federal regulation, and that the historical background of such regulation, coupled with the fact that Congress, in the same statute, expressly provided the limits of state authority and specifically dealt with the subject of damage actions for the Act's violations,<sup>24a</sup> more appropriately applicable and required is the enunciation in *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U.S. 767, 772, that

"It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."

The Virginia appellate court's further attempted justification for upholding the state court's jurisdiction, power and authority in the instant case is that Laburnum's action for damages was "for a completed common-law tort for which admittedly the Act affords no redress" (R. 1948). Since, as petitioners have shown, the activities herein involved are in the field of labor relations, substantive rights and procedures derived under state laws are superseded and "Whatever Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority." *Sherlock v. Alling*, 93 U.S. 99, 104.<sup>25</sup>

<sup>24</sup> Ratner, Federal-State Jurisdiction, New York University Fifth Annual Conference on Labor, 77, 86.

<sup>24a</sup> Discussions of these matters appear herein, *post* pp. 40-47.

<sup>25</sup> See *N. Y. C. & Hudson R. R. Co. v. Tonawanda*, 244 U. S. 360; *Pennsylvania R. R. Co. v. Public Service Commission*, 250 U. S. 566, 569, wherein it is stated that "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them"; and

While it is true the Act did not afford Laburnum a remedy by which it could have obtained a money damage award, contrary to the Virginia Supreme Court's conclusion that the Act afforded Laburnum no redress, Congress did accord Laburnum redress under the procedures and remedies set forth in the Act. If such procedures and remedies are inadequate, the remedy lies within the legislative province. As the Court observed in *Garner* (p. 170):

"... Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit. ..."

**3. Both the Legislative History of Section 8(b)(1)(A) and Other Provisions of the Act Show Congressional Intent to Foreclose State Authority Over a Common-Law Tort Action Instituted by a Private Party.**

Although in *Garner* (p. 164) Mr. Justice Jackson, speaking for the Court, observed that *Garner's* involvement was not "a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes", both in the legislative history of Section 8(b)(1)(A) and in the other provision of the Act are legislative indicants that the conclusions reached and applied in *Garner* are applicable to the instant case and that Congress foreclosed the rights of state courts, at the instance and upon complaint of a private party, to hear and determine the issues in a common-law tort action for damages based upon the type of conduct for which the Virginia appellate court has held the petitioners liable.

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*Frazier v. Hines* (USDC, E.D., So. Carolina), 260 F. 874, 880, wherein it was held that "The rule is that, if the facts appear to bring the case under the act, the statute is exclusive . . . and . . . no recovery can be had as in common law".

**A. THE LEGISLATIVE HISTORY OF SECTION 8(b)(1)(A) MANIFESTS A CLEAR INTENT TO PRECLUDE STATE COURT JURISDICTION OF COMMON LAW TORT ACTIONS BASED UPON CONDUCT INVOLVED HEREIN.**

The Hartley Bill (H.R. 3020, 80th Congress, 1st Session), as introduced and adopted by the House of Representatives, specifically made the type of conduct involved herein "unlawful concerted activities" and provided, not only for injunctive relief by private persons, but also for damage actions by "Any person injured in his business, person or property by an unlawful concerted activity" in any federal district court "having jurisdiction of the parties".<sup>26</sup> These provisions were deleted from H.R. 3020 in the Senate and such deletions were agreed to by the Managers on the Part of the House in the Conference Report on H.R.

<sup>26</sup> H.R. 3020, as enacted by the House, provided in Section 12 as follows:

**"UNLAWFUL CONCERTED ACTIVITIES**

"Sec. 12. (a) The following activities, when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's premises and going to any other place;

"(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful." Legislative History of the Labor Management Relations Act, 1947 (U. S. Gov't. Printing Office, 1948), pp. 204-207. House Report No. 245 on H.R. 3020 explained that the bill "accomplishes . . . (14) For unlawful concerted activities it gives the person injured thereby a right to sue civilly any person responsible therefor." Ibid., 292, 296-297.

3020.<sup>27</sup> Such deletions sharply deny that Congress intended that an infringement of Section 8(b)(1)(A) was to ground an action sounding in money damages; and while said Section 12 contemplated permissive actions in the federal courts, it is clearly unreasonable to assume or imply that Congress, rejecting damage actions in federal tribunals, intended that violators of proscribed unfair labor conduct would be responsive therefor in damage actions in state ~~intended such a result~~ *courts*.

In the House debates concerning preservation of state authority on union-security agreements, it was suggested that the provision be broadened so as to have it read, "Nothing in this Act shall be construed to invalidate any State law or constitutional provision" but Congressman Case of South Dakota replied that to do so "might nullify much of the bill, because you would establish State rights to deal with all phases of industrial relations in spite of any provisions whatsoever in the Act." (93 Cong. Record, p. 3559)

The Act's legislative history poignantly reveals a congressional intent that civil procedures for the commission of acts proscribed under Section 8(b)(1)(A) were to be found exclusively in the Act.

The Act's legislative history reveals vigorous opposition to Congress' adoption of Section 8(b)(1)(A), because, as it was argued, it was wholly unnecessary. In the debates, Senator Ives' argument was that "assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary, because offenses of this type are punishable *under State and local police laws*".<sup>28</sup> "For such

<sup>27</sup> Ibid., pp. 226-291. The House Conference Report on H.R. 3020 justified the deletion of Section 12 on the ground, *inter alia*, that "the declaration of policy" in the Act dealt with the problem in general terms and provided that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed". An additional reason given was that under Section 10(k), the Board "is given authority to apply to the district courts for temporary injunctions restraining alleged unfair labor practices temporarily". Ibid., pp. 543, 563.

<sup>28</sup> Legislative History of the LRMA, 1947, p. 1021. Emphasis supplied. See also Ibid., p. 1579, where identical language appears in an Analysis of the Act introduced into the Congressional Record by Senator Murray.

things as 'goon' squads, the only answer is *immediate and decisive police action*," stated Senator Ives, who argued against federal intervention in "matters of that kind which are strictly *police matters*".<sup>29</sup> In urging the adoption of Section 8(b)(1)(A) in the Act, Senator Taft avowed that "we feel that the Board should be given the opportunity to say, 'That is an unfair labor practice and you must stop that particular practice.'"<sup>30</sup> In the colloquy between Senators Taft and Pepper, the latter observed that "The Senator did not say that the men were threatened physically. If they were, they had a right to resort to *police protection* in their own State or city." And, again, "Of course, I am not condoning what those men did; but I point out that that case either comes under the category of one in which the workers can be protected within their own organization, or it comes under the category of one in which the workers can be protected by *police action*."<sup>31</sup> (Italics supplied)

In opposing the inclusion of the provisions now found in Section 8(b)(1)(A), Senator Morse argued that—

"The Senator from Minnesota mentioned the case of a small employer in New York whose employees had been pushed around and threatened by a so-called goon squad in an effort to force them to join the union. Such practices, of course, are not to be condoned, and the junior Senator from Oregon condemns them. *It would be much more effective, however, if the local police were called in to correct such a situation, rather than to make it possible for the employer or the employees to bring unfair labor practice charges before the NLRB in connection with disputes of that type.*"<sup>32</sup> (Italics supplied)

No suggestion appears in the debates by either proponents or opponents that a violation of Section 8(b)(1)(A) or the

<sup>29</sup> Ibid., p. 1024.

<sup>30</sup> Ibid., p. 1028.

<sup>31</sup> Ibid., p. 1029.

<sup>32</sup> Ibid., p. 1194.

commission of conduct interdicted by that Section could serve as a basis for a common-law tort action in a state court. In proposing that the Senate make of such conduct an unfair labor practice, Senator Taft observed that a wrongdoer should be subject to "two remedies".<sup>33</sup> Clearly, Senator Taft had reference to the Board's administrative process and the state and local criminal process. The debates record Senator Taft's ready admission that the unfair labor practice provisions "might duplicate to some extent that State law" but he was assertive that violation of such provisions "may involve some violation of State law respecting *violence which may be criminal*, and so to some extent the measure may be duplicating the remedy existing under state law".<sup>34</sup> Senator Ball, a proponent, made it clear that court action by private parties was not intended or, at the time, desirable. Urging adoption of the administrative process, Senator Ball agreed that "*the main remedy*" for union coercion "*is prosecution under State law and better local law enforcement*",<sup>35</sup> but commented that

"With this administrative-law approach I hope that sometime we shall reach the stage in our labor relations when we can abolish the NLRB completely and write the rights, duties, and responsibilities of employers and employees into the law to permit anyone to go freely *into court* to protect his rights . . ."<sup>36</sup> (Italics supplied)

These debates emphasize that Congress, dealing specifically with the type of conduct for which the Virginia appellate court has found petitioners responsible, sought, not only to bring such activity within the ambit of Board jurisdiction, power and regulation under Section 10(a) of the Act, but to make such jurisdiction exclusive, except

<sup>33</sup> Ibid., p. 1031.

<sup>34</sup> Ibid., p. 1208.

<sup>35</sup> Ibid., p. 1199.

<sup>36</sup> Ibid., p. 1201.

in so far as such conduct was in violation of state criminal law for which violators might also be prosecuted under state criminal procedures for infractions of state criminal law.<sup>37</sup> The instant case, of course, is not a prosecution by a sovereign state for an offense against the public but an action by an employer for a money judgment based upon acts which a state appellate court has found to have been committed and which are unfair labor practices under Section 8(b)(1)(A) of the Act. If to the Board remedy and to the state criminal process there is added a state common-law tort action, then contrary to Senator Taft's argument that a wrongdoer should be subject to "two remedies", it is submitted that three remedies would then be available against a labor organization, a result wholly at variance with the intent of the proponents of the Act and particularly Section 8(b)(1)(A).

**B. THE ACT SPECIFICALLY PROVIDES FOR DAMAGE ACTIONS WHICH CONGRESS REGARDED AS PERMISSIVE; AND SUCH PROVISIONS MANIFEST CLEAR CONGRESSIONAL INTENT TO EXCLUDE AND PROHIBIT ALL OTHER ACTIONS FOR DAMAGES.**

Congress was vocal concerning damage actions it deemed permissible for conduct interdicted by the Act's provisions; and it was specific in its designation of the courts in which damage actions were to be prosecuted. For violation of collective bargaining contracts between an employer and a labor organization, in Section 301(a) Congress authorized actions to be brought by either party in any district court having jurisdiction of the parties. Boycotts and other combinations were made unlawful in Section 303(a); and in subsection (b), Congress declared that

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) of

<sup>37</sup> This is consonant with the language in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672, that to reach alleged violence "the complaint more properly would have relied upon Section 8(b)(1)(A) or would have addressed itself to local authorities."

this section may sue therefor in any district court of the United States . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained . . . " (Italics supplied.)

These statutory provisions bespeak congressional intent to limit an employer's right to sue for damages to those situations made actionable by Sections 301 and 303 and to limit jurisdiction therefor to those courts which Congress specifically designated therein. "*Expressio unius est exclusio alterius*" is especially applicable in the construction of federal statutes. *United States v. Barnes*, 222 U.S. 513.

#### C. THE ACT ITSELF DENOTES THE LIMITATIONS OF THE AREA OF STATE AUTHORITY.

In *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 397-398, this Court avowed that "Congress knew full well that its labor legislation 'preempts the field that the Act covers in so far as commerce within the meaning of the Act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." (Italics supplied) The Court stated further (p. 397):

"When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767. . . ."

It pointed out<sup>38</sup> that, in addition to Section 10(a) which permits the Board by agreement with a state agency to

<sup>38</sup> 340 U.S. 398, footnote 25.

cede jurisdiction in any industry<sup>39</sup> that "congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act" was embodied in other sections of the Act. In Section 14(b), the Act's provisions concerning union-security agreements were subordinated to state law when such law permitted prohibited their execution or application. The Director of Federal Mediation and Conciliation Service is authorized to establish procedures for cooperation "with State and local mediation agencies". Section 202(c), 29 USCA, Section 172(c). The Director and the Service are directed to avoid the mediation of disputes having a minor effect on interstate commerce "if State or other conciliation services are available to the parties." Section 203(b), 29 USCA, Section 173(b).

These express reservations of power to the states to act in certain areas in the field of labor relations not only establish positive limitations of state authority beyond which the states may not go in dealing with labor relations but also establish the congressional intention that Congress went as far as it deemed it should in reserving such limited power, authority and jurisdiction to the states.

Having thus demonstrated (1) that by enacting Section 8(b)(1)(A) Congress has occupied the field in labor relations concerning the activities condemned by the Virginia courts in this case, and (2) that the legislative history, as well as the statutory sections which permit damage actions of certain kinds to be brought, and define the limits of congressional reservation of state power in the field of labor relations, show that Congress did not intend that private parties could process a common-law tort action for damages in a state court, it follows that it is appropriate to say, as this Court did in *Garner* (p. 170): "On the basis of the allegations," and upon the conduct found by the Virginia Supreme Court to have been carried out by

<sup>39</sup> Excepted industries are "mining, manufacturing, communications, and transportation except where predominantly local in character."

petitioners, "[Laburnum] could have presented this grievance to the National Labor Relations Board. The [petitioners] were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

The foregoing discussion of the Act's provisions concerning damage actions and congressional limitations of state power conclusively demonstrates that the Virginia Supreme Court erroneously held (R. 1949-1950) that "there are no words" in the Act which indicate that the remedy provided in the Act "is exclusive, or that the Act was designed to deprive an employer or his employees of the common law rights of action in a state court for acts of violence and intimidation which may constitute unfair labor practices." The Virginia Supreme Court was in error when it concluded that, as to the instant common law tort action, the Act "was not the only redress open to" Laburnum. (R. 1948)

**D. The Virginia Supreme Court Misconceived the Basis of Laburnum's Action. It Misinterpreted the Act.**

The Virginia court declared that Laburnum "did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common law tort for which admittedly the Act affords no redress." (R. 1948)

If, as petitioners urge and, we believe, have conclusively shown, the subject activity herein falls within the purview of condemned conduct under Section 8(b)(1)(A), it is of no legal efficacy, and the test of the state court's power, authority and jurisdiction is not to be found, in the characterization or appellation which either Laburnum or the Virginia appellate court gives to its action. Failure or omission to denominate activity as unfair labor practices

*eo nomine* did not deter the court in *Born v. Cease*<sup>40</sup> or the New York state court in *Ryan v. Simons*<sup>41</sup> from judicially characterizing conduct in common law actions as unfair labor practices and within the Board's exclusive jurisdiction. Moreover, state court jurisdiction is not to be determined upon whether the claim is based upon state law, but the test is whether the matter involved lies within the "field" as occupied by Congress. If Congress has occupied it to the exclusion of state jurisdiction, then the federal Act supersedes all substantive rights and remedies flowing from state authority. *Garner v. Union, supra*, p. 170.

In the Virginia appellate court, Laburnum contended that Section 10(a) did not preclude a state court from determining whether an employer's private right had been infringed, and the court's conclusions and holdings that the Act did not deprive state courts "of their traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce" as concerns this case, and that Laburnum sought damages "for a completed common law tort for which admittedly the Act affords no redress" (R. 1948-1949) obviously were merely expressive of Laburnum's contentions. But, this court, in *Garner*, rendered untenable Laburnum's private rights theory and such conclusions and holdings when it concluded that (p. 170):

" \* \* \* when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private

<sup>40</sup> 101 F. Supp. 473 (U.S.D.C., Alaska, 1951), wherein the federal district court dismissed an action for damages instituted by an employee-union member against a labor organization seeking reinstatement in the union and damages for exclusion.

<sup>41</sup> 100 N.Y.S. 2d 18 (1950) affirmed 98 N.E. 2d 707, cert. den., 342 U.S. 897, involving an action to restrain a labor union and an employer from discriminating against plaintiff employees because of their non-membership in the union, brought upon the theory that the union had breached the common law duty of agent to principal by entering into a union-shop agreement with the employer.

right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

In sustaining the state court's power, authority and jurisdiction in this case, the Virginia appellate court averred that "exercise by the state of its jurisdiction in enforcing such cause of action" neither conflicted with the Act's provisions nor impinged upon the rights thereby protected. (R. 1950) We shall discuss these *seriatim* to demonstrate the fallacy in the court's conclusions.

Initially, it is readily apparent that there is definitive conflict with the Act's provisions and the exercise of the state's jurisdiction. "The conflict lies in remedies, not rights," stated this Court in *Garner* (p. 169), and "when two separate remedies are brought to bear on the same activity, a conflict is imminent." Under such juridical test of the supremacy of federal jurisdiction, a judgment by a state court for conduct forbidden by the Act predicated upon a jury verdict is at total variance with the Act's remedy of a cease-and-desist order, enforced by federal appellate courts, and "conflict is imminent."

Furthermore, it is fallacious to reason that the exercise of state jurisdiction did not impinge upon rights protected by the Act. The activity for which the Virginia jury found petitioners responsible was to obtain from Laburnum for its unorganized laborer employees union recognition and higher wages and occurred in Kentucky where the Court of Appeals had given its imprimatur to the principle that union activities designed to promote legitimate interests of employees, where the means employed are not unlawful, could not be barred. *Blanford v. Press Publishing Co.*, 286 Ky. 657, 151 S.W. 2d 440. Likewise such activity under the Act is protected activity and the prohibitive language of Section 8(b)(1)(A) is activated when it is alleged that the *means* used collide with the statutory provisions of Section 7 and fall within the purview of conduct made and

unfair labor practice under Section 8(b)(1)(A) of the Act. It will be recalled that the issue determined was whether the men refused to return to work solely because of the existence of a peaceful picket line or because of the wrongful conduct of Hart and the men with him. The jury found against petitioners' contentions; but such factual determination was one which the Congress had entrusted to the Board as an administrative agency possessing specialized skill and experience. Under the Act petitioners had the right to have this disputed issue determined by the federal Board and courts pursuant to the remedies and procedures delineated in the Act.<sup>42</sup> Whether the Board would have agreed with the Virginia jury and its courts is immaterial. "There is no indication that the statute left it open for such conflicts to arise." *Garner v. Teamsters', etc., Union, supra*, p. 170. The Board itself has asserted "that its jurisdiction is exclusive in all matters which the Act entrusts to it." Seventeenth Annual Report of the NLRB (1952), p. 21. In *H. N. Thayer Company*, 30 LRRM 1184, 1185, the Board, proclaiming its exclusive jurisdiction in a case which involved a Section 8(b)(1)(A) charge, said that the "Board is not bound by a decision as to the objectives of a strike which the state court had no power to make. Nor is it bound by that court's ruling *respecting the character of the means*. *The Act vests the Board with exclusive primary jurisdiction over all phases of the administration of the Act . . .*" (Italics supplied)

#### **E. The Consequences of Sustaining the Virginia Supreme Court's Theory of Concurrent Jurisdiction.**

The Court will recall that the activity which gave rise to the instant case occurred in Kentucky and the jury which rendered the verdict was a special one called by the

<sup>42</sup> In urging the adoption of Section 8(b)(1), Senator Taft referring to union unfair labor practices, remarked: "We feel that the Board should be given the opportunity to say, 'That is an unfair labor practice and you must stop that particular practice.' " (Legis. History of the LMRA, 1947, p. 1028.)

Virginia trial court. (Tr. . . . .) Furthermore, and pertinently, Laburnum made no effort to process its complaint with the federal Board. It ignored the "peaceful procedures" provided by Congress in the Act's Section 10 "for preventing" any alleged interference by petitioners "with the legitimate rights of" Laburnum "in order to promote the full flow of commerce."<sup>43</sup> Laburnum's president Bryan admitted that he told both Hart and David Hunter, a UCW Regional Director, that he expected to hold the "United Mine Workers responsible for what happened." (R. 609, 562) Obviously—and contray to Congress' will, purpose and policy expressed in the Act—Laburnum kept its eye windward to the potentialities of a jury damage award. It permitted those potentialities to be the paramount factor rather than to seek the avoidance of any disruption to commerce through the procedures which Congress made available to it. Laburnum was dollar-conscious rather than relief-conscious as Congress, in adopting the Act, had mandated. Unlike Laburnum, Congress was interested in the public welfare and interest. Unlike Laburnum, Congress placed no dollar mark upon its plan of relief when the free flow of commerce was obstructed. But the Virginia Supreme Court's decision, if permitted to stand, would effectuate a result by which the entire congressional scheme and policy of protecting interstate commerce from industrial strife and obstruction would be completely frustrated and thwarted. If, instead of being required to utilize the procedures provided in the Act, a plaintiff is enabled to resort to a common-law tort action in a state court for damages, then the "elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience . . . by an administrative agency equipped for the task" (*Amazon Cotton Mill Co. v. Textile Workers Union*, *supra*) would be rendered abortive and the federal statutory scheme sup-

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<sup>43</sup> 29 U.S.C.A. Section 141.

planted by jury determinations. The congressional purpose of vindicating public rights would be subordinated to private rights—a doctrine rejected in the *Garner* case, *supra*, and the congressional intent “to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining”<sup>44</sup> would be rejected. It would be inconsonant with and contrary to this Court’s pronouncements in the *Garner* case, *supra*, at page 165, that “Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.”

### CONCLUSION

For the foregoing reasons, petitioners submit that:

In view of the type of conduct found by the Virginia Supreme Court to have been carried out by petitioners, the Board has exclusive jurisdiction over the subject matter so as to preclude the State court from hearing and determining the issues in this case based upon such conduct. The Virginia Supreme Court was in error in sustaining the State trial court’s jurisdiction. The federal Act pre-empt the field as to the conduct involved in the instant case; it expressly covers the subject matter; it prescribes the rights of the parties; and it provides for the promulgation of all procedures requisite to the enforcement of ade-

<sup>44</sup> Senate Rep. No. 573, 74th Cong., 1st Sess., p. 15, quoted by the court in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 267.

quate remedies for the proscribed conduct. Because of such legislation, the proceeding in the state court was superseded by federal law. Article VI of the Constitution of the United States provides, in part, that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Virginia Appellate Court erred in holding that petitioners' motion to dismiss Laburnum's notice of motion for judgment and to enter a final judgment for petitioners on the ground that the trial court was without power, authority and jurisdiction to hear and determine the issues in said action "was properly overruled" (R. 1950) and in affirming the judgment of the trial court to the extent of \$129,326.09, with interest at 6% per annum from February 16, 1951, until paid, and for costs expended by Laburnum "about the prosecution of its notice of motion for judgment in said circuit court" and ordering that Laburnum recover of petitioners its costs by it expended "about the prosecution of the writ of error and supersedeas" in said Virginia Supreme Court, as well as in failing and refusing to reverse, set aside and hold void the judgment of said Circuit Court of July 5, 1951, for \$275,437.19, with interest and costs, in its entirety, and to set aside the jury verdict and enter judgment for petitioners, and each of them.

It erred, too, in failing and refusing to find, hold and conclude that the provisions of the Act were applicable to the facts of the instant case, and that (1) the Act provides exclusive remedies and procedures for conduct proscribed by Section 8 (b) (1) (A) thereof; (2) the Act deprives an employer of his common-law right of action in a state court for damages based upon such conduct; (3) by reason of the provisions of said Act, the Circuit Court of the City of Richmond, Virginia, was without power, authority and jurisdiction to hear and determine the issues in the in-

stant case and to enter its said judgment of July 5, 1951, against petitioners, and each of them, and such judgment is void; and (4) judgment should have been entered for petitioners, and each of them, and Laburnum's notice of motion dismissed.

This Court should reverse the judgment of the Virginia Supreme Court of April 20, 1953, herein complained of in affirming the trial court's judgment as aforesaid and ordering that Laburnum recover of petitioners its costs by it expended "about the prosecution of the writ of error and supersedeas" in said Virginia Supreme Court and, by appropriate order, set aside such judgments and hold them for naught and direct (1) the dismissal of Laburnum's notice of motion, and (2) entry of judgment for petitioners and each of them.

Respectfully submitted,

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March 15, 1954.

**APPENDIX A**

Constitution of the United States Article 1, Section 8:

The Congress shall have power \* \* \*

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

---

Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136 et seq.):

*SEC. 1 Short title: Congressional declaration of purpose and policy.*

(a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in con-

nection with labor disputes affecting commerce. (61 Stat. 136; 29 USCA, Section 141).

## **Title I**

### **Amendment of National Labor Relations Act**

SEC. 101. The National Labor Relations Act is hereby amended as follows:

#### **FINDINGS AND POLICIES**

##### **Section 1. \* \* \***

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. \* \* \*

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of ne-

gotiating the terms and conditions of their employment or other mutual aid or protection. \* \* \* (61 Stat 136; 29 USCA, Section 151).

### DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations \* \* \*

\* \* \* \* \*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. (61 Stat. 137; 29 USCA, Section 152).

### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from

any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). (29 USCA, Section 157; 661 Stat. 140).

## UNFAIR LABOR PRACTICES

### SECTION 8.

• • • • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; \* \* \* (61 Stat. 140, USCA, Section 158(b))

### SEC. 10. *Prevention of unfair labor practices—Powers of Board generally*

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: \* \* \*

(c) The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: \* \* \*

\*   \*   \*   \*   \*   \*   \*   \*

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which applications may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of

the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. \* \* \* The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification \* \* \*

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. \* \* \* Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

• • • • •

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158 (b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief

pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: \* \* \*

(29 USCA, Sec. 160(a), (b), (c), (e), (f), (j), (l); 61 Stat. 146; June 25, 1948, c. 648, Sec. 32, 62 Stat. 991, eff. Sept. 1, 1948.)

\* \* \*

SEC. 14(b):

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. (29 U.S.C.A., Sec. 164 (b), 61 Stat. 151 (b))

## Title II

SEC. 202. (c) \* \* \* The Director may establish suitable procedures for cooperation with State and local mediation agencies. \* \* \* (61 Stat. 153, amended Oct. 15, 1949, c. 695, Sec. 4, 63 Stat. 880; 29 USCA Sec. 172(c))

\* \* \*

SEC. 203. (b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in com-

munication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement. (61 Stat. 153; 29 USCA Sec. 173(b))

### **Title III**

#### **SEC. 301. *Suits by and against labor organizations— Venue, amount, and citizenship***

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (61 Stat. 156; 29 USCA, Sec. 185).

#### **SEC. 303. *Boycotts and other unlawful combinations right to sue; jurisdiction; limitation; damages***

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the repre-

sentative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (61 Stat. 158; 29 USCA, Sec. 187).

**Title V****Definitions**

SEC. 501. When used in this chapter—

(1) The term “industry affecting commerce” means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce. (61 Stat. 161; 29 USCA, Section 142).

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HAROLD B. MILLER

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 188

UNITED CONSTRUCTION WORKERS, affiliated with the UNITED  
MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE  
WORKERS OF AMERICA, and UNITED MINE WORKERS OF  
AMERICA, *Petitioners,*

v.

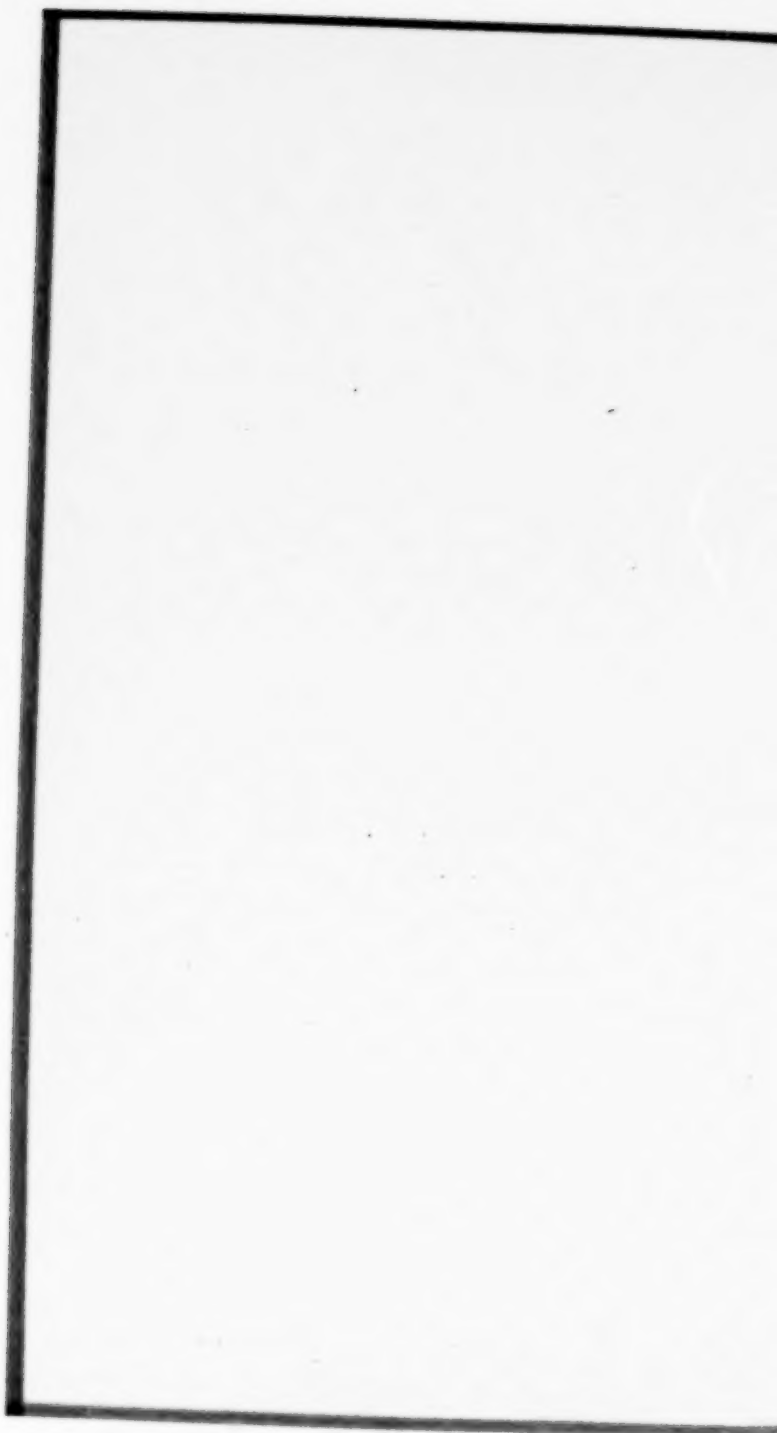
LABURNUM CONSTRUCTION CORPORATION.

On Writ of Certiorari to the Supreme Court of  
Appeals of Virginia

## PETITIONERS' REPLY BRIEF

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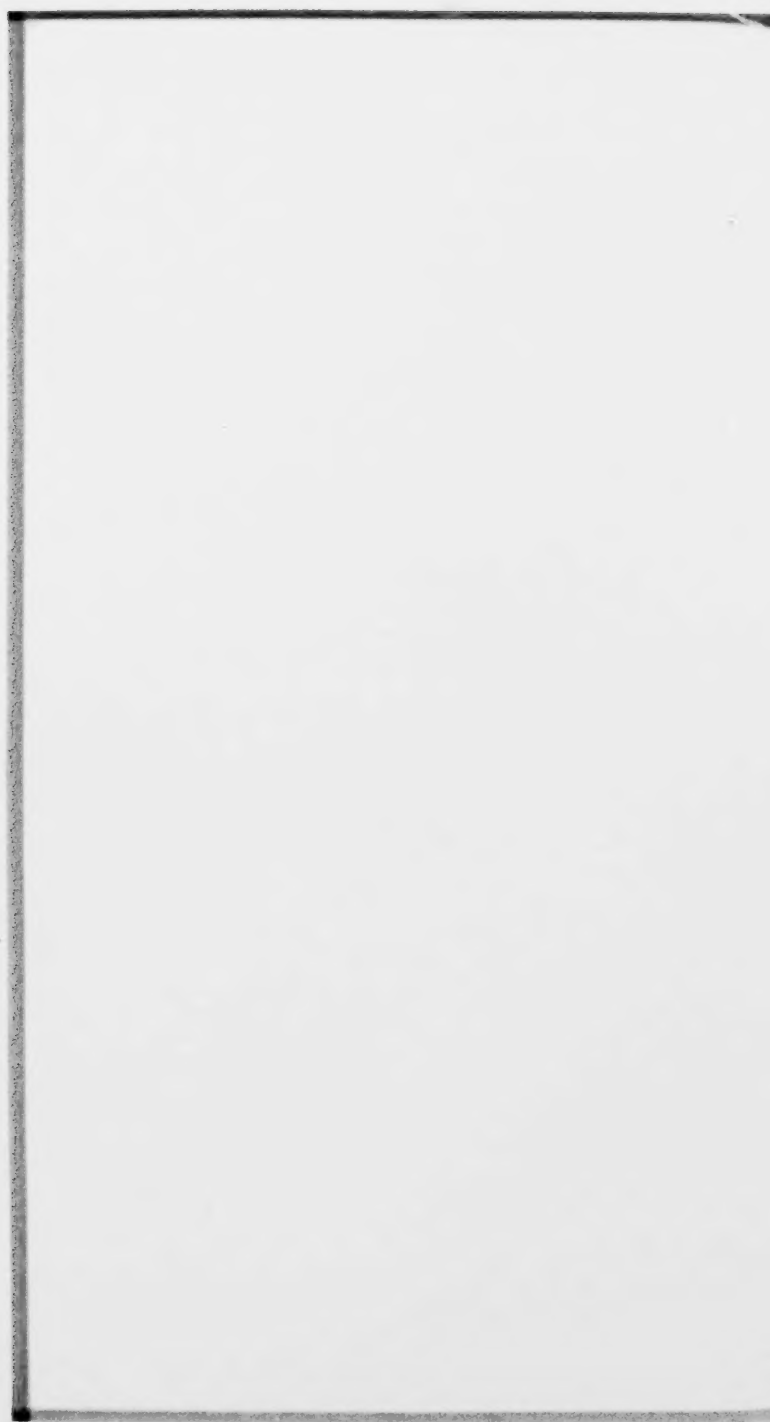
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v.

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---

On Writ of Certiorari to the Supreme Court of  
Appeals of Virginia

---

**PETITIONERS' REPLY BRIEF**

---

No attempt will be made to reply *seriatim* to the arguments advanced in the opposing brief, the answers to which, Petitioners submit, are contained in their original brief. In addition to such discussions, the Court's attention is directed to the following particular matters. Peti-

tioners will follow the heading numerals used in the Laburnum brief.

## I.

Laburnum does not disagree with Petitioners' contention in their original brief (pp. 30-32) that the type of conduct found by the Virginia Supreme Court to have been carried out by Petitioners falls within the activity interdicted by Section 8 (b)(1)(A) of the Act. Laburnum seeks to avoid the impact of Petitioners' argument by its thesis (Brief 14-17) that the instant action "concerns only the right of an employer to do business free from violence and coercion" and that the "wrong done to Laburnum" was by physically forcing it to stop doing business in Kentucky through acts directed not only against its "'employees' but against all who worked for it." Petitioners submit, however, that the essence of Laburnum's claim, and the Virginia Supreme Court's findings of responsibility, concerned only the intimidation and coercion of Laburnum's employees. It was the conduct directed at Laburnum's employees that grounded the Virginia Supreme Court's affirmance of Petitioners' liability. Laburnum's position is inconsonant with the jury's determination and with the Virginia Supreme Court's findings.

The question posed by this Court in granting certiorari is limited to "the type of conduct found by the" Virginia Supreme Court "to have been carried out by Petitioners". Laburnum's President admitted there were no acts of violence<sup>1</sup> and witnesses who testified concerning the alleged

---

<sup>1</sup> In the case at bar Bryan himself, Laburnum's president, testified as follows (R. 803-804):

Q. Mr. Bryan, during the period from July 26 through August 5, when you were out in Breathitt County and in that general neighborhood, did anybody shoot at you?

A. Nobody shot at me, that I know of.

Q. Did anybody try to beat you?

A. No, nobody made a pass at me.

Q. And you went all through that country day and night, which you say is so wild, and you were the head of the business that the

threats towards Delinger (Laburnum's superintendent), discussed in Laburnum's brief (p. 16) attributed such statements to "spotters" *who were never identified*. Laburnum's thesis (Brief 14-17) to sustain the state court's jurisdiction is challenged by its pattern for liability in its pleadings and in its offered instructions, given to the jury<sup>2</sup>, and by the Virginia Supreme Court in its findings of fact.

A ready reply to Laburnum's charge (brief, 15) that the Act makes no mention of an employer's right to engage in his business "free from threats, assault and battery,

trouble was about, and no one offered to interfere with you or to stop you in any way did they?

A. Mr. Hart threatened to.

Q. I asked if anybody did stop you or if anybody did prevent you from going around.

A. No, nobody actually did it.

Q. Nobody offered you any violence of any kind while you were going around on the roads and all?

A. It depends on what you mean by offering violence. If that means threatened violence, I would say yes. If it doesn't the answer is no.

Q. Were any of your employees beat up?

A. I didn't hear of anybody getting a mauling.

Q. Was anybody shot at?

A. No, I didn't hear that anybody got shot at.

Q. Was any property destroyed?

A. No, I didn't hear of any property being destroyed.

Q. Were any automobiles overturned?

A. No, I didn't hear of it that I know of.

Q. In other words it was all talk and no action.

A. Well, I guess you just don't understand the situation out there. When they tell you not to do something, you had better not do it.

Q. Yet nobody was hurt, nobody was shot at.

A. I tried to get my people to go back to work by every way known to man, and I couldn't do it.

This is clear and emphatic evidence from the head of the Laburnum corporation that there was no violence during the course of this dispute. He attempts to imply that there were threats of violence, but this is a mere conclusion on his part based upon his thought that "when they tell you not to do something, you had better not do it". At no time did Bryan testify as to any threat made directly to him that he would be subjected to any personal violence.

<sup>2</sup> See Petitioners' original brief pp. 6-7.

libel, slander, larceny and highway robbery" is that the instant case is not concerned with such matters but with allegations and findings of coercion and intimidation of Laburnum's employees. Section 8 (b)(1)(A) is concerned therewith. Similarly Laburnum's advertence to the alleged threats to Delinger and his widow's right to damages (brief, 17) have no relevancy to the instant case, for the reasons that there is no finding thereon by the Virginia appellate court and, as expressed in *Hughes v. Superior Court*, 339 U.S. 460, 469: "We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts".

## II.

### A.

Laburnum erroneously asserts that the question for decision "is whether by the mere inclusion of Section 8 (b)(1)(A)" in the Act, Congress has ousted state jurisdiction over torts, for in addition to such inclusion the legislative history of that section and other provisions of the Act are vital criteria demonstrating that state courts' jurisdiction is precluded in common law tort actions based upon conduct which falls within proscribed activity of Section 8 (b)(1)(A).

#### 1 and 2.

Laburnum's argument (brief, 21) that the "Act does not say that only the Board may adjudicate in situations which contain elements of unfair labor practices" and that from Section 10 (a) of the Wagner Act Congress deleted the words "this power shall be exclusive" make reference appropriate to *Amazon Cotton Mill Co. v. Textile Workers Union*, 4 Cir., 167 F. 2d 183, 187, where it stated:

" \* \* \* As pointed out above, however, a remedy in the courts not expressly given is not to be inferred; and especially is this true where Congress has worked

out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task. The change in the statute upon which reliance is placed was clearly intended, not to vest the courts with general jurisdiction over unfair labor practices, but to recognize the jurisdiction vested in the courts by section 10, subsections (j) and (1), section 208, and section 303, to which we have heretofore made reference, as well as the power in the Board conferred by the proviso in section 10(a) to cede jurisdiction to state agencies in certain cases. This is not only the clear meaning of the statute when its language is considered in the light of existing law, but it is also the meaning given it by the Conference Committee of the House and Senate (See H.R. No. 510, June 3, 1947)."

The assertion in Laburnum's brief (p. 24) that in enacting Section 8 (b)(1)(A) of the Act "Congress sought to outlaw those coercive acts *which were not unlawful in the States*," is not supported by, and is inconsistent with, the legislative debates. See Petitioners' original brief, pages 40-45. Demonstrating Laburnum's error is the quotation in Laburnum's brief (p. 26) which contains the statement that "*Some of these acts are illegal under State law.*" Furthermore, the quotation by Senator Ball (Laburnum's brief, 27) from 93 Cong. Rec. 4137, Legis. Hist., 1019, dealt with *economic* coercion as distinguished by Senator Ball from "violence and that sort of thing."

The legislative history of the Act condemns Laburnum's contention (brief p. 32) that "Section 8 (b)(1)(A) was intended . . . primarily to insure that representation elections would be free from coercive tactics" and "not intended as a substitute for common law torts."

Laburnum parenthetically states (brief, 24), "[This is the unfair labor practice which Petitioners now claim they committed.]" Petitioners denied that they had committed any wrongful conduct; the jury and the Virginia Supreme

Court found that they had committed acts which petitioners have shown to be unfair labor practices. Petitioners' complaint is that the issue of wrongful conduct fell within the exclusive primary jurisdiction of the Board. Similarly, Laburnum says (brief, 4) that "it has been determined that no legitimate labor activity was involved, and that Petitioners committed the acts charged against them . . . maliciously, intentionally, wilfully, and without regard to the rights of Laburnum, its officers, its employees or anyone else." While the latter portion of the statement goes beyond the issues of the case, determination of whether the labor activity was legitimate was a matter for the Board and not for a state court jury.

## 3.

Laburnum's argument (brief, 32) that "Other Extrinsic Evidentiary Factors Do Not Indicate an Intent to Preclude the Exercise of State Jurisdiction Over Torts" cites no such *evidentiary* factors. Citations in Laburnum's brief to support its contention that Congress has not precluded state court jurisdiction for common law torts do not sustain its position, for in the instant case Congress has regulated the very type of conduct upon which Petitioners' responsibility is grounded. Where Congress has so exercised its constitutional authority by regulating such conduct—that is, the subject matter—its regulation itself shows that Congress has preempted that field, and any assertion that Congress intended that the states should have concurrent jurisdiction would require definitive proof of such an intent. In *California v. Zook*, 336 U.S. 725 (1949), wherein the Court's majority opinion rejected federal preemption because "there were no state laws to displace when Congress acted" (p. 735), Mr. Justice Burton, in a dissenting opinion, noted that (p. 749):

"Once Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its con-

sent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so."

Laburnum assiduously avoids any attempt to answer Petitioners' contentions (original brief, 40-45) concerning deletions from the Hartley Bill which would have authorized damage actions for unlawful concerted activities of the type involved herein, as well as the contentions that the Act's specific provisions for damage actions which Congress regarded as permissive manifest clear congressional intent to preclude other damage actions, and that the Act itself denotes the limits of state jurisdiction. Laburnum offers no answer—because there is none—to Petitioners' reference to this Court's recognition in *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U.S. 383, 398, that Congress had embodied in the Act "congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act". (See Petitioners' original brief, 45-47).

Contrary to Laburnum's assertion (brief, 34), Petitioners submit that the instant case does "lie in a field where the Federal interest is dominant," and makes *Hines v. Davidowitz*, 312 U.S. 52, applicable to the instant case as support for Petitioners' contentions. The contention that this case "lies within a field which is reserved to the States in the Federal Constitution" was answered adversely to Laburnum almost twenty years ago and is so firmly established in both federal and state jurisprudence as to render citation of authority unnecessary. See, however, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. Nor is there substance in Laburnum's view that "control [of the field] is necessary for the existence of State governments". Such argument could be persuasive if this were a case where the sovereignty of state or city authority in the exercise of its police authority was being challenged; but petitioners submit preservation of state sovereignty is not dependent,

as Laburnum urges, upon state court jurisdiction to enforce private rights under common-law principles in the labor relations field.

### B.

To sustain the state court's jurisdiction, Laburnum argues that the "Board is empowered to *prevent* future unfair labor practices, *not to adjudicate* damages caused by past activities." Initially, Laburnum's argument overlooks this Court's pronouncement in *Garner v. Teamsters, etc. Union*, 346 U.S. 485, 98 L. Ed. (Adv. op. 161, 169) that conflict which precludes state court jurisdiction "lies in remedies, not rights". Furthermore, Section 10(c) empowers the Board to enter such order as will effectuate the policies of the Act, thus enabling an order of the Board to have an impact not only as to future activities but past activities as well.

Laburnum's argument (brief, 36), that the "Board is not concerned, nor are its processes hampered by the fact that the guilty Petitioners are also required by a State court, acting under State law to pay damages to the party injured by their wrongs", is fully answered by this Court's pronouncement against the conflict of remedies in *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767, and the *Garner* case. See also Petitioners' original brief (pp. 49, 50-52).

Nor is there any merit to Laburnum's position that because violent conduct may be subject to state criminal processes, it follows, as Laburnum contends (brief, 37), that Petitioners "be required to pay damages". As demonstrated in Petitioners' original brief, the legislative history of Section 8 (b)(1)(A) is indicative of congressional intent to allow prosecutions under the state criminal process and procedures but such history and other provisions of the Act demonstrate that Congress did not intend that a common law tort action, such as the instant one, could be prosecuted in a state court. These criteria challenge

Laburnum's contentions. Laburnum's argument offends this Court's pronouncement in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, approved in *New York C. R. Co. v. Winfield*, 244 U. S. 147, 153, that "the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the matter."

As stated in Ratner, Problems of Federal-State Jurisdiction in Labor Relations, New York University Fifth Annual Conference on Labor, 77, 95:

"... the propriety of state court relief does not turn on whether the claim is predicated upon state law or upon the national act. The test, rather, is whether the transaction involved is in the 'field' covered by the national act. If so, the rights to which it gives rise flow exclusively from Federal law; *substantive rights as well as remedies flowing from State authority are superseded*. (Emphasis supplied).

### C.

Laburnum cites *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 793, but fails to mention that the Court, in that case, sustained the position that Congress has preempted the field in the situation with which that case was concerned. The majority opinion noted (p. 783) that "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure."

The contention of Laburnum that exclusion of state jurisdiction in the situation presented herein would be repugnant to and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States is untenable. It is well settled that there is no vested right in the continued existence of a common-law rule. 16 C.J.S., Subject, Constitutional Law, Section 223. It must be remembered that in 1949, when the alleged

wrongful conduct occurred, the Federal statute which superseded Laburnum's right to sue in a state court for damages had been in effect for substantially two years, so that Laburnum had no vested right in any action for damages. In *Mondou v. New York, New Haven and Hartford Railroad Company*, 223 U.S. 1, this Court recognized the well-established principles that no one has any vested right in any rule of the common law and that a congressional act which supersedes a common law remedy under state law is not violative of the due process of law clause of the Fifth Amendment to the Federal Constitution. See also *New York C.R. Co. v. Winfield*, *supra*; *Arizona Copper Company v. Hammer*, 250 U.S. 400. Neither is there any merit to Laburnum's assertion that it was without a substantial right to redress by some effective procedure, for Congress in the Labor Management Relations Act provided procedures which Laburnum could have, but did not utilize, to protect its alleged rights against the alleged interference by Petitioners.

#### D.

##### 1 and 2.

Counsel for Laburnum, in quoting Ratner, Federal-State Jurisdiction, *supra*, p. 77, 106, failed to include Ratner's observation that "if the integrity of the Congressional decision to occupy the field is to be preserved, the States cannot be permitted to duplicate *or supplement* protection accorded by the Act to the rights which Congress guaranteed *under the guise* of applying general, rather than labor-relations oriented, laws and policies."

Reliance is also had upon a quotation from Cox and Seidman's "Federalism and Labor Relations", 64 Harvard Law Review 211, but counsel for Laburnum do not quote therefrom (p. 240) the following:

"For State law cannot be the measure of the scope of 'concerted activities' while the boundaries of that

phrase mark the limits of a Federal right. *The State courts can no longer apply their common law doctrines to labor disputes affecting commerce.*" (Emphasis supplied)

The statement in Laburnum's brief (p. 41) that "All Authority Support Retention of State Jurisdiction of Torts" is challenged by *McNish v. American Brass Co., et al.*, 139 Conn. 44, 89 A. 2d 566, Cert. Den. 344 U.S. 913; *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W. 2d 94 (1950); *Ryan v. Simons*, 100 N.Y.S. 2d 18 (1950), aff. 98 N.E. 2d 707, cert. den. 342 U.S. 897. See also *Schatte v. International Alliance, etc.*, 9 Cir., 182 F. 2d 158, wherein the 9th Circuit rejected an action for damages based on alleged violation of Section 8 (b)(1) of the Act upon its provision that exclusive remedy therefor was in Board proceedings "except in so far as the District Courts are given jurisdiction over certain suits for injunctions brought by the Government and over suits brought by private parties under Sections 301 and 303" of the Act. In *Direct Transit Lines v. Teamsters' Union*, 29 LRRM 2492 (D. C. Mich. 1952), in which an employer brought suit in a Michigan Court seeking damages and an injunction to restrain a secondary boycott and which was removed to the Federal Court, it was held that the Michigan anti-monopoly statute was superseded by the Act in so far as the anti-monopoly statute might be applied to cover the same ground as the Federal Act. In sustaining the Federal Act's supersedure the Court said "the fact that the Taft-Hartley Act applies to and prohibits the acts alleged to have been committed is of itself sufficient to deny the applicability or relevance of state law covering the same acts." See *Direct Transit Lines, Inc. v. Local Union, etc.*, 6 Cir., 199 F. 2d 89 (1952).

Of the cases which Laburnum has cited to sustain state court jurisdiction (brief, 45, footnote 11): *Art Steel Co. v. Velasquez*, 280 App. Div. 76, 111 N.Y.S. 2d 198, in approving state court jurisdiction, the court observed (p.

201) that "The Taft-Hartley Law contains no reference to violence as a ground for action by the National Labor Relations Board" and directed (p. 202) that steps should be taken to ascertain whether the Board desires to act with respect to" the basic dispute involved. In *Grist v. Textile Workers Union*, R.I. , 82 A. 2d 402, there was no issue of the conflict of federal and state jurisdiction.

The remainder of said cited cases are not common law tort actions, such as the one brought by Laburnum, but are injunction cases or contempt proceedings stemming from injunctive decrees. These injunction cases, Petitioners submit, do not support Laburnum's contention that the Virginia court had jurisdiction to hear and determine the private right issues in a common law tort action for damages. In some of such cases it appeared that the rights of the public, in addition to those of the employers, were involved. See *Williams v. Cedartown Textiles, Inc.*, 208 Ga. 659, 68 S. E. 2d 705; *Missouri v. Thatch*, 361 Mo. 190, 234 S.W. 2d 1. Moreover, the legislative history of the Act militates against the correctness of the results in those cases for it is not reasonable to assume that Congress intended to afford to private litigants the right of injunction in state courts when it unequivocally denied such right in the federal courts. Although in *Kuzma v. Millinery Workers Union*, 27 N.J. Sup. 579, 99 A. 2d 833, the court approved state court jurisdiction, it is doubtful that the factual situation consisted of an unfair labor practice so as to invoke the preemption doctrine, but it is noteworthy that the New Jersey court's decision is clearly based upon its unwillingness to yield its jurisdiction. Likewise, the Alabama court, in *Russell v. United Auto Workers*, 64 So. 2d 384, gave no consideration to the fact that the Act specifies the instances in which damage actions may be brought for violations of the Act and the courts in which such actions are to be prosecuted; and that court, noting there is "no authoritative holding from the Supreme

Court on the matter now before us", also observed that it "would prefer that the Supreme Court of the United States express its judgment on the question before committing the Supreme Court of Alabama to a profound change in law . . ." Both *Kuzma* and *Russell* were tort actions.

Laburnum notes (Brief, 45) that at least 32 states have statutes of general application protecting the right to work from coercive interference, gives no citations in support of that assertion but argues (Brief, 46) that a "decision against state jurisdiction here would largely nullify all of the state statutes." Of course, a decision against state jurisdiction would apply only where interstate commerce is concerned; but Laburnum's observation that there is a great number of state statutes focuses the importance of the policy of Congress in establishing a paramount single agency so as to have uniformity of regulation, expertness and specialization of administration, and guaranty that public interest rather than private rights will be the basis for decision. The language of the National Labor Relations Board's brief in the *Garner* case is apropos and reads:

"Thus at each step of this case, petitioners invoked procedures different from those provided for in the Act, and obtained rulings at variance with those which might have been elicited from the Board. Clearly, there can be no uniformity of regulation, no specialization and expertness of administration, and no guarantee that public rights rather than private interests will be the basis of decision if private parties may have recourse to local tribunals for relief against the very conduct which Congress has prohibited. As the Court of Appeals for the Fourth Circuit has pointed out in the analogous case involving an effort by a private party to enforce the National Labor Relations Act in a federal district court (*Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183, 190):

'More than two hundred local tribunals of general jurisdiction would be clothed with the special jurisdiction now vested in a unified agency with nationwide jurisdiction over labor controversies; and it is not difficult to foresee the confusion that would necessarily result. Certainly the statute should not be given an interpretation which would lead to such consequences.'

"The mischief warned against by the Fourth Circuit with respect to an overlapping of federal court jurisdiction in the field of unfair labor practices would of course be infinitely multiplied if a similar jurisdiction were extended to state courts as well."

Since the instant cause of action is grounded in events which allegedly occurred in Kentucky, and Petitioners asserted (R. 80), and it was not challenged, that "the substantive law governing the case was the law of Kentucky", it is noteworthy that the Kentucky statute [Baldwin's Kentucky Revised Statutes Annotated (1942)] provides:

"Section 336.130

(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

This statutory provision was given by the trial court to the jury (Instruction 1A, R. 129-130). In addition thereto, the statutory law of Kentucky provides for federal procedure:

"Section 336.150. Conciliation of labor disputes; joint wage agreement; Federal jurisdiction to supersede.

\* \* \* \* \*

(3) . . . Nothing in KRS 336.130, 336.150 or 399.200 shall apply where the authority of a Federal agency has been invoked or a Federal agency assumes jurisdiction. \* \* \* "

Thus, it is submitted, the public policy of Kentucky recognizes federal supersedure. Also pertinent is the declaration of the Sixth Circuit in *International Union of Operating Engineers v. Dahlem Construction Co.*, 6 Cir., 193 F. 2d 470, 475, in damage action based upon the Act, that "Kentucky law does not control, for Congress has occupied the field and has closed it to state regulation."

#### E.

Laburnum argues (Brief 37-38, 46) that state court jurisdiction should be sustained because the Mine Workers ignored the procedures of the Board and employed force to accomplish their end. But the issue herein is not whether state courts have jurisdiction because Petitioners did not seek Board procedures, but rather whether, because of the Act, Congress has precluded state court jurisdiction to entertain an employer's common law tort action for damages based upon conduct interdicted by the Act—the answer to which is not dependent upon whether Petitioners did or did not seek Board action.

#### CONCLUSION

For the reasons assigned and discussed herein and in Petitioners' opening brief, Petitioners submit the question presented in this case should be given an affirmative answer.

**Appendix C in Laburnum's Brief**

Counsel for Laburnum have placed in their brief as Appendix C (brief, App. 7) a reprint of an article of The Saturday Evening Post. Petitioners submit that the matters therein contained are entirely separate and distinct from the instant case and have neither connection with or relevancy to the case at bar. Counsel for Petitioners are certain, too, that this Court will look upon the inclusion of the reprint with the same disfavor as it did prejudicial newspaper comment in *Sheppard v. Florida*, 341 U.S. 50, 71 S. Ct. 549 (1951) and *Bridges v. California*, 314 U.S. 252, 271, wherein it said that "Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspapers." The matters contained in the article do not, it is submitted, come to this Court with the same solemnity as a court record containing factual data given under oath and subject to cross examination, with the right of litigants to be confronted with the witnesses against them. The reprint is irrelevant and impertinent; the Court should order it removed from the brief, and Petitioners so move.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1953

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No. 188

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UNITED CONSTRUCTION WORKERS, AFFILI-  
ATED WITH THE UNITED MINE WORKERS  
OF AMERICA; DISTRICT 50, UNITED MINE  
WORKERS OF AMERICA; AND UNITED MINE  
WORKERS OF AMERICA,

*Petitioners,*

v.

LABURNUM CONSTRUCTION COMPANY,

*Respondent.*

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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---

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### OPINION OF COURT BELOW

The opinion of the court below (the Supreme Court of Appeals of Virginia), printed at R. 1945, is reported at 194 Va. 872.

### JURISDICTION

The date of the judgment sought to be reviewed is April 20, 1953. The jurisdiction of this Court is claimed under 28 U.S.C., section 1257(3).

## STATEMENT

The action was at law for damages, both compensatory and exemplary, for common law tort.

Laburnum's case was: That it was, pursuant to contract, engaged in the construction of a coal tippie, dwelling houses and other structures for Pond Creek Pocahontas Company at that Company's Number One Mine then being developed deep in the woods and mountains in an isolated section of Breathitt County, Kentucky; that it was employing various craftsmen who belonged to the American Federation of Labor; that while its work was in progress, on July 14, 1949, Petitioners, through their field representative, William O. Hart, made known to Laburnum (via a long distance call from Hart to Bryan, President of Laburnum) that Laburnum was "working in United Mine Workers' territory" and that Petitioners were going "to take over" the job, and that he, Hart, "was intending to organize all" of Laburnum's workers, "including the carpenters, electricians, pipefitters, iron workers, millwrights, laborers and everybody else", and that if Laburnum didn't make an agreement recognizing United Construction Workers they were going to close down Laburnum's job; that Laburnum refused to recognize Hart; that thereafter there were persistent rumors that the Mine Workers were coming to the job site with a large gang of armed men to run Laburnum off the job; that on July 26, 1949, Hart made good his threats by leading to Laburnum's job site a gang of men estimated at from 75 to 150 in number; that these men were armed, some with guns, many with knives, drunken and rough looking; that Hart, backed up by his gang, made it plain that Laburnum's men were either going to join Hart's union, get off the job or be killed; that Laburnum's men wouldn't join but were scared off the job; that La-

burnum was never able to persuade its men to return to the job; that as a result it lost its contract with Pond Creek Pocahontas Company and was, in fact, "run out of Kentucky", and was thereby damaged.

The jury was instructed as follows (Instruction C, R. 137):

"The jury is instructed that:

"The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

"In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

"The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

"Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character."

(Instruction E, R. 139):

"The jury is instructed that:

"If you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for the defendants."

The jury's verdict, for Laburnum, has been upheld as supported by the evidence by the Supreme Court of Appeals of Virginia, except as to certain elements of compensatory damages.

Thus, by jury verdict there is no question of peaceful activities or even minor disorders in this case. Here the jury has found that Laburnum's employees were driven from their jobs and that Laburnum's job was shut down by brute force. The case concerns not labor relations but hoodlumism.

### QUESTION PRESENTED

The only question presented by the Petition for Writ of Certiorari is whether the Labor Management Relations Act of 1947 has abrogated an employer's right to recover damages at law for the common law tort of violence committed by Petitioners.

### ARGUMENT

The position of this Court with respect to the issue presented is already clear.

In *International Union v. O'Brien*, 339 U.S. 454, 457 (1950), the Court ruled that Congress has occupied and closed to the States the field of "regulation of *peaceful* strikes for higher wages."

So also in *International Union v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253 (1949), the Court said:

"... However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management

Relations Act of 1947, that 'Congress designedly left open an area for state control'. . . ."

\* \* \*

"While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the states' power to police coercion by those methods."

To the same effect the Court said in *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951):

"In the instant case, the violence on the picket line is not material. The complaint was not based upon that violence, as such. *To reach it, the complaint more properly would have relied upon §8(b)(1)(A) or would have addressed itself to local authorities. . . .*" (Emphasis added).

See also *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740 (1940).

The decision below in the case at bar has no importance in administration of the Act, since the National Labor Relations Board, in its latest expression, is in accord with the decision below. See *In the Matter of Texas Foundries, Inc.*, 101 N.L.R.B. #249 (1952), where the Board adopted the following as its decision:

"The argument that the State court was without jurisdiction proceeds from the premise that Congress

has vested in the Board and in the Federal courts the exclusive power to regulate conduct such as was reached by the injunction, thereby foreclosing State court jurisdiction. . . . The injunction obtained by the Respondent was aimed not at the right to strike or to engage in concerted activities, a subject outside State jurisdiction where interstate commerce is involved, but at the methods, alleged to be illegal under State law, by which it was claimed the strike was being conducted. Decisions of the United States Supreme Court have made clear that the Act does not preclude States from exercising their traditional police power and injunctive control over unlawful conduct that may be committed during the course of a strike or labor dispute. See *Allen Bradley Local v. Wisconsin ERB*, 315 U.S. 740; *International Union v. Wisconsin ERB*, 336 U.S. 245. I am therefore unable to agree that the court was without jurisdiction."

In fact, the authorities are unanimous that, whether or not such conduct is an unfair labor practice within the contemplation of the Labor Management Relations Act of 1947, State law may provide a remedy when violent coercion is employed.\* *Russell v. United Auto Workers*, ..... Ala. ...., 64 So. (2d) 384 (1953); *Lodge Mfg. Co. v. Gilbert*, 32 L.R.R.M. 2500 (Sup. Ct. Tenn. 1953); *Erwin Mills v. TWVA*, 235 N.C. 107, 68 S.E. (2d) 813 (1952); *Art Steel Co. v. Velasquez*, 280 App. Div. 76, 111 N.Y.S. (2d) 198 (1952); *Williams v. Cedartown Textiles, Inc.*, 208 Ga. 659, 68 S.E. (2d) 705 (1952); *Wortex Mills, Inc. v.*

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\* All of the cases cited by Petitioners involved the extent to which a state might regulate *peaceful* labor activities affecting interstate commerce. That question will no doubt be clarified in *Garner v. Teamsters, Chauffeurs and Helpers, Local Union 776*, 373 Pa. 19, 94 A. (2d) 893 (1953), in which certiorari was granted by this Court on June 15, 1953. That question is not involved here.

*Textile Workers Union*, 369 Pa. 359, 85 A. (2d) 851 (1952); *International Moulders v. Texas Foundries*, 241 S. W. (2d) 213 (Tex. Civ. Apps., 1951); *Grist v. Textile Workers Union*, ..... R.I. ...., 82 A. (2d) 402 (1951); *Rice & Holman v. United Electrical Radio & Machine Workers*, 3 N.J.S. 288, 65 A. (2d) 638 (1949); *Southern Bus Lines, Inc. v. Amalgamated Ass'n.*, 205 Miss. 354, 38 So. (2d) 765 (1949); *Missouri v. Thatch*, 361 Mo. 190, 234 S.W. (2d) 1 (1950).

There is no public interest in having this Court reiterate what is generally understood to be, and what necessarily must be, the law.

### CONCLUSION

The petition should be denied.

August 19, 1953.

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No. 100

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v.

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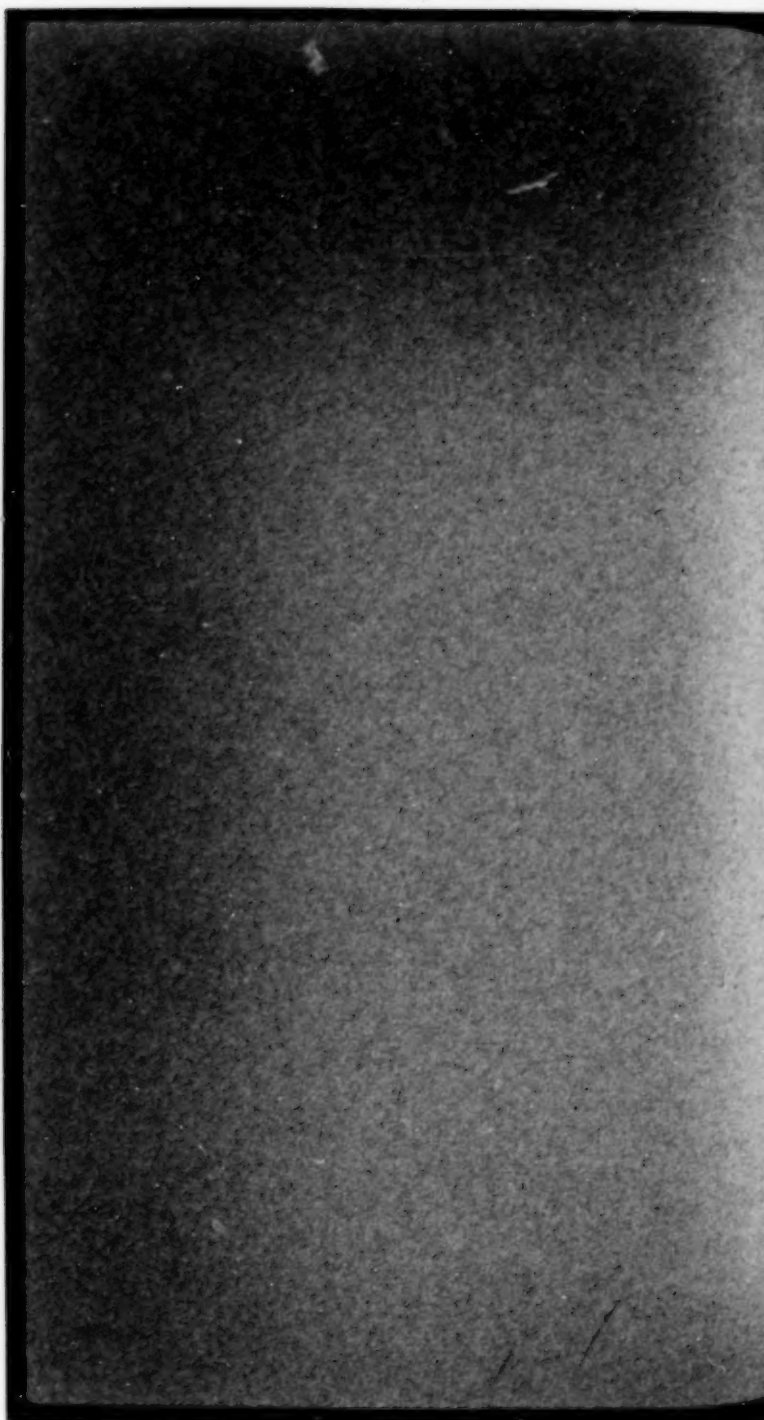
*Respondent.*

On Writ of Certiorari to the Supreme Court of  
Appeals of Virginia

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# Supreme Court of the United States

October Term, 1953

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**No. 188**

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UNITED CONSTRUCTION WORKERS, AFFILIATED WITH THE UNITED MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE WORKERS OF AMERICA; AND UNITED MINE WORKERS OF AMERICA,

*Petitioners,*

v.

LABURNUM CONSTRUCTION CORPORATION,

*Respondent.*

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**On Writ of Certiorari to the Supreme Court of  
Appeals of Virginia**

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**BRIEF OF RESPONDENT**

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## **OPINION BELOW**

The opinion of the Supreme Court of Appeals of Virginia (R. 1945, *et seq.*) is reported at 194 Va. 872.

## **JURISDICTION**

The Jurisdiction of this Court is claimed by Petitioners under 28 U. S. C., Section 1257 (3). The petition for writ of certiorari was granted on January 18, 1954.

## QUESTION PRESENTED

In the order allowing certiorari this Court limited the issue to the following question:

"In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State court from hearing and determining the issues in a common law tort action based upon this conduct."?

## STATUTE INVOLVED

The exclusiveness of the jurisdiction of the National Labor Relations Board must be found, if at all, in the provisions of the Labor Management Relations Act of 1947.<sup>1</sup> That Act is Public Law 101, 80th Congress, H. R. 3020.

## STATEMENT

Laburnum Construction Corporation (hereinafter sometimes called *Laburnum* or *Plaintiff*) filed its Notice of Motion for Judgment in the Circuit Court of the City of Richmond, Virginia, on November 16, 1949.

The action is a common law action in tort where the Notice of Motion for Judgment (R. 2-12) charges Petitioners with commission of acts of force and violence, "all of which said actions were wilful, malicious, illegal and unwarranted and were intended to and did actually greatly damage and injure the Plaintiff's (sic) in and about its property and reputation and caused Plaintiff's work \* \* \* to be stopped and its \* \* \* contracts to be cancelled \* \* \*" and further caused Plaintiff to lose other contracts for work

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<sup>1</sup> Provisions of this Act pertinent here are printed in Appendix A.

which would have resulted in large profits to Plaintiff (R. 11-12).

The Notice of Motion for Judgment further charges that the acts committed were done "for the purpose of wilfully, maliciously and unlawfully attempting to destroy Plaintiff's business, and to prevent Plaintiff from further continuing lawfully to work within the State of Kentucky unless and until Plaintiff submitted to their demands \* \* \*." (R. 12).

The Notice of Motion for Judgment does not mention the Labor Management Relations Act of 1947, and no claim was ever made by Plaintiff that the acts complained of were unlawful under that statute or that recovery should be based in any way on that statute.

Each of the defendants filed a plea of not guilty and grounds of defense denying all material allegations of the Notice of Motion for Judgment.

The grounds of defense which were filed on October 24, 1950, nearly a year after the Notice of Motion for Judgment was filed, allege (R. 80) :

#### "Second Defense

The supposed cause of action arose in Kentucky and the substantive law governing the case is the law of Kentucky. The provisions of the Kentucky Revised Statutes of 1948 (4th Biennial Edition) § 336.130 give the right to strike, the right to engage in peaceful picketing, and the right to assemble collectively for peaceful purposes."

The case was tried before a jury, beginning January 22, 1951, and in the course of the trial Petitioners denied the allegations against them, and presented their theory of the case and their evidence to support their theory. The Trial Court instructed the jury in a manner which fully protected

every legitimate right of Petitioners to organize employees, to strike, to assemble peaceably and to picket (R. 129-146); See Instructions Nos. 1-A, C, D, E, F-1, O-2, and P set forth in Appendix B.

The jury rejected all defenses of Petitioners and found against them upon every material issue in the case. The verdict was for Laburnum in the amount \$275,437.19; \$175,437.19 compensatory damages and \$100,000.00 punitive damages.

Thus, it has been determined that no legitimate labor activity was involved, and that Petitioners committed the acts charged against them, and committed those acts maliciously, intentionally, wilfully, and without regard to the rights of Laburnum, its officers, its employees or anyone else.

The verdict of the jury has been reviewed and approved by the Trial Court upon motion of Petitioners to set aside the verdict and grant Petitioners a new trial upon the ground that the verdict is unsupported by the evidence.

The verdict of the jury and the judgment of the Trial Court have likewise been reviewed and approved by the Supreme Court of Appeals of Virginia, except as to some items of compensatory damages.

Otherwise the verdict of the jury and the judgment of the Trial Court have been sustained as amply supported by the law and the evidence, and whatever may be the theory of Petitioners in this case, the facts have been found against them. But Petitioners ignore the findings of fact against them, and in their statement of the case in their brief they seek to evade the consequences of those findings. They speak as if they had won the jury verdict, when actually the reverse is true. They can only have their case reviewed now upon the basis of the facts already determined.

Petitioners for the first time raised the issue whether the National Labor Management Relations Act of 1947 had

deprived the Trial Court of jurisdiction to try the case more than two months after the jury's verdict and nearly a year and a half after the case was begun.<sup>2</sup>

The Supreme Court of Appeals of Virginia correctly rejected the belated plea to the jurisdiction. It is now the only subject of this review. The facts bearing upon the issue are voluminous but simple.

Laburnum, a Virginia corporation, secured contracts to construct various projects in Breathitt County, Kentucky, for certain coal producing companies. Laburnum proceeded to Kentucky and began to perform its contracts. While work under these contracts was in progress the events occurred which led to this litigation. Those events are described in the opinion of the Supreme Court of Appeals of Virginia, which understates the facts which actually transpired, the threats which were actually made and the violence which actually occurred.

The facts as stated by the Supreme Court of Appeals of Virginia, so far as relevant here, are as follows:

"Laburnum proceeded with its work on these several projects without trouble until July 14, 1949, when William O. Hart, speaking from Pikeville, Kentucky, telephoned Bryan<sup>3</sup> who was in Richmond. According to the testimony of Bryan, which was accepted by the jury, Hart identified himself as a 'field representative of the United Construction Workers and District 50 of the United Mine Workers of America,' working under David Hunter, 'Regional Director of Region 58

<sup>2</sup>The cause of action arose during the summer of 1949, and this action was initiated on November 16, 1949. Trial before a jury began on January 22, 1951, and the jury returned its verdict on February 17, 1951. During all that time, Petitioners were represented by competent counsel, and yet they did not raise the present question until April 30, 1951.

<sup>3</sup>A. Hamilton Bryan, President of Laburnum.

of United Construction workers and District 50,' with headquarters in Pikeville. Hart told Bryan that he was familiar with the work which Laburnum was doing and about to do in Breathitt county, that the plaintiff was 'working in United Mine Workers territory,' and that he (Hart) would close down this work unless the plaintiff recognized the United Construction Workers in the employment of its workers. Bryan told Hart of Laburnum's agreement with the American Federation of Labor affiliate at Richmond, under which it was to employ members of that union, and that consequently it would not be able to comply with Hart's demand and make an agreement with the United Construction Workers. Hart replied that he was going 'to take over' the plaintiff's work, that he intended to 'organize' all of its workers, 'including the carpenters, electricians, pipefitters, ironworkers, millwrights, laborers, and everybody else,' and that if the plaintiff failed to make an agreement 'recognizing the United Construction Workers, he (Hart) would close down' all of the plaintiff's work in Breathitt County, as had been done in other instances within his (Hart's) territory. (R. 1952)

"According to Bryan, during this conversation Hart said nothing as to any of Laburnum's laborers being dissatisfied with their wages or working conditions, but based his statements on the fact that Laburnum was working in United Mine Workers' territory and must recognize the United Construction Workers, the latter's affiliate. Just before concluding this telephone conversation Bryan requested Hart to communicate with him before he took any other steps, and Hart agreed to do so. (R. 1952-3)

"Bryan immediately telephoned Cecil M. Delinger, his superintendent at the Kentucky job site, about his conversation with Hart. Delinger told Bryan that he knew nothing of any labor trouble, or any threatened complaints. (R. 1953)

"On Monday, July 25, about 7:30 p. m., Delinger

telephoned Bryan that he had been informed that on the next day, at noon, the United Construction Workers were coming to the job site with a large group of men, that they would be armed, and would stop the plaintiff's employees from working on the projects. (R. 1953)

"It was then too late for Bryan to catch a train for arrival at the job site by noon the next day, so with one of his employees he set out for Kentucky that night in a company truck, reaching Huntington, West Virginia, about 7:00 a. m. on Tuesday July 26. Bryan then undertook to call Hart at Pikeville, Kentucky, and was informed that he was not there but that he might speak to Hart's 'boss', David Hunter, regional director of District 50 United Mine Workers of America, and regional director of United Construction Workers. Bryan requested Hunter to direct Hart not to interfere with the plaintiff's workmen before Bryan had an opportunity to talk with Hart at the job site. Hunter stated that he would try to get the message to Hart. (R. 1953)

"Having been delayed by trouble with his truck Bryan did not reach the job site until about 3:00 p. m. on the same day. When he arrived there he found that all work on the several projects in which his men were engaged had stopped. It developed that about noon on that day Hart had arrived at the job site accompanied by a crowd variously estimated at from 40 to 150 men. There is evidence that this was 'a very rough, boisterous crowd,' that some of the men used abusive language, that some were drunk, and that some carried guns and knives. (R. 1953)

"There is evidence on behalf of the plaintiff that when Hart and his men reached the 'schoolhouse site' upon which some of the plaintiff's skilled laborers were working, Hart demanded that these workmen join the United Construction Workers. When several of the Laburnum workers informed Hart that they were members of the American Federation of Labor, Hart replied, 'God damn you, if you work here you are going

to join the United Construction,' or else we will kick you out of here.' (R. 1953-4)

"Hart and his men then went to the coal preparation plant and told the Laburnum workers there that he was taking over the job and that the Laburnum workers would have to 'join up with the United Construction Workers.' He accosted other employees of the plaintiff at another site where he repeated his threats that he would 'take over' the job unless they joined the union which he represented. Some of the plaintiff's employees yielded to these threats and agreed to join Hart's labor organization, while others refused to do so. (R. 1954)

"It is true that Hart's version of these incidents is quite different. He denied that he undertook to coerce the plaintiff's employees into joining his union, or that he told them that they could not work unless they did so. In short, his story is that he went to the job site for the purpose of organizing the unskilled laborers who were unorganized and not members of any union, and to 'represent' other employees of the plaintiff who were dissatisfied with their wages and working conditions. He related that some of the plaintiff's employees, including both the skilled and unskilled laborers, voluntarily signed up with the United Construction Workers. (R. 1954)

"The verdict of the jury has, of course, resolved this conflict in favor of the plaintiff. (R. 1954)

"When Bryan arrived at the job site and was informed of what had happened, he talked to Hart and reminded him of their telephone conversation of July 14, when Hart had promised to let Bryan hear from him before he undertook to stop the work. Hart denied that he had any such understanding and repeated to Bryan that the latter was in United Mine Workers' territory, that he (Hart) was 'taking over' for the United Construction Workers regardless of the fact that the majority of the Laburnum employees were members of the American Federation of Labor, or had made application to join it. (R. 1954-5)

"According to Bryan, Hart further admitted that he had received Bryan's message sent through David Hunter that morning, but asserted that he 'had already made all his plans and arrangements and couldn't stop them.' He boasted to Bryan, 'I bet you \$500 right now that you will never finish your job unless you use United Construction Workers' men,' adding, 'Nobody has ever been able to buck the United Mine Workers yet, and you can't do it either.' (R. 1955)

"There is ample evidence to support the finding that because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work. (R. 1955)

"Bryan talked with Hart again at the job site on August 1, and, as he says, Hart 'left no doubt in anybody's mind that he was going to have people to stop any men from working who tried.' 'He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. \* \* \*' (R. 1955)

\* \* \*

"\* \* \* According to the evidence of the plaintiff's witnesses, this was no peaceful labor dispute in which the agents of the defendants were merely attempting to organize or persuade a few unskilled laborers to join the union. On the contrary, there is ample evidence that it was the willful and avowed purpose of defendants' agents to prevent the plaintiff's employees from proceeding with their work unless these employees joined the United Construction Workers, one of the defendant unions, and that such purpose was evinced by words and conduct so violent and abusive as to put these employees in fear for their lives and safety. Yielding to these threats the plaintiff's employees refrained from continuing with their work, with the result that plaintiff's business relationship with its customers was disrupted and destroyed, to its considerable damage." (R. 1966-7)

From the foregoing statement of facts it is obvious that Laburnum's employees were "run off the job" and Laburnum was "run out of Kentucky."

In their brief Petitioners state repeatedly that Laburnum should have settled this matter by means of the "peaceful procedures" provided by the Labor Management Relations Act of 1947;<sup>4</sup> but if that Act was applicable, why did not Petitioners, who now insist that Laburnum should have used the peaceful procedures of the Act, utilize those procedures to establish themselves as the collective bargaining agency? A chief purpose of that Act is to establish procedures to determine questions of representation. The answer is plain. The purposes of Petitioners were not legitimate, and the argument of their counsel now is not legally sound. Petitioners' contention really is that the laws of the various states and of the United States are for everyone to obey and follow — except the United Mine Workers and its affiliates.

Petitioners stand before this Court convicted of having maliciously and wantonly organized a band of men, armed with guns and knives, with whom they set upon a smaller group of unarmed men in a remote and inaccessible place, and drove them and their employer from their work by actual and overwhelming threats of physical force upon the ground that certain territory was "United Mine Worker territory" where men cannot work unless they contract with or join the United Mine Workers.

Because Petitioners call themselves a "labor organization", they argue that the Federal government has freed them from all liability for actions which impose liability upon all others. According to Petitioners, all that can happen to them is a cease and desist order from the National

<sup>4</sup>Laburnum did no unpeaceful act. The implications in Petitioners' brief that Laburnum failed to use "peaceful procedures" are completely unwarranted.

Labor Relations Board directing them to refrain from similar actions hereafter.

If Petitioners are correct in their argument, people are at the mercy of the United Mine Workers of America and its affiliates in large areas of our country.<sup>5</sup>

To adopt the "goon" synonym of Petitioners in their brief, the proposition for decision here is whether the Congress of the United States has, in effect, licensed "goon squads" to maraud the countryside with practical immunity from sanctions applied to all other citizens.

Common sense dictates that no American legislative body ever could have approved any such proposition.

## SUMMARY OF ARGUMENT

### I.

The employees of Laburnum were coerced to join Petitioners and unite in Petitioners' activities. Assuming that Petitioners violated section 8 (b) (1) (A)<sup>6</sup> with respect to Laburnum's employees, the National Labor Relations Board (hereinafter called the Board) might have remedied in part the wrong done those employees.

But the present action was not brought to vindicate the rights of the employees nor to protect any public interest in such rights. That the employees may also have been wronged is incidental to the present action. The acts of Petitioners went far beyond the scope of section 8 (b) (1) (A).

The subject of this proceeding is not the wrong to the employees, but the right of a company to conduct its business

<sup>5</sup> To corroborate this statement read "The Reign of Terror at Widen, W. Va." in the February 20, 1954, issue of *The Saturday Evening Post*. (Appendix C)

<sup>6</sup> Section 8 (b) (1) (A) of the National Labor Relations Act. The National Labor Relations Act (hereinafter sometimes called the Act) is Section 101 of the Labor Management Relations Act of 1947.

in a peaceful manner free from violence and unlawful interference.

The Labor Management Relations Act of 1947 is not concerned with this right and therefore cannot be said to have eliminated it.

## II.

Even if Petitioners' acts were unfair labor practices within the intendment of section 8 (b) (1) (A) as to Laburnum's employees, they were not unfair labor practices as to Laburnum, the only plaintiff in this case. The rights of Laburnum are not within the intent or the language of the Act and the states are free to apply their own remedy for the damages caused by Petitioners. The acts of which Petitioners are guilty are unlawful in every state in the Union and the common law has always provided a remedy for such acts.

In the face of these undoubted and unassailable facts, Petitioners urge here that the Congress is presumed to have deprived the states of traditional authority over such activities by the mere passage of an act without manifestation of intent to do so.

The Act has no words expressing an intent to oust the traditional jurisdiction of the states. To the contrary, legislative history of the Act indicates an intent that the States shall retain jurisdiction over violent conduct.

There is no conflict between a state's remedy for a completed tort and the Board's prevention of future unfair labor practices and in the absence of conflict, the Court will not infer that a state's traditional jurisdiction has been impaired.

The presumptions of statutory interpretation favor affirmance of the judgment below. Not only is it presumed, under

the circumstances present here, that the Congress has not disturbed traditional state jurisdiction, it is also presumed that the Act has not derogated the common law. The latter presumption is especially operative here because it is, at least, doubtful that the Congress has the power to eliminate the common law right of remedy for tort. Particularly, this is so since the Congress did not even discuss such a result in connection with section 8 (b) (1) (A).

The choice of consequences also favors affirmance of the judgment below. Affirmance means that the peaceful and orderly procedures of the Board will more likely be followed. Reversal will sanction disregard of the procedures established for the purpose of resolving questions of representation of employees, and will encourage indulgence in the use of unlawful force.

This choice of consequences was recognized by this Court in the recent case of *Garner v. Teamsters Union*, 346 U. S. 485 (1953), which involved peaceful union activity. The Court was careful to distinguish that situation from a case of unlawful and tortious conduct when it stated (p. 448):

“Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes.”

*Laburnum* is the case of mass force, threatening of employees, and indeed torts of a larger and more shocking scope. It lies within the field of “historic powers” which the *Garner* case holds the several states exercise for the protection of their citizens.

All authorities support the retention of state jurisdiction over common law torts.

Thus, by all established criteria the judgment below should be affirmed.

## ARGUMENT

### I.

#### **The Wrong Under Review Is Not an Unfair Labor Practice Within the Meaning of Section 8 (b) (1) (A)**

Petitioners determined that Laburnum was either going to contract with them or they were going to drive Laburnum out of Kentucky. When Laburnum did not promptly contract with them, Petitioners organized a gang of men, led them to Laburnum's job site, and with a show of overwhelming force "shut down" the job, intimidated *all* Laburnum's employees and "ran" them off the job with the threat that if Laburnum did any more work Petitioners would be back with as many men as might be necessary to prevent further work. Thereafter Petitioners informed Laburnum that they would do the same thing if Laburnum tried to work anywhere else in their "territory." They succeeded in preventing Laburnum from doing any further work and Laburnum lost its contracts for work and was thereby damaged.

Laburnum brought this action in tort to recover compensatory and punitive damages. Petitioners pleaded not guilty and asserted that the substantive law of Kentucky governed the case. See grounds of Defense, Second Defense (R. 80) and Jury Instruction A, requested by Petitioners (R. 137). Petitioners also pleaded their right to picket and their right to assemble peacefully, and the jury was instructed so as to insure to Petitioners all their lawful rights (See Jury Instructions, Appendix B). The jury's verdict forecloses any argument that Petitioners acted peacefully.

Petitioners now contend that the wrongs they committed involved unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act and that such wrongs are

therefore remediable, if at all, only through the processes of the National Labor Relations Board.

Section 8 (b) (1) (A) provides that "it shall be an unfair labor practice for a labor organization or its agents \* \* \* to restrain or coerce \* \* \* *employees* in the exercise of the rights guaranteed in Section 7." The rights guaranteed in Section 7 are the rights to form or join a labor organization and to engage in concerted activities or to refrain therefrom. The National Labor Relations Board is empowered by Section 10 (a) of the Act "to *prevent* any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce."

Thus, Section 8 (b) (1) (A) proscribes only restraint and coercion of *employees* in the exercise of *their* rights and the Board is empowered *only* to *prevent* restraint and coercion of *employees*.

The present action was not brought to vindicate the right of *employees*, nor does it concern the right of *employees*. This action concerns only the right of an *employer* to do business free from violence and coercion. The action is for damages resulting to the *employer* because the *employer* was made to go out of business by physical force. That is simply a tort and an offense with which Section 8 (b) (1) (A) is not concerned.

There is no mention in the Labor Management Relations Act of 1947 of an employer's right to engage in business free from violence. There is no mention of the right of an employer to engage in his business free from threats, assault and battery, libel, slander, larceny and highway robbery. Plainly the Labor Management Relations Act of 1947 is not concerned with these matters, at least insofar as they affect persons who are *not employees*.

Here Petitioners, according to the evidence, by their own

fiat, have staked out territory in which they decide who, whether he be employer or employee, will do business or work, and who will not do business or work. They enforce their decisions by force of arms.

While some of the physical force was directed toward Laburnum's "employees", it was by no means limited to them, and it was intended to and did stop Laburnum.

On July 27, 1949, a message was delivered to C. M. Delinger, Laburnum's Construction Superintendent,<sup>7</sup> that if he "wanted to get out of Kentucky alive and in good health, to get the hell out of there before Sunday; not to go back in Breathitt County after Sunday" (R. 1029). Delinger left the job and Kentucky on Friday, the 28th, and has never been back (R. 1030-1031). Delinger had no rights under the Act.

Bryan was threatened on July 27, 1949, when he went to the job site (R. 851, 964). The testimony being (and it was never denied) that the "spotters" left there by Petitioners threatened:

"If you go to work, in an hour there will be a hundred men here and they will fish you out of that pond out there, and that damned squirt there with that straw hat on (Bryan) will be the first one to get in" (R. 851);

and again,

"If that fellow out yonder with the straw hat on (Bryan) and that big-bellied son-of-a-bitch (Delinger) comes out here he will be picked out of that pond here and he won't walk out." (R. 964)

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<sup>7</sup> The Act limits the meaning of employee as follows: "The term 'employee' shall not include . . . any individual employed as a Supervisor." (Sec. 2 (3)).

Hart, the union organizer who led the assault on Laburnum's job site, put the whole thing in a nutshell on July 26, 1949, the day of the assault, when he told Bryan :

"I bet you \$500 right now that you will never finish your job unless you use United Construction Workers men" (R. 561) ;

and,

"Nobody has ever been able to buck the United Mine Workers yet, and you can't do it, either." (R. 562)

Thus it appears that whatever may have been the underlying objective of Petitioners, they did in fact take the law into their own hands. And in doing so they went far beyond the confines of Section 8 (b) (1) (A) ; far beyond the limits of labor relations ; and deeply into the realm of gangsterism. What they did was far more than a violation of 8 (b) (1) (A).

With respect to Laburnum's employees Petitioners may technically have committed an unfair labor practice for which the National Labor Relations Board might have been able to afford some redress, but the wrong to the employees was only incidental to the larger wrong inflicted upon Laburnum. Had the threat to Delinger been carried out, would the Court hold that because the ultimate objective of Petitioners was to coerce Laburnum's employees, Delinger's widow could not recover damages? Or that the perpetrators could not be punished under state law? Obviously not.

The wrong for which Laburnum sought redress was not the incidental wrong to its employees. It was the larger wrong done to Laburnum by physically forcing it to stop doing business in Kentucky through acts directed not only against its "employees" but against all who worked for it.

## II.

**The Labor Management Relations Act of 1947 Does Not Preclude the Exercise of State Jurisdiction to Hear and Determine Issues in a Common Law Tort Action Involving Violence and Coercion.**

## A.

THE STATE WILL NOT BE DEPRIVED OF ITS TRADITIONAL JURISDICTION UNLESS THE INTENT OF CONGRESS IS CLEAR.

The question for decision, assuming the acts of Petitioners were unfair labor practices, is whether by the mere inclusion of Section 8 (b) (1) (A) in the National Labor Relations Act the Congress has ousted the states of traditional jurisdiction over torts.

It is already established by the decisions of this Court that the subject matter of this action lies well within the sphere of traditional state jurisdiction. The Court has said in *Allen-Bradley Local v. W. E. R. B.*, 315 U. S. 740, 749 (1940), in which violence was involved and in which the claim of preemption was made:

"We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several states in that regard."

*Allen-Bradley* was decided before Section 8 (b) (1) (A) was enacted, but the decision made it plain that acts of physical force and violence are traditionally the concern of the states. In that case the Court upheld an order of the Wisconsin Employment Relations Board directing a union to cease and desist from mass picketing and other similar practices. The Court said (p. 750-1):

"Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy. If the order of the state Board affected the status of the employees or if it caused a forfeiture of collective bargaining rights, a distinctly different question would arise. But since no such right is affected, we conclude that this case is not basically different from the common situation where a state takes steps to prevent breaches of the peace in connection with labor disputes. Since the state system of regulation, as construed and applied here, can be reconciled with the federal Act and since the two as focused in this case can consistently stand together, the order of the state Board must be sustained under the rule which has long obtained in this Court. See *Sinnot v. Davenport*, 22 How. (US) 227, 243, 16 L. ed. 243, 247.

"In sum, we cannot say that the mere enactment of the National Labor Relations Act without more excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal Act or that the status of any of them under the federal Act was impaired."

Thus, on the basis of *Allen-Bradley* it is plain that the National Labor Relations Act did not preclude state jurisdiction over tortious conduct before the enactment of Section 8 (b) (1) (A). Since the enactment of Section 8 (b) (1) (A) this Court has considered the matter of exclusion of states from the exercise of their traditional jurisdiction and has said the Congressional intent to do so must be clearly manifest.

Thus, in *International Union v. W. E. R. B.*, 336 U. S. 245 (1949), this Court said (p. 252):

"However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude states from exercising their police power must be clearly manifested.' "

That the Congress did not intend to oust the states of their traditional jurisdiction over tortious conduct by the enactment of Section 8 (b) (1) (A) is a fact plainly apparent from all applicable criteria of Congressional purpose.

1.

*The Labor Management Relations Act of 1947 Does Not in Terms Preclude the Exercise of State Jurisdiction*

There is no language in the Labor Management Relations Act of 1947 expressly stating that the states have been deprived of any jurisdiction whatsoever. It is true that the necessities of different situations have compelled the conclusion that in some areas state action is precluded. But such exclusion has always been by necessary inference or implication, never on the ground that the exclusion was express.<sup>8</sup> This point was expressly stated in *International Union v. W. E. R. B.*, 336 U. S. 245 (1949), at page 252:

"Congress has not seen fit in either of these Acts (Wagner and Labor Management Relations Act of 1947) to declare either a general policy or to state spe-

<sup>8</sup> Compare *Hill v. Florida*, 325 U. S. 538 (1945); *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767 (1947); *La Crosse Telephone Corp. v. W. E. R. B.*, 336 U. S. 18 (1949); *Plankinton Packing Co. v. W. E. R. B.*, 338 U. S. 953 (1950); *Auto Workers v. O'Brien*, 339 U. S. 454 (1950); *Amalgamated Ass'n v. W. E. R. B.*, 340 U. S. 383 (1951); *Garner v. Teamsters*, 346 U. S. 485 (1953).

cific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control."

Employees are given certain rights by Section 7 of the Act—namely the right to form, join or assist labor organizations, to bargain collectively and to engage in concerted activities, and the corollary right to refrain from so doing. Section 8 (b) (1) (A) provides merely that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the rights guaranteed them under Section 7. The Act establishes the National Labor Relations Board and in Section 10 (a) empowers the Board to *prevent* unfair labor practices.

Section 10 (a) provides:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

It is significant to note here that Section 10 (a) merely gives the National Labor Relations Board power to *prevent* unfair labor practices listed in Section 8. After appropriate findings of fact, the Board is directed to issue a cease and desist order (Section 10 (c)).

Significantly also the Act does not say that only the Board may adjudicate in situations which contain elements of unfair labor practices.

Thus, the Act does not expressly deprive states or state courts of their traditional jurisdiction over common law torts; and Petitioners admit this to be the fact (Brief 36).

## 2.

*The Legislative History of the Labor Management Relations Act of 1947 Reveals Congressional Intent to Preserve the Exercise of State Jurisdiction Over Common Law Torts.*

The legislative history of the Labor Management Relations Act of 1947 reveals no intent on the part of Congress to eliminate from state jurisdiction the field of torts and remedies for the commission of torts. To the contrary, the legislative purpose was plainly to supplement the law of torts in the states, *not* to eliminate it.

The Wagner Act (The original National Labor Relations Act) was passed in 1935. The statutory scheme of the Wagner Act for the prevention of unfair labor practices, was substantially that which obtains under the Labor Management Relations Act of 1947.<sup>9</sup>

The Wagner Act declared it to be the policy of the United States to encourage and foster organization of employees and collective bargaining in industries affecting interstate commerce. To that end the Wagner Act endowed employees with the right to form, join and assist labor organizations, and to engage in concerted activities (Section 7). To implement the right thereby granted that Act made unlawful (Section 8) certain activities of employers which were declared to be unfair labor practices.

One of five unfair labor practices was (Section 8 (1)) "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The Wagner Act then empowered the National Labor Relations Board (which it created) to prevent the unfair labor practices enumerated (Section 10 (a)).

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<sup>9</sup>As previously noted the National Labor Relations Act was re-enacted as a part of the Labor Management Relations Act of 1947.

Under the Wagner Act the prevention of unfair labor practices was exclusive. Thus Section 10 (a) provided:

"The Board is empowered \* \* \* to prevent any person from engaging in any unfair labor practice \* \* \* affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

The framers of Section 10 (a) of the Wagner Act were not thinking in terms of excluding state court proceedings, for the all sufficient reason that no state court had jurisdiction at common law of the employer "unfair labor practices" which constituted the only type of conduct outlawed in that Act. The employer conduct proscribed by the Wagner Act was perfectly valid under the common law. Thus the Court said in *Agwalines, Inc. v. N. L. R. B.*, 87 F. (2d) 146, 150 (CCA 5th, 1936):

"The prohibitions against interference by employers with self-organization of employees were not only unknown, they were obnoxious to the common law."

Under the Wagner Act, labor organizations were free to commit against employees the very conduct which was proscribed as "unfair" and unlawful for employers. Since such activities were for the most part perfectly lawful under the laws of the states, there was no recourse against the labor organization which indulged in them.

The labor organizations abused the advantages which they enjoyed, or at least the Congress so thought. 93 Cong. Rec. 3950, *et seq.*, Leg. Hist. 1005, *et seq.*, and consequently Congress turned its attention to these matters in 1947, and passed the Labor Management Relations Act of 1947, which

included the National Labor Relations Act with amendments.

The right of employees to organize and engage in concerted activities which had been bestowed by Section 7 of the Wagner Act was retained intact in Section 7 of the present National Labor Relations Act, but the corollary right not to organize, not to join and not to engage in concerted activities was added. Section 8 of the Wagner Act declaring five employer unfair labor practices was retained, but was redesignated Section 8 (a), and Section 8 (b) was added, declaring similar practices by labor organizations to be unfair labor practices. Thus, under the present National Labor Relations Act, Section 8 (b) (1) (A), it is an unfair labor practice for unions to restrain or coerce employees in their rights granted under Section 7. [This is the unfair labor practice which Petitioners now claim they committed.] The Board was retained under the present Act and so was Section 10 (a), but from it the words "this power shall be exclusive" were deleted.

The legislative history of the Labor Management Relations Act of 1947 demonstrates that by the addition of Section 8 (b) (1) (A) Congress did not intend to preclude state actions in those cases in which the coercion was unlawful under state law. To the contrary, it is plain that Congress sought to outlaw those coercive acts which were not unlawful in the States.

The Senate Committee on Labor and Public Welfare held hearings on the general subject of labor legislation from January 23 to March 8, 1947. On March 6, 1947, Paul M. Herzog, who was then Chairman of the National Labor Relations Board, testified before the Committee with respect to proposed amendments to the National Labor Relations Act. His testimony included the following:

"Interference and Coercion by Unions. Section 5 (a) of S. 360 would amend Section 8 of the National Labor Relations Act to make it an unfair labor practice for a labor organization or its agents to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act. \* \* \*

"The proposal is not a new one. It has been advanced in varying forms in the past, and the Board has on a number of occasions expressed its views to the Congress.

"The most frequent argument made for the proposal is that it is necessary in order to provide 'equal treatment' of employers and labor unions. As a matter of logic, this would not operate as a truly 'equalizing' amendment in practice. It makes unions and their agents liable twice for the same offense, once under State and once under Federal law. Employers run no such double risk for interfering with their employees' rights. True 'equality' would require that improper conduct by unions and their leaders, now already subject to local criminal law and penalties, should hereafter result only in 'cease and desist' orders by the Board as do employer unfair labor practices. *This is an equalization that no one has suggested and which we certainly do not urge.*" (Emphasis added)

The Senate Committee on Labor and Public Welfare voted 7 to 6 not to include in the bill, later introduced, the provisions of Section 8 (b) (1) (A). The bill which came from the Committee was S. 1126. It was introduced by Mr. Taft in the Senate on April 17, 1947. 93 Cong. Rec. 3753, Leg. Hist. 1000. On the same day Mr. Taft submitted to the Senate Report No. 105, 93 Cong. Rec. 1000, Leg. Hist. 1000.

Report No. 105 contained the supplemental views of Senators Taft, Ball, Donnell, Jenner and Smith, members of the Senate Committee on Labor and Public Welfare, in expla-

nation of an amendment which is now Section 8 (b) (1) (A). Report No. 105 is in part as follows:

"An amendment to make it an unfair labor practice for employees or unions to 'interfere with, or coerce, employees in the exercise of the rights guaranteed in section 7' of the National Labor Relations Act. It is now an unfair labor practice for employers to so interfere with, restrain, or coerce. Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. *Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act.* We believe that the freedom of the individual workman should be protected from duress by the union as well as from duress by the employer. The text of this amendment follows: On page 14, line 6, after the word 'coerce,' insert the following: '(A) employees in the exercise of the rights guaranteed in section 7; or (B)' " (Emphasis added) Leg. Hist. 456.

The Amendment which is now Section 8 (b) (1) (A) was introduced by Senator Ball on April 25, 1947, 93 Cong. Rec. 4136, Leg. Hist. 1018. Mr. Ball then spoke in behalf of his amendment and stated:

"The purpose of the amendment is simply to provide that where unions, in their organizational campaigns, indulge in practices which, if an employer indulged in

them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices" 93 Cong. Rec. 4136, Leg. Hist. 1018.

After citing several cases Senator Ball continued :

"In all those cases if an employer had made such statements during an organization or preelection campaign, the National Labor Relations Board would have held the employer guilty of unfair practices on the ground that he was coercing employees in their free choice of a bargaining agent.

"The common practice in organization campaigns is for the business agent to threaten all employees and tell them that if they do not join the union before the election, or vote for it, they will be charged double initiation fees afterward. That is done in a great many cases. It is clearly an attempt to coerce and threaten employees in the exercise of the freedoms guaranteed by the Act. *However, such practices do not fall within the purview of State laws against violence and that sort of thing.*" (Emphasis added) 93 Cong. Rec. 4137, Leg. Hist. 1019.

Senator Ball concluded :

"I think that the adoption of the amendment offered by me, which is identical with the provision applying to employers who interfere with the freedom of employees in organizing, is essential to equalize the rights and responsibilities of both employers and unions in this field, to really assure to employees the freedom supposedly guaranteed in Section 7 of the National Labor Relations Act. \* \* \*" 93 Cong. Rec. 4138, Leg. Hist. 1021.

Senator Ives of New York, in argument *against* the Amendment then stated :

"Moreover, assuming that these proscribed acts involve violence and physical coercion, the provision is unnecessary, because offenses of this type are punishable under State and local police law. *In fact, the enactment of this provision would make unions and their agents liable twice for the same offense, once under State and once under Federal law.* Employers run no such risk for interfering with their employees' rights." (Emphasis added) 93 Cong. Rec. 4140, Leg. Hist. 1021.

In the debate which followed Senator Taft said in support of the amendment :

"Many cases were referred to by the Senator from Minnesota [Mr. Ball] in which it was found that in the election the employer had made threats of one kind or another against employees in order to dissuade them from voting for a particular union and the election was invalidated. But if a union makes threats against such employees, or issues defamatory statements misrepresenting the facts, that is not an unfair labor practice, and in no way invalidates the election." 93 Cong. Rec. 4142, Leg. Hist. 1026.

Senator Taft stated further :

"There is no law of any State providing that a man cannot threaten another man that if he does not join a union he may lose his job, or that something may happen to him other than actual physical violence. There are plenty of methods of coercion short of actual physical violence. So that in this section there is no duplication whatever. *But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state.* Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as

employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to state law, and they are also subject to be proceeded against for violating the National Labor Relations Act. *There is no reason in the world why there should not be two remedies for an act of that kind.*" (Emphasis added) 93 Cong. Rec. 4145, Leg. Hist. 1031.

The Amendment was adopted by the Senate on May 2, 1947. 93 Cong. Rec. 4568, Leg. Hist. 1217.

The House of Representatives also considered labor legislation in 1947, and on April 10, 1947, Mr. Hartley introduced H. R. 3020. 93 Cong. Rec. 3400, Leg. Hist. 591. On April 11, 1947, the House Committee on Education and Labor reported on the bill (House Report No. 245, Leg. Hist. 292) as follows:

#### "Equal Responsibility Before the Law

When employers violate rights that the Labor Act gives to employees or to unions, the Board can issue orders against them. *When employers violate rights of employees or of unions under other laws, they must answer in court for what they do.* Under the bill, when unions and their members violate rights given to employers and to employees, the new Board can issue orders protecting the employers and the employees. \* \* \* *For all these acts and others like them, unions and their members will be equally responsible with other persons under law.*" (Emphasis added) Leg. Hist. 299.

H. R. 3020 was quite different from S. 1126. H. R. 3020 was passed by the House of Representatives on April 17, 1947. 93 Cong. Rec. 3694-3748, Leg. Hist. 769-863. On May 13, 1947, the Senate substituted the language of S. 1126

*for the language of H. R. 3020 and then passed H. R. 3020.* 93 Cong. Rec. 5298, Leg. Hist. 1522. Committees from the House and Senate met in joint conference May 15-29th. The Conference Report (H. Rept. No. 510), Leg. Hist. 505, adopted the Senate version of Section 8 (b) (1). That report states:

"Under the new section 8 (b) of the Senate amendment, the following unfair labor practices on the part of labor organizations and their agents were defined:

(1) To restrain or coerce employees in the exercise of rights guaranteed in section 7, or to restrain or coerce an employer in the selection of his representatives for collective bargaining or the adjustment of grievances. This provision of the Senate amendment in its general terms covered all of the activities which were proscribed in section 12 (a) (1) of the House bill as unlawful concerted activities and some of the activities which were proscribed in the other paragraphs of section 12 (a). While these restraining and coercive activities did not have the same treatment under the Senate amendment as under the corresponding provisions of the House bill, participation in them, as explained in the discussion of section 7, is not a protected activity under the act. Under the House bill, these activities could be enjoined upon suit by a private employer, specific provision was made for suits for damages on the part of any person injured thereby, and employees participating therein were subject to deprivation of their rights under the act. The conference agreement, while adopting section 8 (b) (1) of the Senate amendment, does not by specific terms contain any of these sanctions, but an employee who is discharged for participating in them will not, as explained in the discussion of section 7, be entitled to reinstatement. *Furthermore, since in section 302 (b), unions are made suable, unions that engage in these practices to the injury of another may subject themselves to lia-*

*bility under ordinary principles of law."* (Emphasis added) (Leg. Hist. 546)

\* \* \*

"(1) The House bill omitted from section 10 (a) of the existing law the language providing that the Board's power to deal with unfair labor practices should not be affected by other means of adjustment or prevention, but it retained the language of the present act which makes the Board's jurisdiction exclusive. The Senate amendment, because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. *By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.*" (Emphasis added) (Leg. Hist. 556)

The House adopted the Conference Report on June 4, 1947. 93 Cong. Rec. 6549, Leg. Hist. 899.

The Senate adopted the Conference Report on June 6, 1947. 93 Cong. Rec. 6695, Leg. Hist. 1620.

The foregoing legislative history of the Labor Management Relations Act of 1947 demonstrates that Congress did not intend by the enactment of Section 8 (b) (1) (A) to interfere with the states in the control and remedy of acts of physical force and violence. To the contrary, the intent expressed was that there was no reason why such acts should not be subject to more than one remedy.

Section 8 (b) (1) (A) was intended, as the sponsors of it clearly stated, primarily to insure that representation elections would be free from coercive tactics. It was plainly not intended as a substitute for common law torts.

To sum it all up conservatively — the legislative history of the Act reveals that Congress intended to preserve the exercise of state jurisdiction over common law torts.

### 3.

#### *Other Extrinsic Evidentiary Factors Do Not Indicate an Intent to Preclude the Exercise of State Jurisdiction Over Torts.*

Where the purpose of Congress was not clear from the language of the Act or from its legislative history, this Court has considered other evidentiary factors in determining whether Congress intended to foreclose action by the States. While the legislative history of Section 8 (b) (1) (A) is dispositive of the issue here, it is also true that all other factors support the view that Congress did not intend to eliminate actions in state courts for common law torts.

In determining the effect of the Federal Warehouse Act on State jurisdiction in *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), the Court reviewed and summarized at page 230 the evidentiary factors to be considered in testing for Congressional purpose to proscribe state jurisdictions as follows:

“Congress legislated here in a field which the States have traditionally occupied. \* \* \* So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*,

315 U. S. 740, 749. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n.*, 250 U. S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U. S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U. S. 597; *New York Central R. Co. v. Winfield*, 244 U. S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U. S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend v. Yecomans*, 301 U. S. 441; *Kelly v. Washington*, 302 U. S. 1; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177; *Union Brokerage Co. v. Jensen*, 322 U. S. 202."

The previous decisions of this Court have established that the Federal scheme of regulation is not so pervasive as to reasonably infer that Congress left no room for the States. *Allen-Bradley Local v. W. E. R. B.*, 315 U. S. 740 (1940); *International Union v. W. E. R. B.*, 336 U. S. 245 (1949); *Algoma Plywood Co. v. W. E. R. B.*, 336 U. S. 312 (1949). The Court has reaffirmed this fact in its latest decision, *Garner v. Teamsters*, 346 U. S. 485 (1953), stating (p. 488):

"The National Labor Relations Act, as we have pointed out, leaves much to the States, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

This case does not lie in a field where the Federal interest is dominant, such as the field of Alien Registration involved in *Hines v. Davidowitz*, 312 U. S. 52 (1940). Here the case lies within a field which is reserved to the States in the Federal Constitution and the control of which is necessary for the existence of State governments.

Recognition of the fact that there is no evidence of Congressional intent to exclude State action is implicit in the prior decisions of this Court. All of them have turned upon a finding of conflict between Federal and State actions.

In *Hill v. Florida*, 325 U. S. 538 (1945), the court found that the Florida Statute requiring union agents to secure a state license conflicted with the Federal Act. The Court said (p. 543):

"Our holding is that the National Labor Relations Act and §§ 4 and 6 of the Florida Act as here applied cannot 'move freely within the orbits of their respective purposes without impinging upon one another.' "

In *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767 (1947), the court found that action by the State Labor Relations Board conflicted with action by the National Labor Relations Board. The court said (p. 775):

"Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bar-

gaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past."

In *La Crosse Telephone Corp. v. W. E. R. B.*, 336 U. S. 18 (1949), the court struck down the certification of a union by the Wisconsin Labor Relations Board and followed its decision in the *Bethlehem* case, saying (p. 25): "We thought the situation too fraught with potential conflict to permit the intrusion by the State."

In *Plankinton Packing Co. v. W. E. R. B.*, 338 U. S. 953 (1950), the Supreme Court in a *per curiam* decision citing the *Bethlehem* and *La Crosse* cases, held invalid an order of the Wisconsin Board which found the Company and the Union had interfered with an employee in his right not to engage in union activity.

In *Auto Workers v. O'Brien*, 339 U. S. 454 (1950), the court struck down a Michigan statute which required a strike-vote conducted by the state before a strike could be called. The Federal Act safeguards the right to strike and the court said (p. 458):

"Without question, the Michigan provision conflicts with the exercise of federally protected labor rights. A State statute so at war with federal law cannot survive."

In *Amalgamated Ass'n v. W. E. R. B.*, 340 U. S. 383 (1951), the court struck down the Wisconsin Statute forbidding strikes and requiring arbitration in public utilities. The court said (p. 394):

"And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emer-

gencies, however serious, it is manifest that the state legislation is in conflict with federal law."

The Court has upheld the right of the States to act in the field of labor relations when no conflict was found. *Allen-Bradley Local v. W. E. R. B.*, 315 U. S. 740 (1940); *International Union v. W. E. R. B.*, 336 U. S. 245 (1949); *Algoma Plywood Co. v. W. E. R. B.*, 336 U. S. 312 (1949).

## B.

### REDRESS IN DAMAGES FOR TORTIOUS CONDUCT DOES NOT CONFLICT WITH FEDERAL LABOR POLICY

The judgment below does not deprive Petitioners of any right guaranteed to or conferred upon them by the Labor Management Relations Act of 1947. It would be absurd even to suggest that Congress intended to give any protection whatsoever to the use of force and violence.

Thus, the conflict, if any, must lie between remedies.

The decision in this case concerns not an unfair labor practice, but a completed common law tort. The remedy for such a tort is an action for damages. The National Labor Relations Board is not concerned with damages for completed torts. The National Labor Relations Board is empowered to *prevent* future unfair labor practices, *not to adjudicate* damages caused by past activities.

If the activity of Petitioners constituted an unfair labor practice, then the Board, interested only in preventing future occurrences, could only have issued its cease and desist order. The Board is not concerned, nor are its processes hampered by the fact that the guilty Petitioners are also required by a state court, acting under state law, to pay damages to the

party injured by their wrongs. Plainly in such case there is no conflict.

On the other hand, if the activity of Petitioners was not an unfair labor practice, then the Board is not concerned, and the activity lies in a field where if not "governable by the State \* \* \* it is entirely ungoverned." In such circumstances, this court has held the state may act. *International Union v. W. E. R. B.*, 336 U. S. 245 (1949).

The result in this case does not conflict in any way with Federal Policy as pronounced in the Labor Management Relations Act of 1947. This conclusion is supported by the fact that the conduct of Petitioners would be not only a tort, but also a crime in many states; and as this Court has said, "no one questions the State's power to police coercion \* \* \*". *International Union v. W. E. R. B.*, 336 U. S. 245 (1949), at page 252.

Petitioners also agree (Brief 43-44) they may be prosecuted criminally under state jurisdiction for the acts they have committed.

Everyone agrees, therefore, at least in the criminal aspect, that States have jurisdiction to police violent activities, and that such policing does not conflict with the Federal labor policy. If that be so, it follows that no conflict results if the guilty Petitioners be required to pay damages for their unlawful acts. There is no greater conflict with the Federal policy when one is required to pay damages than when one guilty of an unfair labor practice, is required to serve a term in the state penitentiary.

Petitioners in their brief assert a right to have their rights considered by an administrative agency skilled in labor relations matters. The judgment of the court below has not denied Petitioners the right to avail themselves of the remedies and procedures afforded by the Act. Petitioners them-

selves chose not to exercise that right even though a chief purpose of the Act is to provide machinery for establishing a collective bargaining agent. See Statement of Policy, and Section 9. Petitioners refused to utilize that procedure and elected to use force and violence instead.

Clearly there is no such repugnancy between the common law tort remedy provided by the state and the Federal labor policy as would require the emasculation of traditional state jurisdiction in the situation presented here.

### C.

#### OTHER PRESUMPTIONS OF STATUTORY INTERPRETATION FAVOR THE RETENTION OF COMMON LAW JURISDICTION BY THE STATES.

"Statutes which invade the common law \* \* \* are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."<sup>10</sup>

Petitioners ask not only that the Labor Management Relations Act of 1947 be construed in derogation of common law, but that long established common law be eradicated, with no substituted remedy afforded.

In other words, if Petitioners are correct in their contention, there is the following result:

1. The aggrieved party cannot bring a common law tort action in a State Court to recover damages for a tort arising out of conduct involving an unfair labor practice, the state court having been deprived of its jurisdiction.
2. The aggrieved party cannot recover damages in a

<sup>10</sup> *Isbrandtsen Co. v. Johnson*, 343 U. S. 779 (1952) at page 793.

proceeding before the National Labor Relations Board, no provision for a money damage award having been made by the Act.

3. The aggrieved party will have no place in which to bring an action to recover damages for a tort arising out of conduct involving an unfair labor practice.

Any action on the part of Congress producing such a result would be repugnant to and in violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides, in part, as follows:

“ \* \* \* ; nor shall any person be deprived of life, liberty or property, without due process of law ; \* \* \* .”

The Constitution contains no description of what processes shall or shall not be considered “due process of law.” It is manifest, however, that it was not left to the legislative power to enact any process which might be devised. In other words, the phrase, “due process of law” has been held to be a restraint on the legislative as well as the executive and judicial powers of the Government and cannot be so construed as to leave Congress free to make any process “due process of law”, by its mere will.

A right of action to recover damages for an injury is “property” which neither Congress nor a legislature has power to destroy. 12 *Am. Jur.*, Const. Law, Section 661; 16 *C. J. S.*, Const. Law, Section 599, P. 1196.

In *Angle v. Chicago & St. Paul, etc. Railway*, 151 U. S. 1 (1893), the Court used the following language at page 19:

“A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public ex-

acts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

Of course, a person has no property right, in a constitutional sense, in any particular form of remedy so long as there is preserved for his benefit a substantial right to redress by some effective procedure. *Gibbes v. Zimmerman*, 290 U. S. 326 (1933).

If it be correct that Congress has deprived a State Court of its jurisdiction over a common law tort action for damages arising out of an unfair labor practice without providing an aggrieved party with another substantial right to redress, then such action of Congress was and is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States and, therefore, is void. *Marbury v. Madison*, 1 Cranch 137 (1803); *Bank of Columbia v. Okely*, 4 Wheat 235 (1819); *Den v. The Hoboken Land and Improvement Company*, 18 How. 272 (1855); *Dred Scott v. Sandford*, 19 How. 393 (1856); *Munn v. Illinois*, 4 Otto 113 (1876); *Hurtado v. California*, 110 U. S. 516 (1884); *Eastman v. County of Clackamas*, 32 Fed. 24 (1887); *North Carolina v. Vanderford*, 35 Fed. 282 (1888); *Robertson v. Baldwin*, 165 U. S. 275 (1897); *In Re Opinion of Justices*, 211 Mass. 618, 98 N. E. 337 (1912); *Ludwig v. Johnson*, 243 Ky. 533, 49 S. W. (2d) 347 (1932); *Scriven County v. Brier Creek Hunting & Fishing Club*, 202 F. (2d) 369 (1953).

However, the Court will not reach this question because under settled rules of construction the court will adopt the construction of an act which is free of constitutional difficulties. This is particularly true in this instance because the legislative history of the Act reveals that the Congress did not even consider the result for which the Petitioners contend.

## D.

ALL AUTHORITIES SUPPORT THE RETENTION OF  
STATE JURISDICTION OVER TORTS

## 1.

*The Commentators Support State Jurisdiction*

The Court will recall that it has been the policy of the Board to appear in recent cases before this Court and, whenever possible, argue in favor of the exclusiveness of the Board's jurisdiction. Mozart G. Ratner, formerly Assistant General Counsel of the National Labor Relations Board, was charged with that duty. However, even Mr. Ratner did not argue that the Act set at naught the generally applicable law of the states. He wrote, 3 Labor Law Journal 761-2:

"This is not to say that every aspect of conduct reachable by the National Board because it occurs in a labor relations context is necessarily removed from State control. The Act is a labor relations measure; its function and purpose are to define the rights of the parties in collective bargaining and labor disputes. Conduct which offends the Act's standards because it infringes rights which Congress desired to protect may at the same time independently offend general standards of conduct applied by the States regardless of the context in which it occurs.

"The most familiar example of this is the use of violence by a labor organization to prevent nonstrikers from crossing its picket line. When the Taft-Hartley Act was being debated it was urged by some that acts of violence of this character should not be dealt with at all by the Federal Act, but should be left entirely to the States to police (93 Cong. Rec. 4019, 4021, 4024, 4428). Recognizing that acts of violence and coercion, as such,

were and should remain independently unlawful under State law, Congress nevertheless decided that when violence and other coercive conduct by labor organizations infringed the self-organizational rights of employees, it should be treated as an unfair labor practice under the Federal Act (Senate Report No. 105, Supplemental views of Senators Taft, Ball, Donnell, and Jenner, 80th Cong., 1st Sess., p. 50; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42). Consequently, although Section 8 (b) (1) (A) authorizes the Board to enjoin picket line violence on the ground that it interferes with the right of employees to refrain from participating in concerted activity, the States remain free to prohibit and to punish such conduct in the interest of preserving the peace. See, e. g., *Erwin Mills, Inc. v. Textile Workers Union*, 234 N. C. 321, 67 S. E. 2d 372. Since the basis of the State's action is not grounded in labor relations policy and the rights it protects are not the rights protected by the National Act, there is no duplication of Federal policy or protection. For the same reason the States remain free to punish on traditional non-labor-relations grounds acts of violence and coercion by individual employees, who, unless they are acting as agents of a union, are immune from the ban imposed by Section 8 (b) (1) (A). It should be noted, moreover, that this is not a one-way street. Thus, although an employer's assault upon a union organizer may amount to 'interference' within the prohibition of Section 8 (a) (1) of the National Act, the States retain jurisdiction to punish such an assault as a police court matter."

In a law review article, Cox and Seidman, *Federalism and Labor Relations*, 64 Harvard Law Review 211 (December, 1950), "arguing for a large area of exclusive federal authority in order to permit the development of a unified labor relations program", the authors state (at page 236) :

"In *Allen Bradley Local 1111 v. Wisconsin Employment Relations Bd.* the Supreme Court held that the original Wagner Act did not restrict the power of a state to deal with mass picketing and violence in connection with a labor dispute. The Taft-Hartley Amendments gave the N. L. R. B. jurisdiction over such misconduct whenever it was directed against individual employees and affected interstate commerce. The amendment should not prevent a state from asserting its former power to deal with breaches of the peace and destruction of property. Mass picketing, assault and battery, intimidation and similar misconduct are unlawful regardless of whether there is a labor dispute. Congressional regulation as part of a labor program can scarcely be taken to show that Congress meant to render the states powerless to deal with offences against public order which are forbidden under laws of general application. Nor is such misconduct a concerted activity protected by Section 7."

## 2.

*The Decided Cases Hold That the States Retain  
Jurisdiction Over Common Law Torts*

In cases involving common law tort actions in which it has been claimed that such actions were superseded by the Federal Labor policy, the jurisdiction of the State has been sustained.

Thus in *Barile v. Fisher*, 197 Misc. 493, 94 N. Y. S. (2d) 346 (Sup. Ct. 1949), the Court held, page 350:

"The defendant moved to dismiss the complaint upon the ground that it was insufficient upon its face and also upon the ground that the court had no jurisdiction of the subject matter of the action. The second ground urged for dismissal may be readily disposed of. Of course, this court has no jurisdiction to entertain pro-

ceedings to remedy alleged unfair labor practices under the National Labor Relations Act. Exclusive jurisdiction with respect to such matters is vested in the National Labor Relations Board. However, the complaint is not based upon alleged violations of the Federal Statute, but is based upon common-law tort principles. The fact that the grievance complained of in a common-law tort action may also constitute an unfair labor practice under the Federal Statute does not deprive the state courts of jurisdiction over the common-law tort action. The motion for dismissal for lack of jurisdiction is therefore denied."

In *Kuzma v. Millinery Workers Union Local No. 24*, 27 N. J. Super. 579, 99 A. (2d) 833 (1953), appellants, Kuzma and his wife, brought action against the defendant labor union and individual members thereof, charging that defendants had contrived to obtain the wife's discharge from her employment because she refused to contribute toward a gift to a union official.

The defendants moved for dismissal upon the ground that the cause of action pleaded constituted an unfair labor practice under the National Labor Relations Act, and was therefore reparable exclusively before the National Labor Relations Board, but the court said (pp. 837-840):

"It is a commonplace of constitutional law that the Federal Government has control over interstate commerce. If a Congressional enactment, either expressly or by necessary implication, occupies and preempts a particular field of commerce, state control thereof terminates. And this doctrine is applicable to the labor relations of employers whose operations are in commerce to the requisite degree.

\* \* \*

"The notion that the traditional jurisdiction of the state court to enforce a common-law tort liability has

been removed by this federal enactment because the conduct constitutes an unfair labor practice as well is as startling as it is novel. There certainly is no express declaration of Congress of such supersedure. And in the absence thereof, plainly the State should not yield its sovereignty unless the intention to preempt and occupy the field is an inescapable conclusion from the language employed. This approach is not a mere chauvinistic desire for the perpetuation of state control but rather a recognition of a principle long since established by the United States Supreme Court. (Cases cited)

\* \* \*

"All of these considerations lead us to the conclusion that there is no such repugnancy between the remedy provided by the Labor Act where an employee has been subjected to unfair labor practice by a labor union, and his common law remedy as would manifest a Congressional intention to emasculate the jurisdiction of the state courts."

*Russell v. International Union*, ..... Ala. ...., 64 So. (2d) 384 (1953), reaches the same result.

Thus, the decisional authority holds that the Federal labor policy does not abolish state jurisdiction over common law torts.<sup>11</sup>

<sup>11</sup> At least 32 states have statutes of general application protecting the right to work from coercive interference: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin. The states also have consistently enjoined the use of unlawful means in connection with labor disputes. *United Mineral & Chemical Corp. v. Katz*, 33 L. R. R. M. 2453 (U. S. D. C. E. D. N. Y. 1954); *Lodge Mfg. Co. v. Gilbert*, ..... Tenn. ...., 260 S. W. (2d) 154 (1953); *Erwin Mills v. TWUA*, 235 N. C. 107, 68 S. E. (2d) 813 (1952); *Art Steel Co. v. Velasquez*, 280 App. Div. 76, 111

## E.

CHOICE OF CONSEQUENCES FAVORS THE  
DECISION BELOW

A choice of consequences favors affirmance of the judgment of the Supreme Court of Appeals of Virginia. The resulting consequences will not be at all as Petitioners urge in their brief.

If the State's jurisdiction is denied in this case, it will mean that the Mine Workers are at liberty to ignore the procedures of the Board and to employ force (as they did against Laburnum) to accomplish their end. On the other hand, if the State's jurisdiction be sustained, the decision will be a deterrent to the use of force and an incentive to use of the peaceful procedures provided by the Act.

The Board has peaceful procedures for the determination of questions of representation, and it also has peaceful procedures by which recognition of a chosen representative can be effected.

Affirmance of the judgment below will not lead to litigation against unions, because unions will be fully protected if they follow the procedures provided by the Act and no action at law will lie against them.

---

N. Y. S. (2d) 198 (1952); *Williams v. Cedartown Textiles, Inc.*, 208 Ga. 659, 68 S. E. (2d) 705 (1952); *Wortex Mills, Inc. v. Textile Workers Union*, 369 Pa. 359, 85 A. (2d) 851 (1952); *International Moulders v. Texas Foundries*, 241 S. W. (2d) 213 (Tex. Civ. Apps. 1951); *Grist v. Textile Workers Union*, .... R. I. ...., 82 A. (2d) 402 (1951); *Missouri v. Thatch*, 361 Mo. 190, 234 S. W. (2d) 1 (1950); *Rice & Holman v. United Electrical Radio & Machine Workers*, 3 N. J. S. 288, 65 A. (2d) 638 (1949); *Southern Bus Lines, Inc. v. Amalgamated Ass'n.*, 205 Miss. 354, 38 So. (2d) 765 (1949). A decision against state jurisdiction here would largely nullify all of the state statutes and would overrule all of the foregoing decisions.

## CONCLUSION

Petitioners are asking that this Court relieve them of the responsibility, which is justly theirs, for acts of force.

This Court has never indicated approval of acts such as those committed by Petitioners. Nor has this Court ever indicated an intention to alleviate the consequences of such acts.

This case is the converse of *Garner*. It is the case which this Court said *Garner* was not. Thus, in *Garner* it was said:

"The National Labor Management Relations Act, as we have before pointed out, leaves much to the States, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

"This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union v. Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749. Nothing suggests that the activity enjoined threatened a probable breach of the state's peace or would call for extraordinary police measures by state or city authority. Nor is there any suggestion that petitioners' plea of federal jurisdiction and preemption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked."

It follows that the jurisdiction of the State Court should be sustained and the judgment of the Supreme Court of Appeals of Virginia affirmed.

Respectfully submitted,

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**APPENDIX**

BLEED THROUGH

BLURRED COPY

## App. 1

### Appendix A

The provisions, pertinent here of the Labor Management Relations Act of 1947, Public 101, 80th Congress, H. R. 3020, are:

#### "An Act

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, *to equalize legal responsibilities* of labor organizations and employers and for other purposes. \* \* \*

"Title I — Amendment of National Labor Relations Act.

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

#### Findings and Policies

\* \* \*

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. *The elimination of such practices* is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States *to eliminate* the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining \* \* \*.

\* \* \*

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Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

"Sec. 8. \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 \* \* \*.

Sec. 9(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has

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reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise

\* \* \*

**Appendix B**

Petitioner's instructions to the jury guaranteed all their rights (R. 137-141):

**INSTRUCTION "A"**

The jury is instructed that:

Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this case.

**INSTRUCTION "C"**

The jury is instructed that:

The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character.

INSTRUCTION "D"

The jury is instructed that :

In Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce plaintiff to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellow-men, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for the legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends, that is, use persuasive powers in a peaceful way.

INSTRUCTION "E"

The jury is instructed that :

If you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a

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peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for the defendants.

INSTRUCTION "F-1"

The jury is instructed that :

Under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe that the plaintiff restrained or coerced such employees in the exercise of these rights, then the plaintiff acted unlawfully.

INSTRUCTION "O-2"

The jury is instructed that :

If you believe from the evidence in this case that none of the defendants, or any of their respective agents acting within the scope of their authority, have acted wantonly, recklessly, or oppressively or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

INSTRUCTION "P"

The jury is instructed that :

If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants.

Appendix C  
**THE REIGN OF TERROR  
AT WIDEN, W. VA.\***

**By Craig Thompson**

*This once-peaceful little town is not in some war-ravaged, jungle-law country — it's right in the U. S. A. But ever since John L. Lewis' "organizers" moved in, the people walk in fear, while dynamiters, arsonists and thugs go unpunished for their crimes.*

Widen, West Virginia, is a coal camp that sprawls over the bottom of a hollow among the hills some sixty miles northeast of Charleston, the state capital. With its tipple, wash house, shops, railroad yard and "gob" piles, it is first and foremost a colliery. With its school, post office, bank, store, movie, medical dispensary, Y.M.C.A., baseball park and 310 dwellings, it is also a town, inhabited by 1274 persons, some of whom have raised children and grandchildren here. It is a company town, owned from tipple to barbershop by the Elk River Coal and Lumber Company, a private firm.

In this remote spot an outbreak of "labor trouble" occurred in September of 1952, and a picket line was stretched across the only automobile road into Widen. There it remained until Christmas Eve of 1953, when the pickets, conceding their cause to be hopeless, withdrew. During these fifteen months the company and people, at least in theory, continued to be as much entitled to governmental protection of their lives, property and civil rights as are the citizens of any community at all times. But, in fact, they lived in a reign of terror, and at times in a state of siege, instigated by a band of men who sought to force them to sign up with the United Mine Workers of America, whether they wanted to or not.

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It was abundantly plain that a majority did not want to, and never had.

In this "strike," as UMW officials called it, three railroad bridges, two electric-power substations and one high-tension tower were destroyed by dynamite; nine houses or barns burned; a train stopped, its passengers removed at gun point and one beaten severely; another train fired on, with bullets and slugs pinging against a coach that contained a dozen passengers, including women and children; and twenty-nine automobiles belonging to individual citizens overturned, shot up, dynamited or "rocked" with fist-sized stones flung by strong arms at short range. The climax was an ambush involving some twenty shotguns and rifles fired from darkness upon a motorcade on a public road, killing one man and wounding three.

In the case of the killing, the West Virginia state police acted vigorously and promptly. But all the other acts of violence were approached, by the same police, with attitudes that ranged from marked sluggishness to downright indifference.

The reason for this indifference is traceable beyond individual troopers and their officers, to the political convictions and obligations of Democratic Governor Okey L. Patteson and his successor, William C. Marland, who for the most part, has inherited the necessity of trying to defend a situation that developed under his predecessor. Ultimately, however, the explanation comes to rest more on a fact than on any individual. The fact is that, politically speaking, the state's most powerful figure is John Llewellyn Lewis, the thundering chieftain of the UMW.

Lewis' power in West Virginia stems from his ability to deliver the votes of his union members to the candidates of his choice. His basic interest is to promote and protect his tightly organized labor empire. In elemental logic the

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candidates he supports must subscribe—as Patteson did and Governor Marland now does—to the Lewis code of labor tactics. Stripped to its simplest expression this code asserts that in any dispute between an employer and an employee, the employee automatically becomes the injured party and must be given every possible governmental protection and indulgence.

However correct such an assumption may be in many cases, it cannot be right in all. Yet its acceptance by a state government is the circumstance that raises Widen's war above the dimension of a local feud in a foothill or just another clash between labor and management. What has happened at Widen is an explicit and explosive exposure of what can happen when a state's officials become beholden to a labor boss.

The strike was a year old and still on when this reporter began making inquiries concerning it and learned that, in this case, the usually thunderous Lewis has chosen to stay silent. He declined to be interviewed, and, through subordinates, said he had made it a "policy" not to talk about Widen.

Others in the UMW have not been so circumspect. One of these is William Blizzard, forceful veteran of many a bloody organizing campaign, and Lewis' principal lieutenant in West Virginia. In various statements, Blizzard has said: (1) the UMW had nothing to do with instigating the Widen strike, but became involved, after it had begun, when the strikers appealed to him for help; (2) that the ambush in which a nonstriking worker was killed was no "ambush" at all, but a manly and justifiable attempt by the strikers to defend themselves after being fired on by company guards; (3) that the strikers at Widen numbered 400, or roughly two thirds of the company pay roll; (4) that the company was to blame for everything that had happened through its

refusal to "bow to the will of its employees."

Blizzard is president of the UMW's District No. 17, which has 43,000 members in Central and Southern West Virginia. He has spent his adult life as an organizer in these and the adjacent fields of Kentucky and once, years ago, was indicted, but never convicted, on a treason charge growing out of his alleged leadership of an armed insurrection against United States troops sent to quell labor disturbances. Now in his sixties, he is a stocky man with a rugged, ruddy, weatherbeaten face, who wears expensively conservative clothes and runs his district from a capacious office in an old, red-brick and white-pillared mansion in Charleston. Among West Virginia's Democratic officeholders he enjoys the status of a sort of elder statesman *ex officio*.

On December third, three weeks before the Widen picket line dissolved, this reporter had a two-hour interview with Blizzard.

Reiterating all his previous statements, Blizzard said, "I am feeding the families of a hundred and forty-five strikers down there now, and there are at least a hundred more strikers who have gone away or taken other jobs. According to my analysis of sworn statements the company has to make to various state agencies, I figure the company is losing at least one dollar on every ton of coal it sells. For 1953 that will mean something like six hundred thousand dollars. They're giving away their capital and their assets without a red copper in return, and I don't imagine they'll go on doing that for more than another year or so. Why, they'd be better off just to shut down the operation—at least they'd save their coal."

Blizzard did not say he wanted to see the operation shut down. But from the bland, quick, conspiratorial smile with which he punctuated his statement, it was apparent that he

did not regard such an outcome as in the character of a calamity.

Actually, Blizzard's estimates of the company's losses during the first twelve months of Widen's violence were decidedly low. When the UMW's expenditures, for which Blizzard advanced no precise figures but which can be estimated roughly at twenty dollars weekly per striker, are added to the company's losses, it becomes likely that at the end of 1953 Widen's war represented a cumulative, combined cost of around \$2,000,000.

Yet the money was the least important element involved. At Widen it was the violence and the events leading up to it that made the story. On this score, Blizzard was adamant in insisting that it was all the work of armed company guards or due to their brutal provocations.

"I went down there," he said, "and told my boys that if they expected me to support them, they would have to stay within the law. But when they began to get beat up and shot at—well, that's different."

Considering the quality of marksmanship indigenous to the area, if Blizzard's boys had been shot at even a tenth as often as he says, it is odd that none of them was hit. The fact remains that all the bullet wounds were sustained by the other side. Going a step further, in order to accept Blizzard's view one has to believe that the company paid men to blow up its bridges, strafe its train, burn its houses, shoot its nonstriking employees and wreck their automobiles.

All the evidence, available to any open-minded inquiry, shows that Blizzard's boys were outside the law before he admonished them, and remained there afterward. His self-appointed position was that of a man who disclaimed responsibility for an indefensible series of illegal acts, including one killing, while he fed, financed and defended those who committed them.

In early December, Blizzard appeared determined to continue the strike indefinitely. But when the pickets threw in the sponge three weeks later, he said, "I will go along with their decision." Whether this means genuine peace or merely a temporary, tactical truce is something only time can prove. In sporadic forays, Widen's war has been going on more than forty years since the UMW made its first unsuccessful attempt to establish a local union there in 1912.

#### AN ANNUAL PAYROLL OF \$4,000,000

At that time the Elk River company was only eight years old. It had been formed in 1904 by Joseph Gardner Bradley, a grandson, on his mother's side, of the James D. Cameron who was Secretary of War in Grant's second administration and who, in 1869, acquired the 80,000-acre tract of timberland that comprises the Elk River company property. Bradley, now seventy-two, and still the company's dapper, slender and vigorous president, has built it into a complex that consists of three towns, a twenty-mile railroad, a lumbering camp that supplies timbers for shoring his mine drifts, and a mine with a productive capacity of 1,000,000 tons of high-quality bituminous coal a year. In good times it contributes an annual payroll of about \$4,000,000 to West Virginia's economy.

As Bradley's operation grew, so grew the UMW determination to gain control of its labor. The 1912 campaign was before Blizzard's time in this area, and Bradley's version is the only one available. He says that he was then employing a mixture of local and immigrant labor, the immigrants being mostly Italians. The UMW organizers, he says, failed to make any progress among the natives—mostly hill people descended from pre-Revolutionary settlers of Anglo-Saxon stock—but they got the immigrants

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stirred up to the point where there was not only friction between the immigrants and the company but between immigrants and natives as well. Bradley ended it by shipping all the foreigners out, and thereafter followed a policy of employing nothing but local labor.

Blizzard's first, and the UMW's second, attempt at Widen was in 1934. "At that time," he recalls, "they had something in the way of a company union called Widnra, the name made up of the word Widen and the initials of the National Recovery Act. In those days there was no automobile road, and anybody who went to Widen had to get there on the company railroad. We went in, but they just rounded us up and shipped us out again, and that was that. I didn't make an issue of it."

The company version is that Blizzard came into Widen and held organization meetings at various points around the town for three months, during which the response grew steadily more desultory, until he gave up and left. "There was no violence," says a company official, "except one instance where a special policeman tried to break up a meeting and had a scuffle with Blizzard."

The third attempt, in 1941, was marked by lots of gunplay concerning which there are two versions. Bradley claims that Widen was besieged by 200 to 300 UMW people, "brought in from outside," who took up positions on the hills overlooking the camp and began shooting down into it. His employees, he says, got down their shotguns and rifles, formed into combat teams and chased the attackers away. Blizzard claims that his boys got shot at first, and, being only human, just naturally had to shoot back, but there is no explanation of how they came by all those rifles so quickly when the bullets first began to fly. In any case, the most notable casualty was a superintendent of state police, who died of a heart attack brought on, so it was

claimed, by his efforts to cope with the sanguinary doings in the Widen hills.

Blizzard moved on Widen again in 1944, this time with a demand for a National Labor Relations Board election, which he got. In the campaign, a UMW organizer named E. H. Foley shot and killed a Widen miner named Joe Groves. In this case, the circumstances are undisputed. Foley, who was the smaller man, got into a fist fight with Groves, and while they scuffled, Foley pulled his gun and killed his antagonist. He pleaded self-defense, but two separate local juries convicted him of second-degree murder, and twice the state's Supreme Court reversed the conviction on technical grounds. The case has not since been retried, and although he is under bond, Foley remains about as free as he was the day he killed Joe Groves.

Meanwhile, the UMW lost the labor election by a margin of eight votes. Again, in 1946, Blizzard demanded and got another election. This campaign produced nothing more jarring than a number of fist fights, and Blizzard lost again, by thirteen votes.

In both of these elections, the UMW competition was a local union called the Employees League of Widen Miners. It had been organized in 1938 to succeed the earlier Widnra, and certified by the NLRB as the legal bargaining agency for Bradley's employees. Though the league beat the UMW on both occasions, the margins by which it won do not accurately reflect the sentiment of the Widen miners. In both elections scores of eligible employees did not vote at all, and still others, either deliberately or through ignorance, spoiled their ballots. The main point is that while both elections unmistakably showed the existence of UMW sentiment at Widen, neither the UMW nor the league came within 30 votes of attaining a simple majority.

For six years after the last NLRB election Widen re-

remained relatively peaceful, until, in September, 1952, UMW agitation once again shattered its busy calm. In the interim the Widen league had signed a contract which provided the company's miners with an average of two dollars a day more than does the standard UMW agreement because it gives them nine hours' pay for eight hours at the coal face, in contrast to the UMW practice of getting eight hours' pay for seven and a half at the face. There also had been instituted a forty-cents-a-ton welfare fund that pays more and larger benefits than does the UMW fund. Since the league's members pay only fifty-cents-a-month dues, compared to UMW dues of two dollars, the best the UMW could offer the Widen employees was a cut in pay and benefits and an increase in union dues.

If a handbook on labor tactics should ever be compiled, Widen would provide a classic chapter on how to set up a phony strike. Its central figure would be a man named Dennis Zirkle, a native of the locality. Zirkle had worked at Widen, then gone "outside," leaving behind a reputation as a good, careful and productive miner. When he returned and asked for a job, he got it.

Zirkle told some of the other miners at Widen that while he was away he had gone to a school for union organizers and acquired a UMW card. This, Blizzard emphatically denies. "Zirkle," he says, "never worked for the UMW and he never worked under a UMW contract. Nor was he ever the leader of that strike down there." Then he adds, "It wouldn't do for me to try to fool anybody about these things because then I'd wind up fooling myself, and I can't afford that. I know."

Concerning Zirkle's union membership, Blizzard is, of course, the final authority. But if, as he says, he had nothing to do with instigating the Widen strike, and only got into it at a later date, then his knowledge of other matters must

Zirkle's name was on none. Bradley believed that Zirkle had confidently expected to win the nomination, but, watching him narrowly, he could see no sign of disappointment or chagrin. It was Zirkle, in fact, who proposed that they make Waggoner the unanimous choice, which was done.

Next day, a Saturday, the seven men met with Facemire and other league officers. As Bradley had anticipated, Facemire was eager to patch up the rift by appointing Waggoner. He also showed the seven young insurgents the league's books, which they pronounced in good order. So Widen went into Sunday, its weekly day of no work, in the serene belief that its disturbances were over. It couldn't have been more mistaken.

Nearly half of Widen's miners live outside the town, in houses scattered through the hills. During that Sunday there was much coming and going as two men, neither of them Widen employees, made a round of visits among these isolated homes. One they called on was Waggoner, the newly created officer of the league. A dark, deliberate, strongly built man in his late twenties, he possesses an excellent local reputation for veracity.

Concerning this visit, he says, "They said they were working for the UMW, and showed me a letter. It was signed by Bill Blizzard. In this letter, Blizzard says he does not want to be identified with the strike at Widen just yet, but that he has asked John L. Lewis to send out an organizer from the international union, and that Lewis is going to send Ed Heckelbech.

"So I asked them why they came to me. They said, 'We want you to help get the men out.' I told them I didn't want to get the men out. Then they said, 'Blizzard has got \$200,000 to spend on this, and it's a chance to make some money.' I told them I didn't want that kind of money, and they went away."

The work week at Widen begins at eleven o'clock on Sunday night. That night, as the No. 1 shift reported, they found the wash house in an uproar, with many men around who were not scheduled to go to work at that time. In the center of the excitement was Zirkle, shouting, gesticulating, buttonholing men individually and in small clots.

"We've been double-crossed!" he shouted. "Bradley and Facemire have put a dirty deal over on us. . . . We've got to have the UMW to get our rights!" and so on and on. At a given point in the turmoil Zirkle called for a strike, and was followed out of the building by about half the men there, including many who apparently had no other reason for being present at the time.

On this occasion Zirkle wasted no time in oratory. Instead, he promptly organized a picket line and flung it around the wash house. Next he set in motion a torchlight motorcade. Amid a din of blaring horns and shouting men, it wound back and forth through the town's streets, creating a condition of noise, confusion and fear such as Widen had never before known. This was the strike.

For a week Zirkle and his followers kept Widen in pandemonium. The company could not determine how many of its men actually considered themselves on strike and how many simply were not reporting because of the ceaseless commotion. Appeals to the governor—Patteson at the time—and to the state police brought no relief, and Bradley had to recruit his own police force.

In order to lend credence to the Blizzard version of the Widen war, it has been necessary to depict this force, which came to be known by both sides as the company's "guards," as a murderous motley of imported, high-priced thugs and killers. Actually, it consisted of thirteen nonstriking employees who were sworn by the regularly elected sheriff of Clay County, in which Widen is located, as deputies. Their

pay was the same hourly rate they would have received as miners, with, of course, overtime added. The one "outsider" involved was a trained police executive whom Bradley hired to supervise this force. He was Charles W. Ray, who had previously been both the superintendent of West Virginia state police, and Charleston's police chief.

By the end of the first wild week the guards, who wore sidearms and sometimes carried rifles as well, had forced the picket line out of Widen. With Zirkle still in command, it re-formed about a mile north of the town where the only automobile road into Widen branched off a state highway. With Widen quieted, the company took stock. It was at once apparent that out of 731 employees, 490 were available for work. This meant that 241—not the 400 men Blizzard claimed—were on strike, and already a few of these were beginning to come back.

Some of the strikers were younger men, impatient with the oldsters who outnumbered them. Some were men the company would have been content to lose at any time under other circumstances. These were the grumblers, malcontents, troublemakers and careless workers who could not have stayed on the payroll as long as they had if the company had pursued a more ruthless labor policy. And some were just plain confused. One youngster, a war veteran, when asked how the strike had come about, gave this astonishing answer, "I don't know. I just saw there was a picket line and it seemed to me my place was with them."

Among the strikers, there were also a few simple-minded gullibles, like the old man who had only two more years of work to gain a pension. He struck, he said, "'cause I ain't gonna go on paying fifty cents a month to that no-'count league." Since the rules of pension eligibility require twenty full years of service, of which he already had eighteen, he

had thrown away the prospect of \$1200 a year for life to save twelve dollars.

Finding that nearly 500 of its workmen were still available, the company, which had remained completely shut down during the first week, resumed limited operations. Resumption brought two, possibly unrelated, developments. Ed Heckelbech, the organizer from the UMW's international who had been mentioned in the letter Waggoner saw, turned up on the picket line. And the violence began.

Zirkle's pickets, commanding the only road into Widen, were strategically placed to cut off all the nonstrikers who lived outside the town. Oddly, their first victim was Dennis Gray, who had served with Zirkle on the young insurgents' committee of seven and who, like Waggoner and all the others on it except Zirkle, had refused to heed the call-out. When Gray turned his car off the highway onto the Widen road, he found a wall of men standing in his path. Rather than run them down, he stopped. Zirkle pushed a piece of paper with some printing on it in front of Gray's face.

"Sign this," he ordered, "and join the UMW."

"Go to hell," Gray replied.

At which a dozen or more strong arms grabbed Gray's car by its skirts, grunted, heaved and flipped it on its side. As Gray pushed his car door upward and climbed out, someone brought a four-foot wooden club crashing down on his head. Gray was too scared to drop. Propelled by mortal fear, he ran for the safety of the nearby woods.

Before that day ended, one other car was overturned, three more battered by flying rocks and a sixth punctured by bullets. More calls for police protection resulted in a pair of state troopers paying a quick visit. They drove down the road, stopped at the picket line for a while, and drove on, reporting that there was "no disturbance." Meanwhile, the word got around and traffic into Widen ceased.

Next, the pickets turned their attention to the railroad. One train was boarded, the passengers forced off at gun point, and one beaten very badly. Thereafter the trains ran under armed guard.

On October sixth, company lawyers obtained an injunction against the pickets in the Clay County Circuit Court. Later, Zirkle swore he had resigned the strike leadership two hours before the injunction was issued.

Heckelbech, however, was present when copies of the injunction were served on the pickets. Seizing one and waving it aloft, he made the impassioned speech, the burden of which was, "Pay no attention to it. It isn't worth the paper it is written on." In a manner of speaking, he was right. Lacking effective enforcement, the injunction did nothing to stem the rising tide of violence.

But defiance was not Heckelbech's only weapon. At around noon, on October 6, 1952, Charles Ferguson, the acting director of the UMW's safety division, who happened at that moment to be staying in a suite in The Netherland Plaza hotel in Cincinnati, received the following telegram:

WOULD APPRECIATE ON THE DOUBLE LAST TWO FEDERAL MINE INSPECTION REPORTS OF ELK RIVER COAL AND MINING (SIC) COMPANY CLAY COUNTY WIDEN WEST VIRGINIA. APPROXIMATELY 650 EMPLOYEES HIGHLY MECHANIZED NONUNION MINE ON STRIKE FOR RECOGNITION. MINE 48 YEARS WITHOUT UNION. ANY OTHER ASSISTANCE WOULD BE MOST HELPFUL. THE IMMEDIATE VISIT OF AN INSPECTOR WOULD EXCITE COMPANY.

This telegram bore, as the sender's name: "Ed Heckelbech, International Representative, P. O. Box 1313, Charleston, W. Va."

In checking out of the hotel, Ferguson left this telegram behind, and the next tenant of his suite mailed it to Bradley. Sure enough, a day or so later an inspector from the United States Bureau of Mines showed up in Widen. "I don't know what's biting those fellows in Washington," he said, "but I've got orders to look this mine over, even though they know I was here only two months ago."

His visit produced nothing to excite the company. Bradley had been a pioneer in promoting safety rules and devices, and among mining men his operation is famous as one of the safest anywhere. But it did bring to Bradley a sobering realization that the power behind that illegal picket line at the head of the road could not only deprive him of police protection to which he was entitled from his state but could also threaten him with an arm of the Federal Government.

Now the assault on Widen was stepped up in fury and diversity. From the surrounding hilltops, rifle bullets came whining into switch houses which controlled electric circuits into the mines, and drift mouths where guards were posted to prevent the entry of possible saboteurs. Other rifle bullets were used to cut power lines supplying the town. Telephone posts were uprooted and a quarter mile of line cut into short pieces. Finally, on October twenty-third, two railroad bridges were blown up, effectively isolating the town. Since coal could not be hauled out, the mine closed down. Since food could not be hauled in, more than 1200 people began to learn, for the first time, the meaning of hunger.

Harry L. Gandy, Bradley's assistant and operations boss, was convinced that the pickets hoped to starve Widen. He got out to Charleston, where he organized shipment of a daily carload of food. This car had to be unloaded at the first blown-out bridge by a human chain, like a bucket bri-

gade. Passing the car's contents from hand to hand, they loaded them into a railroad motor coach that, luckily, had been left in operable condition between the two blasted bridges. At the next destroyed bridge the same operation had to be repeated before the daily shipment finished its journey into Widen. At both transfer points men prudently worked under the protective rifles of company guards.

It was at this point that the attorney general of West Virginia, with the apparent concurrence of the governor, delivered himself of the opinion that since all the shooting and blasting at Widen was taking place on private property, there was nothing the state could do about it. In a seething rejoinder, the Charleston Daily Mail ran a front-page editorial, captioned: HAVE A CARE; MAKE CERTAIN YOU'RE MURDERED IN PUBLIC.

Election Day brought a demonstration of what Governor Patteson might have done at any time he chose. In response to a plea from Widen citizens, he sent this telegram:

HAVE GIVEN STATE POLICE DEFINITE INSTRUCTIONS TO KEEP ROAD OPEN SO THAT ALL CITIZENS WILL HAVE ACCESS TO AND FROM WIDEN IN ORDER THAT THEY MAY BE ABLE TO CAST THEIR VOTES ON ELECTION DAY.

And it worked! For one day the people of Widen came and went as freely as they ever had.

But next day the line closed again, and the pickets resumed their viciously exuberant exercise of "putting the rocks" to cars attempting to come and go. And this went on until November twentieth, when, as suddenly and dramatically as on Election Day, the pickets spread apart and Widen once again became freely accessible.

Several state troopers have since said that this second opening was due to an order from Governor Patteson, and

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one went so far as to describe the order as a "proclamation." No such proclamation, however, exists in the state archives, nor was it noted in the local newspapers. But for some days before the order, what the papers had been carrying—and in big, black, Page 1 headlines—was the news that a ten-man team of FBI agents had rented headquarters in Clay County to carry on an intensive investigation of the Widen affair.

Under civil-rights statutes dating back to Reconstruction days, and reaffirmed in the Taft-Hartley Act, it is a Federal offense to hinder any person from the peaceful pursuit of his work. Although the FBI men did inquire into the dynamitings and other violence, their primary target was to determine whether the pickets had violated the civil-rights statutes, and to what extent. With stenographers recording questions and answers, they examined every person on the picket line, and many a picket, after his interrogation was finished, went back to the line with a quietly ominous FBI warning ringing in his ears. "I would advise you," the agents counseled, "to get a lawyer."

In Charleston, Governor Patteson now realized the Widen strike had become a very hot potato. His first reaction was a statement to the newspapers in which he blamed everything on his superintendent of state police, W. E. Burchett. Next, he ordered an inquiry and, inconsistently, appointed Burchett, together with the state Commissioner of Labor, and the state's Attorney General to conduct it. He also asked Bradley and Blizzard to sit as ex-officio members. Bradley disqualified himself because of his connection with the events to be scrutinized, as did Burchett. Blizzard refused to follow suit, and Patteson allowed him to remain. Because of Blizzard's continued presence, Bradley's entire side—his attorneys, executives, nonstriking employees and their families—boycotted the hearing.

It thus became a one-sided affair wherein the witnesses attempted to justify the strike by damning Bradley, and to whitewash the state administration as well as the police by blaming the violence on the company. The statements of the police set the tone. One of them said that he, himself, had been stopped on an occasion when the pickets had picked up the rear end of his car, but he had done nothing about it. Others said that although they had been on the scene virtually around the clock during a period when no less than fifty-eight instances of violent actions were reported, they had seen no violence. All of them said they had seen strikers stop cars and turn them around but it had all been done in a very courteous way. And all of them agreed with one trooper who said, "I have been in a lot of strikes, and this is the quietest picket line I have ever seen."

Filled, largely, with this sort of thing, the inquiry report runs to 184 printed pages. In West Virginia it has become the bible of the pro-UMW forces. Both Blizzard and Governor Marland recommended it to this reporter as the one place to learn the truth about the Widen situation. Considered in the light of these recommendations, it is, indeed, a most extraordinary document.

With the advent of the FBI, terror at the road head ceased, but its spread in the surrounding countryside continued unabated. Barns were burned; homes, automobiles and one railroad culvert blown up; men and cars shot at; and one man's private lane was land-mined.

During the winter, the number of men on the picket line dwindled steadily, as, one by one, the strikers came down to ask for their jobs back. But the company refused to accept any man until he had been approved by a committee of his fellow workers, and this committee blackballed every striker who could be personally linked to any violent act. In

an area where everybody is kin to almost everybody else, it is not hard to remember who threw the rocks or to find out where the dynamite was hidden and who had been seen around the cache. Nonstriking employees might not tell company officials or investigators what they had seen or heard, but they would not hesitate to act on it to keep an unwanted man, even if he happened to be a relative, off the job. As a result, many strikers were refused re-employment, and went outside to other work. By spring the body of strikers still on the picket line had been chipped back to its hard core of bitter irreconcilables, numbering not more than fifty men.

From the start of the trouble, the company had constantly admonished its people to avoid any action that might be construed as provocation. By May, however, the men had grown tired of turning the other cheek, and, without company knowledge, a group of them took a bulldozer up to the head of the Widen road. Just off the state highway, in the middle of the company road, the pickets had set up a sort of field station. It consisted of benches and old automobile seats ringed around a cluster of fifty-gallon drums called "fire barrels" because the pickets built fires in them for warmth. As pickets scattered right and left to safety, the bulldozer tracked into this setup, pushing barrels, benches, lunch boxes and accumulated trash across the road and over the lip of a deep gully.

Two nights later the retaliation of the pickets was murderous. For a long time the miners who lived outside the town had gone to and from work in motorcades, which they called convoys. In this fashion they could breach the picket line in the safety of numbers. The pickets, meanwhile, had taken over a commercial garage down the road as a cook-shack and headquarters. In the early morning of May sev-

enth—1953 now—as a convoy passed, there was a blaze of rifle and shotgun fire from the cookshack. The lead car, driven by a miner named Charles Frame, plowed into a gully, with Frame dead at the steering wheel, a bullet having gone through his skull.

Possibly because Frame had the luck to be killed on a public road, state police acted with decision and efficiency. Arresting everyone they found in and around the cookshack, they hauled fifty-two persons, including one woman and two small boys, off to the county jail at Clay. A blistering protest came from Blizzard about dirty, overcrowded jail conditions. For once, he was ignored. Pointing to the laws which make all parties to a conspiracy equally guilty, C. P. Taylor, a state-police major, bluntly announced, "If the men who did it won't daddy (own up to) the shooting, they'll *a!!* daddy it." And from the cookshack itself and from cars and trucks around it the police confiscated a twenty-gun arsenal.

Eventually, all were released except three men, who were indicted. The first to be tried was a young miner named Jennings Roscoe Bail. Although the trial lasted longer than any in Clay County history, the elements of proof were short and simple. It was proved that Frame was killed by a .35-caliber steel-jacketed rifle bullet. State police testified that of the twenty weapons confiscated, the only one from which such a bullet could have been fired had been claimed by Bail. In his own behalf, Bail testified he had fired four or five times at the convoy. But, he said, he opened fire only after the company guards in the convoy fired on the cookshack. The jury was taken to the shack and shown many bullet marks on its walls. Whereupon three top officials of the state police testified that they had examined those walls the morning after the shooting, and that the bullet marks the jurors saw had not been present.

The jury thereupon found Bail guilty of second degree murder, and he was sentenced to five years' imprisonment. The UMW lawyers who defended him have, however, appealed the conviction, and the prospect is that for many months to come his case will remain on the dockets of the higher state courts.

Largely as a result of evidence gathered by the company's own investigators the 1953 October term of the Clay County grand jury handed up a series of indictments. In these, eleven strikers were charged with holding up the railroad train; the Frame murder case was reopened and Dennis Zirkle was added to the two other, previously indicted, defendants still awaiting trial; four other men were charged with stealing, from the State Road Commission, the dynamite used to blow up the railroad bridges; and finally, one man was charged with perjury as a result of his testimony in the trial of Bail. Of these, only one case has come to trial. It involved the railroad holdup and resulted in a hung jury, which, reportedly, stood eleven to one for conviction.

In November, 1953, the evidence gathered by the FBI was finally laid before a Federal grand jury in Huntington, West Virginia, which handed up an indictment charging a conspiracy to violate civil rights against thirty-seven persons, including the UMW's international representative, Ed Heckelbech.

The inclusion of Heckelbech among the defendants necessarily means that, in the view of the Government attorneys and the grand jurors, the United Mine Workers of America is a part of the conspiracy. And this, in turn, means that Lewis and Blizzard will be almost as deeply involved as if they had been among the indicted.

The United States Department of Justice regards the indictment as the most important attempt to deal with labor

violence under civil-rights statutes yet made, and attorneys for both the Government and the UMW are determined to carry it to the United States Supreme Court. If they do, it will take months, even years, to reach a final decision. By this judicial process, regardless of how the verdict falls, Widen's reign of terror may be transmuted into one of the more significant chapters on civil rights in United States history.



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**BLEED THROUGH**

**BLURRED COPY**

# **In the Supreme Court of the United States**

OCTOBER TERM, 1953

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No. 188

**UNITED CONSTRUCTION WORKERS, AFFILIATED WITH  
THE UNITED MINE WORKERS OF AMERICA; DIS-  
TRICT 50, UNITED MINE WORKERS OF AMERICA,  
AND UNITED MINE WORKERS OF AMERICA,  
PETITIONERS**

*v.*

**LABURNUM CONSTRUCTION CORPORATION**

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF APPEALS OF VIRGINIA*

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## **MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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The Solicitor General files this memorandum, on behalf of the National Labor Relations Board, in response to the invitation of the Court "to submit a memorandum setting forth the policy of the Board in regard to: (1) the proviso in Section 10 (a) [of the National Labor Relations Act]; and (2) other cases, apart from those in Section 10 (a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the

Board declines to act and whether the standards are applied by rule or regulation or on a case-by-case method." 346 U. S. 936.

1. *The Board's policy in regard to the Section 10 (a) proviso.* The proviso to Section 10 (a) empowers the Board

by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is the Board's view that the proviso bars it from ceding jurisdiction to state regulatory agencies unless they are enforcing legislation substantially identical with the national Act. *Hearings before the Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess., Part 2, pp. 1125, 1143; *Kaiser-Frazer Parts Corp.*, 80 N. L. R. B. 1050, 1051-1052; *Scars Roebuck & Co.*, 91 N. L. R. B. 1411, n. 2; *L. Wiemann & Co.*, 106 N. L. R. B. No. 190, 32 L. R. R. M. 1640.<sup>1</sup>

<sup>1</sup> The Board's interpretation of the limitation placed upon its authority to cede jurisdiction has been recognized, and

Following the enactment of the proviso in 1947, the Board, through its General Counsel, held conferences with various state representatives with a view to determining the feasibility of consummating agreements ceding jurisdiction to these states, pursuant to the proviso. At that time, the Board found it impossible to negotiate such agreements because of a failure to satisfy the statutory requirement that the relevant state or territorial law must not be "inconsistent" with the corresponding provision of the national Act or have received a construction "inconsistent therewith." N. L. R. B., *Thirteenth Annual Report* (Govt. Print. Off. 1949) p. 18. Since these initial efforts, the Board has continued to find it not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction. Accordingly, it has entered into no such agreement with any state or territorial agency. *Hearings before the Senate Committee on Labor and Public Welfare, Taft-Hartley Act Revisions*, 83d Cong., 1st Sess., Part 4, pp. 2103, 2122-2123.<sup>2</sup>

concurrent in, by the Joint Committee on Labor-Management Relations which was established by Congress to study the operation of the amended Act. *Report of the Joint Committee on Labor-Management Relations*, S. Rept. No. 986, Part 1, 80th Cong., 2d Sess., pp. 30-31. See also, S. Rept. No. 105, 80th Cong., 1st Sess., p. 26; H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 52; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, n. 23.

<sup>2</sup> In 1949, a bill was introduced in the Senate (S. 249, 81st Cong., 1st Sess.) to amend the Taft-Hartley Act in various

2. *The Board's jurisdictional standards.* The Board's authority in the area in which it operates is, as decisions of this Court have recognized, coextensive with the federal power to regulate interstate commerce. *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1; *Polish National Alliance v. National Labor Relations Board*, 322 U. S. 643. Despite the breadth of its statutory authority, the Board has, however, long taken the position that it would better effectuate the purposes of the Act "not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to

respects. The majority report accompanying this bill observed with respect to the Section 10 (a) proviso (S. Rept. No. 99, 81st Cong., 1st Sess., Part 1, p. 43) :

"The proviso to section 10 (a) of the act was intended to permit the Board to allow State and Territorial labor relations boards to exercise final jurisdiction over cases involving border-line employers, provided the State or Territorial statute conforms to national policy. Far from achieving its purpose of enabling the cession of cases, the proviso has had the opposite effect. It has prevented any cession at all, because no State or Territory has enacted a labor-relations statute consistent with the Taft-Hartley Act."

Subsequently, at the same session of Congress, Senator Taft introduced a bill which, *inter alia*, was designed to eliminate the proviso to Section 10 (a) (95 Cong. Rec. 8716-8717). In the report on this bill, Senator Taft observed (S. Rept. No. 99, 81st Cong., 1st Sess., Part 2, p. 8) :

"The Board has not been able to cede jurisdiction to any State agency since passage of the act. The limitation of 'consistency' has prevented agreement since no State has enacted a statute modeled after the act."

Neither proposal to eliminate the proviso became law.

limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635, 636. The Board's abstention from exercising the full measure of its statutory jurisdiction has been prompted, in general, by a policy to utilize its limited budget and personnel in the processing of cases which individually or in the aggregate present, in relation to the Board's potential case-load, the most serious threat to interstate commerce.<sup>3</sup>

Prior to 1950, the Board followed a case by case method in determining whether to exercise its statutory jurisdiction over the particular enterprise involved. In October of that year, however, the Board concluded that "the time [had] come \* \* \* when experience warrants the establishment and announcement of certain standards" to govern the future exercise of its statutory authority. *Hollow Tree Lumber Co.*, *supra*. Accordingly, in October 1950, the Board issued a series of decisions in several representation proceedings setting forth nine general jurisdictional standards on the basis of which it would determine in future representation or unfair labor practice cases whether or not to exercise its statutory jurisdiction over the particular enterprise involved in a

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<sup>3</sup> *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248, 81st Cong., 2d Sess.*, p. 120.

case.<sup>4</sup> These decisions announced that the Board would in the future take jurisdiction over cases involving enterprises in the following categories:<sup>5</sup>

1. Instrumentalities and channels of commerce, interstate or foreign.<sup>6</sup>

2. Public utility and transit systems.<sup>7</sup>

3. Establishments operating as an integral part of a multistate enterprise.<sup>8</sup>

4. Enterprises producing or handling goods destined for out-of-State shipment, or performing services outside the State in which the firm is located, valued at \$25,000 a year.<sup>9</sup>

5. Enterprises furnishing goods or services of \$50,000 a year or more to concerns in categories 1, 2, or 4.<sup>10</sup>

6. Enterprises with a direct inflow of goods or materials from out-of-State valued at \$500,000 a year.<sup>11</sup>

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<sup>4</sup> These general standards were also summarized and published in a Board press release (No. 342) issued on October 6, 1950.

<sup>5</sup> This Court has taken notice of the jurisdictional standards adopted by the Board in 1950. *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675, 685; *Amalgamated Association, etc. v. W. E. R. B.*, 340 U. S. 383, 392.

<sup>6</sup> *W. B. S. R., Inc.*, 91 N. L. R. B. 630.

<sup>7</sup> *Local Transit Lines*, 91 N. L. R. B. 623.

<sup>8</sup> *The Borden Co.*, 91 N. L. R. B. 628.

<sup>9</sup> *Stanislaus Implement and Hardware Co.*, 91 N. L. R. B. 618.

<sup>10</sup> *Hollow Tree Lumber Co.*, 91 N. L. R. B. 635.

<sup>11</sup> *Federal Dairy Co., Inc.*, 91 N. L. R. B. 638.

7. Enterprises with an indirect inflow of goods or materials valued at \$1,000,000 a year.<sup>12</sup>

8. Enterprises having such a combination of inflow or outflow of goods or services, coming within categories 4, 5, 6, or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100.<sup>13</sup>

9. Establishments substantially affecting the national defense.<sup>14</sup>

During the several years following the adoption of the foregoing jurisdictional yardsticks, the Board has determined on a case to case basis whether the particular enterprise involved in the case satisfied those criteria so as to warrant the Board's exercise of its statutory power. N. L. R. B., *Sixteenth Annual Report* (Govt. Print. Off. 1952) pp. 23-34; N. L. R. B., *Seventeenth Annual Report* (Govt. Print. Off. 1953) pp. 12-19. Presently, however, the Board is contemplating a comprehensive reexamination of its jurisdictional criteria in the light of its intervening experience. Meanwhile, the Board in a series of recent decisions has taken the position that it will not continue to exercise its legal jurisdiction over *all* enterprises which under earlier Board decisions might have been regarded as falling within categories 2, 5 or 9 established by the 1950 standards. Thus, the Board has ruled that it will not continue

<sup>12</sup> *Dorn's House of Miracles, Inc.*, 91 N. L. R. B. 632.

<sup>13</sup> *The Rutledge Paper Products, Inc.*, 91 N. L. R. B. 625.

<sup>14</sup> *Westport Moving & Storage Co.*, 91 N. L. R. B. 902.

to exercise jurisdiction over such public utilities as rural electric cooperatives which are essentially local in character,<sup>15</sup> or local transit or transportation systems,<sup>16</sup> or enterprises which, although performing services in connection with interstate instrumentalities, or performing services for concerns falling in categories 1, 2 or 4, have a comparatively remote or insubstantial impact upon commerce.<sup>17</sup> The Board has also ruled that in exercising jurisdiction over establishments affecting national defense, it will require a showing of a more direct and substantial relationship to the national defense than it had required in earlier cases.<sup>18</sup> As to enterprises covered by the other categories, the Board, pending the results of further study, is, in general, continuing to apply those standards, as it has in the past, for the purpose of determining

<sup>15</sup> *Inter-County Rural Electric Cooperative Corp.*, 106 N. L. R. B. No. 238, 33 L. R. R. M. 1010.

<sup>16</sup> *San Jose City Lines*, 106 N. L. R. B. No. 201, 32 L. R. R. M. 1644; *Auburn Bus Co.*, 107 N. L. R. B. No. 182, 33 L. R. R. M. 1261.

<sup>17</sup> *Checker Taxi Co.*, 107 N. L. R. B. No. 85, 33 L. R. R. M. 1119; *Checker Taxi Co.*, 107 N. L. R. B. No. 181, 33 L. R. R. M. 1261; *Brooks Wood Products*, 107 N. L. R. B. No. 71, 33 L. R. R. M. 1104; *Casey Welding Works*, 107 N. L. R. B. No. 185, 33 L. R. R. M. 1272; *American Coin Lock Co.*, 107 N. L. R. B. No. 88, 33 L. R. R. M. 1135.

<sup>18</sup> *Taichert's, Inc.*, 107 N. L. R. B. No. 167, 33 L. R. R. M. 1240; *McArthur Jersey Farm Dairy*, 107 N. L. R. B. No. 171, 33 L. R. R. M. 1260; *Alpine Mill & Lumber Co.*, 107 N. L. R. B. No. 172, 33 L. R. R. M. 1264; *Ideal Laundry & Dry Cleaners*, 107 N. L. R. B. No. 186, 33 L. R. R. M. 1271; *Casey Welding Works*, 107 N. L. R. B. No. 185, 33 L. R. R. M. 1272.

whether to assert jurisdiction over such enterprises.

Under the standards which the Board is currently continuing to apply, it would assert jurisdiction over an enterprise similar to respondent company herein. Respondent is a Virginia corporation, with its principal office in Richmond, specializing in industrial construction work. From May 1942 to December 1949, it performed work in several states amounting to more than 20 million dollars. Its annual volume of business averages more than 2 million dollars. Its out-of-state work in 1949 exceeded \$452,000 (R. 72, 426). From September 1947 to December 1949, the company performed services valued in excess of \$650,000 for the Pond Creek Pocahontas Co. and the Island Creek Coal Co. (R. 36, 87-88, 458), which together constitute the third largest commercial coal producing unit in the United States. The coal produced by these companies, valued at more than 50 million dollars, is distributed and sold in almost every state east of the Mississippi and others.<sup>19</sup> Upon these facts, the Board would take jurisdiction over Laburnum under category 4 or 5 or both. *Eastern Iron & Metal Co.*, 106 N. L. R. B. No. 220, 32 L. R. R. M. 1671; *South Texas Chapter, Associated General Contractors*, 107 N. L. R. B. No. 190; *Cement Masons Local No. 555*, 102 N. L. R. B. 1408;

<sup>19</sup> Moody's Industrials (1953) pp. 1033, 1126-1127; Standard & Poors Corporation Records, pp. 2769, 9981-9982.

*Local No. 63*, 106 N. L. R. B. No. 46, 32 L. R. R. M. 1452; *Charles E. Daboll, Jr.*, 105 N. L. R. B. No. 44, 32 L. R. R. M. 1283.

3. *The Board's policy as to state action in situations where the Board declines to exercise jurisdiction.* The Act, generally speaking, establishes an exclusive pattern of regulation of labor relations in all industries whose operations substantially affect interstate commerce. It is well settled that, with some exceptions, the States may not establish their own pattern of labor relations in interstate industries over which the Board regularly asserts its statutory jurisdiction.<sup>20</sup> However, as we have stated above, the Board for policy reasons has declined to assert jurisdiction over enterprises whose operations, although within the coverage of the Act, do not satisfy the Board's administrative jurisdictional yardsticks. This Court has noted but not passed upon<sup>21</sup> the question whether the States, in the absence of an agreement with the Board ceding jurisdiction to them, may act with respect to interstate industries over which the Board has but declines to assert jurisdiction.

The Board has not formally decided or otherwise taken a position on this question in any

<sup>20</sup> *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U. S. 953; *Garner v. Teamsters Union*, 346 U. S. 485; *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

<sup>21</sup> *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

case or litigation in which it has been involved. It has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service*, 99 N. L. R. B. 498, 500-501.<sup>22</sup>

The Board recognizes, of course, as this Court recently stated in *Garner v. Teamsters, etc. Union*, 346 U. S. 485, 488, that under the Act the states "still may exercise '[their] historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' " Appearing before the Senate Committee on Labor and Public Welfare in 1953 the Board's then Chairman (Mr. Herzog) stated, "There are, of course, aspects of labor controversies which the States have traditionally been free to control. Although earlier witnesses have apparently sought to convey a con-

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<sup>22</sup> The Board's practice in this respect is reflected in its action in *National Labor Relations Board v. New York State Labor Relations Board*, 106 F. Supp. 749 (S. D. N. Y.). There the Board sought to enjoin the New York State Labor Relations Board from taking jurisdiction over certain taxicab companies over which the Board had asserted jurisdiction. While the case was pending, the Board reconsidered its jurisdictional policy with respect to taxicab companies and concluded that it would refrain from asserting jurisdiction over the type of companies involved in the action against the New York Board. Following this change of policy, the National Board entered into a stipulation with the State Board dismissing the action in the district court.

trary impression, the Labor-Management Relations Act of 1947 has not cut into that freedom. We speak of the inherent police power of each sovereign State to deal with acts of violence or other threats to the peace." *Hearings before Senate Committee on Labor and Public Welfare, Taft-Hartley Act Revisions*, 83d Cong., 1st Sess., Part 4, pp. 2123-2124, 2107. This statement continues to represent the Board's present views.

Although recognizing the States' authority to exercise their traditional police powers in situations arising out of labor disputes, the Board does not, however, regard itself in proceedings before it as bound by the determination which a state court may make as to the legality or purpose of concerted action by employees for mutual aid or protection. *H. N. Thayer Co.*, 99 N. L. R. B. 1122, 1128-1131.

Respectfully submitted,

✓ SIMON E. SOBELOFF,  
Solicitor General.

✓  
GEORGE J. BOTT,  
General Counsel,  
National Labor Relations Board.

MARCH 1954.

# SUPREME COURT OF THE UNITED STATES

No. 188.—OCTOBER TERM, 1953.

United Construction Workers, Affiliated With United Mine Workers of America, et al., Petitioners, <i>v.</i> Laburnum Construction Cor- poration.	}	On Writ of Certiorari to the Supreme Court of Appeals of the Com- monwealth of Virginia.
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[June 7, 1954.]

MR. JUSTICE BURTON delivered the opinion of the Court.

The question before us is whether the Labor Management Relations Act, 1947,<sup>1</sup> has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. For the reasons hereafter stated, we hold that it has not.

November 16, 1949, Laburnum Construction Corporation, a Virginia corporation, respondent herein, filed a notice of motion for judgment in the Circuit Court of the City of Richmond, Virginia, against petitioners United Construction Workers, affiliated with United Mine Workers of America; District 50, United Mine Workers of America; and United Mine Workers of America. The proceeding was a common-law tort action for compensatory and punitive damages totaling \$500,000. The notice contained substantially the following allegations: While respondent was performing construction work in Breathitt County, Kentucky, under contracts

<sup>1</sup> 61 Stat. 136 *et seq.*, 29 U. S. C. (1952 ed.) § 141 *et seq.*

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with Pond Creek Pocahontas Company and others, July 26-August 4, 1949, agents of the respective petitioners came there. They demanded that respondent's employees join the United Construction Workers and that respondent recognize that organization as the sole bargaining agent for respondent's employees on the project. They added that, if respondent and its employees did not comply, respondent would not be allowed to continue its work. Upon respondent's refusal and that of many of its employees to yield to such demands, petitioners' agents threatened and intimidated respondent's officers and employees with violence to such a degree that respondent was compelled to abandon all its projects in that area. The notice further alleged that, as the result of this conduct of petitioners' agents, respondent was deprived of substantial profits it otherwise would have earned on those and other projects. After trial, a jury found petitioners jointly and severally liable to respondent for \$175,437.19 as compensatory damages, and \$100,000 as punitive damages, making a total of \$275,437.19.

Petitioners moved for a new trial claiming numerous errors of law, and for a dismissal on the ground that the Labor Management Relations Act had deprived the court of its jurisdiction over the subject matter. Both motions were overruled and the Supreme Court of Appeals of Virginia granted a writ of error and supersedeas. After argument, it struck out \$146,111.10 of the compensatory damages and affirmed the judgment for the remaining \$129,326.09. 194 Va. 872, 75 S. E. 2d 694. Because of the importance of the jurisdictional issue to the enforcement of common-law rights and to the administration of the Labor Management Relations Act, we granted certiorari limited to the following question:

"In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor

UNITED WORKERS *v.* LABURNUM CORP. 3

Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?" 346 U. S. 936.<sup>2</sup>

We are concerned only with the above-stated jurisdictional question. We accept the view of the National Labor Relations Board that respondent's activities affect interstate commerce within the meaning of the Labor Management Relations Act.<sup>3</sup> The "type of conduct found by the Supreme Court of Appeals of Virginia" is

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<sup>2</sup> Our order also stated that—

"The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in § 10 (a), 61 Stat. 146, 29 U. S. C. (Supp. III) § 160 (a); and (2) other cases, apart from those in § 10 (a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case-by-case method."

The Government filed a memorandum stating that it had found it "not feasible under the limitations prescribed by the Act to consummate agreements ceding jurisdiction" under the proviso in § 10 (a). It stated also that "Under the standards which the Board is currently continuing to apply, it would assert jurisdiction over an enterprise similar to [that of] respondent company herein." It found that respondent's enterprises came within at least the following categories of the Board's jurisdictional standards:

"4. Enterprises producing or handling goods destined for out-of-State shipment, or performing services outside the State in which the firm is located, valued at \$25,000 a year.

"5. Enterprises furnishing goods or services of \$50,000 a year or more to concerns in categories 1, 2, or 4 [*supra*]."

See also, Mimeograph Release of National Labor Relations Board, dated October 6, 1950, entitled "N. L. R. B. Clarifies and Defines Areas In Which It Will and Will Not Exercise Jurisdiction"; *Labor Board v. Denver Building Council*, 341 U. S. 675, 684-685.

<sup>3</sup> See note 2, *supra*.

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set out in the margin.<sup>4</sup> Although the notice for judgment does not mention the Labor Management Relations Act or unfair labor practices as such, we assume the conduct

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<sup>4</sup>"During the period from September 6, 1947 to December 1, 1949, the plaintiff performed work in West Virginia and Kentucky for Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiary companies, under twelve separate contracts amounting to more than \$650,000, from which it derived an annual profit slightly over \$25,000. . . .

"In October, 1948, the two coal-producing companies determined to open a mine in Breathitt county, Kentucky, and Bryan [president of respondent] was asked to undertake the building of the preparation plant there. Because of the undeveloped condition of the roads and lack of living accommodations for the laborers, Bryan was told that if Laburnum would undertake the project it would be awarded additional work which would be required for the operation of another mine in Breathitt county, amounting to more than \$600,000, on the basis of cost plus a fee of five per cent.

"On October 28, 1948, Pond Creek Pocahontas Company awarded the plaintiff a contract for construction of the preparation plant on the basis of cost plus a fee of five per cent, the total fee not to exceed the sum of \$12,000. The estimated cost of the project was \$200,000. Work on this project was commenced November 1, 1948, and was approximately ninety-five per cent completed when it was interrupted on July 26, 1949. Pursuant to their agreement the coal companies also awarded Laburnum several projects included in the additional work to which reference has been made.

"Upon commencing the work in Breathitt county, Laburnum, in compliance with its agreement with Richmond Building & Construction Trades Council, procured skilled laborers through the nearest local affiliates of the American Federation of Labor. With the knowledge and consent of these affiliates it employed local unskilled laborers who were not members of any labor organization.

"Laburnum proceeded with its work on these several projects without trouble until July 14, 1949, when William O. Hart, speaking from Pikeville, Kentucky, telephoned Bryan who was in Richmond. According to the testimony of Bryan, which was accepted by the jury, Hart identified himself as a 'field representative of the United Construction Workers and District 50 of the United Mine Workers of America,' working under David Hunter, 'Regional Director of Region 58 of United Construction Workers and District 50,' with head-

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before us also constituted an unfair labor practice within the following provisions of that Act:

"SEC. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . . ."

quarters in Pikeville. Hart told Bryan that he was familiar with the work which Laburnum was doing and about to do in Breathitt county, that the plaintiff was 'working in United Mine Workers territory,' and that he (Hart) would close down this work unless the plaintiff recognized the United Construction Workers in the employment of its workers. Bryan told Hart of Laburnum's agreement with the American Federation of Labor affiliate at Richmond, under which it was to employ members of that union, and that consequently it would not be able to comply with Hart's demand and make an agreement with the United Construction Workers. Hart replied that he was going 'to take over' the plaintiff's work, that he intended to 'organize' all of its workers, 'including the carpenters, electricians, pipefitters, ironworkers, millwrights, laborers, and everybody else,' and that if the plaintiff failed to make an agreement 'recognizing the United Construction Workers,' he (Hart) would close down' all of the plaintiff's work in Breathitt county, as had been done in other instances within his (Hart's) territory.

"On Monday, July 25, about 7:30 p. m., Delinger [in respondent's employ] telephoned Bryan that he had been informed that on the next day, at noon, the United Construction Workers were coming to the job site with a large group of men, that they would be armed, and would stop the plaintiff's employees from working on the projects.

". . . When he [Bryan] arrived there [July 26] he found that all work on the several projects in which his men were engaged had stopped. It developed that about noon on that day Hart had arrived at the job site accompanied by a crowd variously estimated at from 40 to 150 men. There is evidence that this was 'a very rough, boisterous crowd,' that some of the men used abusive language, that some were drunk, and that some carried guns and knives.

"Hart and his men went to the coal preparation plant and told the

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61 Stat. 140, 141, 29 U. S. C. (1952 ed.) § 158 (b) (1)(A).

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

Laburnum workers there that he was taking over the job and that the Laburnum workers would have to 'join up with the United Construction Workers.' He accosted other employees of the plaintiff at another site where he repeated his threats that he would 'take over' the job unless they joined the union which he represented. Some of the plaintiff's employees yielded to these threats and agreed to join Hart's labor organization, while others refused to do so.

"Bryan talked with Hart again at the job site on August 1, and, as he says, Hart 'left no doubt in anybody's mind that he was going to have people to stop any men from working who tried.' 'He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. He said he would do that unless we signed a paper recognizing his organization as the representative of the laborers.' Bryan replied that he 'wouldn't do it and couldn't do it' because of his prior obligation to another labor organization. Moreover, Hart threatened that if the Laburnum men 'went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek.'

"... Consequently, on August 4, the coal companies, because of the dispute in which the plaintiff had become involved with representatives of these labor organizations, canceled the construction contracts with Laburnum which were then in progress.

"After the violent events of July, 1949, Pond Creek Pocahontas Company and Island Creek Coal Company abandoned the award of the additional work upon a cost plus five per cent basis which they had promised the Laburnum company. The coal companies invited bids upon this proposed construction, but Laburnum was unsuccessful in all of its bids for such work. The officials of the coal companies expressed their high regard and sympathy for Bryan, but explained that they could not run the risk of having the defendant unions shut down the mining operations because of the unions' differences with Laburnum." 194 Va. 872, 880-881, 882, 883, 884-885, 75 S. E. 2d 694, 700-701, 702, 703.

of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ." 61 Stat. 140, 29 U. S. C. (1952 ed.) § 157.

Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in *Garner v. Teamsters Union*, 346 U. S. 485, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted.<sup>5</sup> Here Congress has neither provided nor suggested any substitute for the

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<sup>5</sup> The cases relied upon to exclude state jurisdiction are those where a conflict with federal control has been made clear.

"[W]hen Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly v. Washington*, 302 U. S. 1, 10. See also, *Amalgamated Assn. v. Wisconsin Board*, 340 U. S. 383;

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traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act.

In the *Garner* case, we said:

“The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.

“This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is ‘governable by the State or it is entirely ungoverned.’ In such cases we have declined to find an implied exclusion of state powers. *International Union v. Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise ‘its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.’ *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749.” 346 U. S., at 488.

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*United Automobile Workers v. O'Brien*, 339 U. S. 454; *Plankinton Packing Co. v. Wisconsin Board*, 338 U. S. 953; *La Crosse Telephone Corp. v. Wisconsin Board*, 336 U. S. 18; *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767; *Hill v. Florida*, 325 U. S. 538.

To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay. 61 Stat. 147, 29 U. S. C. (1952 ed.) § 160 (c). See also, *Labor Board v. Electrical Workers*, 346 U. S. 464.

One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages in any Federal District Court and "in any other court having jurisdiction of the parties."<sup>6</sup> By this provision, the Act assures uniformity, otherwise lacking, in rights of

<sup>6</sup> SEC. 303. . . .

"(b) Whoever shall be injured in his business or property by reason or [of] any violation of subsection (a) [boycotts and other unlawful combinations] may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof

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recovery in the state courts and grants jurisdiction to the federal courts without respect to the amount in controversy. To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us.

Considerable legislative history supports this interpretation. Under the National Labor Relations Act, 1935,<sup>7</sup> there were no prohibitions of unfair labor practices on the part of labor organizations. Yet there is no doubt that if agents of such organizations at that time had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for the damage done. See *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740.

The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct. It sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances affecting interstate commerce. The fact that it prescribed new preventive procedure against unfair labor practices on the part of labor organizations was an additional recognition of congressional

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without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 61 Stat. 158, 159, 29 U. S. C. (1952 ed.) § 187 (b).

<sup>7</sup> 49 Stat. 449 *et seq.*, 29 U. S. C. (1946 ed.) § 151 *et seq.*

disapproval of such practices. Such an express recognition is consistent with an increased insistence upon the liability of such organizations for tortious conduct and inconsistent with their immunization from liability for damages caused by their tortious practices.\*

The language declaring the congressional policy against such practices is phrased in terms of their prevention:

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . . ." 61 Stat. 146, 29 U. S. C. (1952 ed.) § 160 (a).<sup>9</sup>

Section 10 (c) directs the Board to issue a cease-and-desist order after an appropriate finding of fact. There is no declaration that this procedure is to be exclusive.

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\* " . . . While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods." *International Union v. Wisconsin Board*, 336 U. S. 245, 253. See also, pp. 255-258 distinguishing the conduct there complained of from that protected by § 7 of the Labor Management Relations Act.

<sup>9</sup> " . . . By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." Conference Report on H. R. 3020, H. R. Rep. No. 510, 80th Cong., 1st Sess. 52.

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The history of the enactment of § 8 (b)(1)(A) lends further support to this interpretation. Senate Report No. 105, 80th Cong., 1st Sess. 50, as to S. 1126, said in part:

"Since this bill establishes the principle of unfair labor practices on the part of unions, we can see no reason whatever why they should not be subject to the same rules as the employers. The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. *Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act.*" (Emphasis added.)

Senator Taft, one of the sponsors of the bill, added later:

*"But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why*

*there should not be two remedies for an act of that kind.*" (Emphasis added.) 93 Cong. Rec. 4024.<sup>10</sup>

If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done. If petitioners were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with respondent or its employees, provides no reasonable basis for a different conclusion.<sup>11</sup>

The jurisdiction of the Supreme Court of Appeals of Virginia is, therefore, sustained and its judgment

*Affirmed.*

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

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<sup>10</sup> Similarly, H. R. Rep. No. 245, 80th Cong., 1st Sess. 8, said:

"EQUAL RESPONSIBILITY BEFORE THE LAW

"When employers violate rights that the Labor Act gives to employees or to unions, the Board can issue orders against them. *When employers violate rights of employees or of unions under other laws, they must answer in court for what they do.* Under the bill, when unions and their members violate rights given to employers and to employees, the new Board can issue orders protecting the employers and the employees." (Emphasis added.)

<sup>11</sup> See generally, Note, Labor Law—Federal and State Jurisdiction—Common Law Remedies, 27 N. Y. U. L. Rev. 468; Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 236.

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# SUPREME COURT OF THE UNITED STATES

No. 188.—OCTOBER TERM, 1953.

United Construction Workers,  
Affiliated With United Mine  
Workers of America, et al.,  
Petitioners,

v.

Laburnum Construction Cor-  
poration.

On Writ of Certiorari  
to the Supreme Court  
of Appeals of the Com-  
monwealth of Virginia.

[June 7, 1954.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK  
concurring, dissenting.

If this labor organizer had committed murder on the  
picket line, he would, of course, be subject to prosecution  
by Virginia. For the federal Act in no way deals with  
such conduct and there may be doubt if constitutionally  
it could do so, at least in such a way as to supersede local  
law.

The present case is different. The labor organizer's  
conduct that has led to this judgment for damages is con-  
duct with which the federal Act specifically deals. On the  
facts found by the state court, the labor organizer and the  
union have committed an unfair labor practice under  
§ 8 (b) (1) (A), by using threats and the force of a picket  
line to make employees join a union, contrary to their  
desires. A state court or a state labor board could not  
enjoin that conduct, as *Garner v. Teamsters Union*, 346  
U. S. 485, teaches. And I think like reasons preclude a  
State from applying other sanctions to it.

This conduct is the stuff out of which labor-manage-  
ment strife has been made, ever since trade unionism  
began its growth. For years the law of the jungle ap-  
plied, victory going to the strongest. The emergence of

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more civilized methods of settling these disputes is familiar history. At first, the law was mostly on the side of management. The courts, as well as the legislatures, shaped the rules against the interests of labor. Gradually the human rights in industry were recognized until they finally received more generous recognition under the Wagner Act.

That Act subjected these industrial disputes to settlement and adjudication in administrative proceedings. For example, the administrative agency was granted power to forbid employers from interfering with trade-union activities. May a union not only institute proceedings before the National Labor Relations Board but sue the employer as well? Or may it have a choice of remedies? I would think not. But if the union may not sue the employer for the tortious conduct, why may the employer sue the union?

I think that for each wrong which the federal Act recognizes the parties have only the remedy supplied by that Act—and for a simple reason. The federal Act was designed to decide labor-management controversies, to bring them to a peaceful, orderly settlement, to put the parties on the basis of equality which the rules designed by Congress envisaged.\* If the parties not only have the remedy Congress provided but the right to sue

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\*Section 1(b) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. § 141 (b), provides that:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

UNITED WORKERS *v.* LABURNUM CORP. 3

for damages as well, the controversy is not settled by what the federal agency does. It drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have.